MARYLAND OFFICIALS CALL FOR RECOGNITION OF SAME-SEX MARRIAGES

Maryland’s Attorney General, Douglas F. Gansler, issued a formal Opinion on the morning of February 23, 2010, opining that there was no impediment under Maryland law to the state recognizing same-sex marriages that were contracted lawfully in other jurisdictions, and predicting that the Maryland courts would likely conclude that such marriages should be recognized. At the same time, Gansler said, the governor’s authority to command such recognition through an executive order would be limited to those forms of marriage recognition that were specifically within the purview of the executive branch.

Later that day, Gansler, an announced proponent for same-sex marriages, called a press conference and announced that as the state’s chief legal officer he expected that state agencies would begin to recognize same-sex marriages immediately in compliance with his legal advice. Shortly afterwards, Governor Martin O’Malley, who has stated his support for civil unions but not for same-sex marriage, issued a statement that his administration would be guided by Gansler’s legal opinion, adding, “I am confident that the Attorney General and his office will provide all necessary advice to state agencies on how to comply with the law. I expect all state agencies to work with the Attorney General’s office to ensure compliance with the law.”

With a District of Columbia law authorizing same-sex marriages going into effect on March 3 (unless blocked by a pending lawsuit or an act of Congress), whether same-sex marriages contracted in D.C. would be recognized in neighboring states became an urgent question. It is clear that such marriages will not be immediately recognized in Virginia, where legislation prohibits such recognition. But Maryland is a different matter. Although the state’s marriage statute does not permit same-sex couples to marry in Maryland, and that statute was upheld in a narrow 5–4 vote by the state’s highest court in 2007 in Conaway v. Deane, 932 A.2d 571, there is no explicit statutory prohibition on recognizing such marriages.

Openly-gay Maryland State Senator Richard S. Madaleno, Jr., lead sponsor of proposed legislation to allow same-sex couples to marry in the state, sent a formal request to Attorney General Gansler, posing the question whether the state may recognize same-sex marriages contracted elsewhere, and also whether the governor could issue an executive order requiring state agencies to recognize such marriages. In his request, Senator Madaleno referenced actions taken by New York Governor David Paterson in 2008 towards recognition of same-sex marriages by New York State executive branch agencies.

The Attorney General’s response, titled “Marriage — Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland?,” 95 Op. Att’y Gen. 3 (2010), answered the first question affirmatively. The Opinon carefully observed that it is “not itself the law of Maryland” and that “what we say in this opinion is a prediction, not a prescription, as to how the Court [of Appeals] would approach this issue under current law.” Ultimately, a definitive answer to whether such marriages actually will be recognized would rest with the legislature or the courts. As to the governor’s powers, Gansler responded that the governor’s authority to make policy through executive orders is best established regarding the internal policies of the executive branch on employment, and weakest when it comes to establishing policies that apply to private actors. Thus, the governor might issue an order dealing with recognition in the context of issues that are solely within the purview of the executive branch.

Gansler observed that under the traditional principle of comity followed in Maryland as well as other states, there is a presumption that marriages that were lawful where they were celebrated will be recognized as valid in Maryland. Such marriages would not be recognized if there was a strong public policy against recognition.

One basis for such a public policy would be a state constitutional provision or statute specifically prohibiting their recognition, and there is no such provision in Maryland. Although the state has specifically prohibited issuance of marriage licenses to same-sex couples, it has not specifically prohibited recognizing their marriages formed in other jurisdictions. "A statute that limits marriage in Maryland to opposite-sex couples could be said to embody a policy against same-sex marriage,” Gansler commented, but he pointed out that there are many restrictions on marriage under Maryland law that have not been seen as impediments to recognizing marriages contracted out-of-state.

For example, Maryland has abolished common law marriage. Maryland couples who live together without obtaining a marriage license and performing the necessary civil or religious ceremony are not regarded as married. However, a different-sex couple that moved to Maryland from a state where common law marriage is recognized will be considered married for purposes of Maryland law if their relationship would have been recognized as a marriage in their prior state of domicile. In another example, Gansler pointed out that Rhode Island permits marriages between an uncle and a niece, which are not authorized in Maryland, but if an uncle and niece were married in Rhode Island and their marital status became an issue in Maryland, it would be recognized there.

“While the matter is not free from all doubt,” wrote Gansler, “in our view, the Court is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction. In light of Maryland’s developing public policy concerning intimate same-sex relationships, the Court would not readily invoke the public policy exception to the usual rule of recognition.” He also noted that Senator Madaleno had posed the question “in the abstract,” but that in matters of marriage recognition “context matters,” noting as an example that if federal law governs a particular situation, the federal Defense of Marriage Act (DOMA) might get in the way of Maryland’s recognition of the marriage for that purpose. In fact, this is an important issue in the State of Massachusetts’ lawsuit challenging the federal Defense of Marriage Act, with Massachusetts arguing that it is compelled not to recognize valid Massachusetts same-sex marriages in certain joint federal-state programs because of the overriding effect of DOMA.

As an example of what Gansler is getting at in referring to the context issue, consider the situation in New York. Governor David Paterson, Attorney General Andrew Cuomo, and many other state officials have taken the position, consistent with rulings by several intermediate state appellate courts, that same-sex marriages contracted elsewhere should be recognized in New York. Some New York trial courts, building on this foundation, have recognized such marriages for various specific purposes in pending cases involving employee
On February 18, 2010, the U.S. Court of Appeals for the 5th Circuit affirmed a district court’s ruling compelling Louisiana officials to issue a birth certificate to a gay male couple’s adopted child, thereby affording full faith and credit to an out-of-state adoption. Adar v. Smith, 2010 WL 550420, Circuit Judge Jacques L. Wiener wrote for the unanimous panel.

In 2005, plaintiffs Oren Adar and Mickey Ray Smith adopted “Infant J,” a male child born in Shreveport, Louisiana, that year. The couple then sought from the Louisiana Department of Health and Hospitals a birth certificate listing both men as parents and reflecting Infant J’s new name. The state agency requested an opinion from the Louisiana Attorney General whether Louisiana was required to comply with the couple’s request. In response, the Attorney General issued an opinion finding that LSU

In October 2007, the plaintiffs sued the Registrar in the U.S. District Court for the Eastern District of Louisiana, seeking a declaration that the refusal to issue the certificate violated the Full Faith and Credit and Equal Protection Clauses of the U.S. Constitution, and for an injunction requiring the Registrar to issue the same. After some motion practice, the plaintiffs were awarded summary judgment. The district court held that Louisiana owes full faith and credit to the New York adoption decree and that there is no public policy exception to the Full Faith and Credit Clause. The lower court further held that under state law, upon presentation of a duly-certified copy of the New York adoption decree, the Registrar was required to issue an amended birth certificate. The lower court did not reach plaintiffs’ equal protection claim.

On appeal, the Fifth Circuit rejected each of the Registrar’s numerous arguments. Procedurally, the Registrar argued that the plaintiffs lacked standing in that they did not allege sufficient injuries-in-fact. The court noted that since the Louisiana Supreme Court had already recognized a private right of action to correct the State’s public documents, the Registrar’s standing argument was unavailing (see Treadaway, 54 So.2d 343 [La. 1951]).

The Fifth Circuit next turned to the respondent’s arguments respecting the Full Faith and Credit Clause. The Registrar argued that the adoption judgment is a prospective judgment and therefore does not require full faith and credit, as to be compared to a retrospective judgment that would otherwise be honored in Louisiana. The appellate court rejected this claim, because it is well settled that an adoption decree is a judgment for purposes of full faith and credit (see Hood v. McGehee, 237 US 611 [1915]; Alexander v. Gray, 181 So. 639 [La.App.2d Cir. 1938]).

The Registrar next argued that the New York adoption judgment should be treated like a statute, as opposed to a judgment, and therefore need not be afforded full faith and credit. The appellate court rejected this argument, noting that the adoption decree merely adjudicated a parent-child relationship and did not order Louisiana, or any other state, to do or refrain from doing anything.

The Registrar also contended that “categorically enforcing sister-state adoption decrees will inevitably undermine core social policies of the second State in a way that simple money judgments or even divorce decrees do not.” However, the Fifth Circuit noted that the argument that there are public policy exceptions to the Full Faith and Credit Clause in the context of respect for sister-state judicial actions was expressly rejected by the Supreme Court in Baker v. General Motors Corp., 522 US 222, 233 (1998).

Next, the Fifth Circuit considered the applicable state adoption statute and whether thereunder, even if required to give full faith and credit to the adoption decree, the Registrar was required to issue the amended birth certificate to the plaintiffs under La.Rev.Stat.Ann. Sec. 40:76. The subject statute reads:

“A. When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption or, if the case has been closed and the adoption decree has been sealed, upon the receipt of a certified statement form the record custodian attesting to the adoption decree.

... C. Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives showing: [1] The date and place of birth of the person adopted; [2] The new name of the person adopted, if the name has been changed by the decree of adoption; and [3] The names of the adoptive parents and any other date about them that is available and adds to the completeness of the certificate of the adopted child.”

The Registrar argued that this question of interpretation of state law should be certified to the Supreme Court of Louisiana “pursuant to Rule 12 of the Louisiana Supreme Court.” The Fifth Circuit declined on the basis that the statute’s meaning was clear and unambiguous, and therefore certification was unnecessary.

Turning to the interpretation of sec. 40:76, the Registrar argued that the district court’s holding was incorrect insofar as sec. 40:76(A), by using the word “may,” vests her with the discretion to decide whether to issue a new birth certificate; and that the mandatory language in sec. 40:76 (C) applies only to the contents of the new certificate. The Fifth Circuit rejected this interpretation, finding that it would unconstitutionally delegate legislative authority to an administrative agency under the three-prong test enunciated in All Pro Paint & Body, 639 So.2d 707, 711(1994), and was otherwise devoid of the statute’s plain meaning. The appellate court noted that there was no evidence that the legislature intended to grant the Registrar such discretion, insofar as no legislative guide could be found within the subject statute for the implementation of the legislative policy to otherwise rein in the Registrar’s alleged unfettered discretion.

The court did not go so far as to say that the language in sec. 40:76 was arbitrary, but rather, found that the Registrar’s discretion thereunder was limited to issuing birth certificates upon her determination that the out-of-state decree is “properly certified.”

The Registrar’s second statutory interpretation argument was based on the claim that since adoption provisions other than sec. 40:76 would deny Adar and Smith, an unmarried same-sex couple, the right to adopt in Louisiana, the term “adoptive parents” in sec. 40:76 implicitly excludes Adar and Smith. The Fifth Circuit flatly rejected this argument, finding instead the term “adoptive parents” should be construed according to its plain meaning and not twisted to fit the Registrar’s version.

Lambda Legal staff attorney Ken Upton, Jr. and Regina O. Matthews and Spencer R. Doody of Martzell & Bickford represented the plaintiffs. In press articles subsequent to the release of the Fifth Circuit’s decision, the State Attorney General, Buddy Caldwell, announced his intentions to appeal the court’s decision (see Times-Picayune, Feb. 22, Eric J. Warshorn).

Pennsylvania Superior Court Overrules Quarter-Century Homophobic Precedent in Child Custody Dispute

In 1991, this writer published an article in the Journal of Gay & Lesbian Psychotherapy titled “Homophobia, Heterosexism and Judicial Decision Making,” focusing on a few then-relatively-recent published court opinions as examples of judicial homophobia. One of the cases discussed in that article was Const. A. v. Paul C.A., 496 A.2d 1 (Pa. Super. 1985), in which a panel of the Pennsylvania Superior Court, an intermediate appellate court, had adopted a presumption against awarding custody to gay parents, based mainly on unproven assumptions about the disabilities of gay people as parents. On January 21, 2010, the Pennsylvania Superior Court issued an en banc decision in M.A.T. v. G.S.T., 2010 WL 204148, 2010 PA Super. 8, in which Const. was officially overruled as a precedent. It took a quarter of a century, but finally Pennsylvania is rid of that homophobic presumption against gay parental custody.

This case involved married police officers who adopted a child in 2004. Shortly after the adoption, M.A.T., the Mother, began an affair with another woman, and she informed her husband, G.S.T., about this relationship in February 2006. In October 2006, Mother filed for divorce and sought shared custody of the child, a daughter. Father responded seeking prime physical custody. Judge Joseph E. Kleinfelter of the Court of Common Pleas in Dauphin County initially allowed for an interim shared custody arrangement with the child going back and forth between the parental homes for a few days
at a time, but ultimately awarded prime physical custody to the Father. Judge Kleinfelter expressed a personal preference against shared custody arrangements for school-age children, totally rejected the custody evaluator’s recommendation for shared custody based on that personal preference, and, of course, cited the Constant presumption, finding that Mother had not presented any evidence specifically to rebut the presumption against custody for a gay parent. Mother appealed.

After noting that since Constant various panels of the Superior Court had taken conflicting approaches to the issue of gay parent custody and visitation claims, and that the Pennsylvania Supreme Court has specifically disapproved the use of presumptions in child custody cases, Judge Christine Donohue wrote for the en banc panel that it was overruling both the holding and the reasoning of Constant and those panel decisions that had followed it. Donohue wrote that the court would “conclude that a homossexual parent bears no special evidentiary presumption in a child custody case,” finding that Constant’s adoption of the presumption “is fundamentally contrary to our Supreme Court’s admonition that presumptions should not be relied upon when deciding child custody cases.”

But Constant was overruled not solely because it established a presumption. Judge Donohue also rejected the ideas upon which that presumption had been based, writing, “Moreover, Constant’s evidentiary presumption is based upon unsupported preconceptions and prejudices — including that the sexual orientation of a parent will have an adverse effect on the child, and that the traditional heterosexual household is superior to that of the household of a parent involved in a same sex relationship. Such preconceptions and prejudices have no proper place in child custody cases, where the decision should be based exclusively upon a determination of the best interests of the child given the evidence presented to the trial court.”

Since the trial judge in this case “admitted that Mother’s lesbian extramarital affair played a role in the decision to award primary custody to Father” and cited and relied on a decision that the en banc court was now overruling, “the trial court’s reliance upon Constant was error and its order dated August 11, 2008, must be reversed.” The court found it was also error for the trial court totally to discount the evaluator’s expert testimony and to rely instead on the trial judge’s own explicit biases against shared custody, with no evidentiary basis in the record. Although a trial court is not obligated to accept an expert’s recommendation, wrote Donohue, “It is an abuse of discretion, however, for a trial court to dismiss as unpersuasive, and to totally discount, uncontradicted expert testimony.” In this case, there was no testimony in the record contradicting the evaluator.

The court found there was no need to send the case back to the trial court for a new hearing, since the uncontradicted evidence in the record would support the shared custody arrangement sought by Mother. Consequently, the court sent the case back to the trial court for entry of a custody order consistent with the en banc court’s conclusion in favor of Mother’s custody demand. There was a partial dissent by two judges who, while agreeing that the trial court’s order should be set aside, thought it was not a good idea to send the case back to the trial court 17 months later without an opportunity to consider whether the current factual situation might support a different conclusion concerning the best interest of the child, who was now older and attending school. The dissenters made clear that they agreed with the majority to overrule Constant and to end any sort of presumption against custody for gay parents.

The court also took time in a footnote to lecture Judge Kleinfelter (who is not named in the opinion, but was identified in news reports about the case, e.g., Pittsburgh Post-Gazette, Feb. 25, 2010) for referring to Mother throughout the case by her first name, while referring to Father as “Sergeant.” Mother, a Lieutenant in the Pennsylvania State Police, actually outranks Father, a Sergeant in the Lower Paxton Township Police Department. Wrote Judge Donohue, “The Pennsylvania Supreme Court is dedicated to eradicating gender discrimination in our court system. Its creation of the Interbranch Commission for Gender, Racial and Ethnic Fairness is committed to that goal. Given all of the hard work in the uphill battle against gender discrimination, we would be remiss if we did not remind the trial court that Mother and Father are entitled to equal deference to their respective ranks when being addressed by the trial court.”

The court’s decision is discussed in an article published in Pennsylvania Law Weekly on February 15, see Publications Noted, below.

U.S. Tax Court Finds Gender Transitioning Medical Expenses Tax Deductible, Rejecting IRS Cosmetic Surgery Argument

In O’Donnabhain v. Commissioner of Internal Revenue, 134 T.C. No. 4, Docket No. 0402–06 (U.S. Tax Court Feb 2, 2010), the U.S. Tax Court, ruling en banc, addressed whether medical treatments obtained by transgender people to aid in their transition qualify for the medical expenses tax deduction, which had been disallowed by the Internal Revenue Service. In a complicated opinion, the court held (11–5) that most of these treatments do fall under the definition, and that respondent’s arguments were “at best a superficial characterization of the circumstances that is thoroughly rebutted by the medical evidence.” It is now up to the government whether to appeal the ruling to the First Circuit Court of Appeals.

Petitioner began transitioning in 1997, pursuant to the standards of the World Professional Association for Transgender Health (formerly the Harry Benjamin International Gender Dysphoria Association). She began with a course of female hormones, and subsequently began presenting as female in daily life and changed her gender marker on her driver’s license. In 2001, she submitted her expenses (over $21,000) for hormone therapy, sex reassignment surgery, and breast augmentation surgery as a deductible medical expenses. This was disallowed by the IRS.

Under the Tax Code, to qualify for the medical expense deduction, the expenses must relate to the “diagnosis, cure, mitigation, treatment, or prevention of disease” or costs incurred “for the purpose of affecting any structure or function of the body.”

The IRS argued that the treatments associated with transitioning should not be covered because 1) the treatments were cosmetic surgery directed at “improving [her] appearance,” not treating a disease; 2) GID is not a true disease (i.e., one with organic origins, but actually “a social phenomenon that has been medicalized”); 3) there is “no scientific proof” that these procedures can effectively treat GID beyond mere cosmetic improvement; and 4) the petitioner did not actually have GID anyway.

O’Donnabhain argued in response that 1) GID is a well-recognized mental disorder, notwithstanding respondents definition of “disease,” 2) the treatment mirrored the recommendations of widely-accepted standards of care, and 3) the treatment treated a medical condition, and was thus not merely cosmetic.

The court rejected the IRS’s argument, holding that “respondent’s interpretation of ‘disease’ is incompatible with the stated intent of the regulations and legislative history to cover ‘mental defects’ generally and is contradicted by a consistent line of cases finding ‘disease’ in the case of mental disorders without regard to any demonstrated etiology.” The court also cited GID’s place in the Diagnostic and Statistical Manual (DSM) as evidence of the acceptance of the validity of this condition’s existence by the psychiatric community and noted that in the case law, there was a “clear consensus that GID constitutes a medical condition of sufficient seriousness that it triggers the Eighth Amendment requirement that prison officials not ignore or disregard it.”

The court also rejected respondent’s contention that treatments required by the WPATH standards were not widely accepted as valid. The court stated that “every psychiatric reference text that has been established as authoritative in this case endorses sex reassignment surgery as a treatment for GID in appropriate circumstances. No psychiatric reference text
has been brought to the Court’s attention that fails to list, or rejects, the triadic therapy sequence or sex reassignment surgery as the accepted treatment regimen for GID.” Moreover, even if the debate in the profession was as vigorous as suggested by respondent, “the evidence is clear that a substantial segment of the psychiatric profession has been persuaded of the advisability and efficacy of hormone therapy and sex reassignment surgery as treatment for GID, as have many courts.

Regarding medical necessity, the court held that O’Donnabhain’s surgery fulfilled the legal requirements, “[g]iven [petitioner’s] expert testimony, the judgment of the professional treating petitioner, the agreement of all three experts that untreated GID can result in self-mutilation and suicide, and, as conceded [by the IRS’s own witness], the views of a significant segment of knowledgeable professionals.” The court rejected respondent’s argument that the procedure was not medically necessary due to (1) lack of a “community” standard of care giving rise to a malpractice claim if not prescribed by a physician and (2) the respondent’s expert witness’s view that “therapist should remain neutral regarding the decision to have the surgery – which makes the surgery... elective.”

The court, however, rejected O’Donnabhain’s request to allow a deduction for her breast augmentation surgery. The majority reasoned that “all of the contemporaneous documentation of the condition of petitioner’s breasts before the surgery suggests that they were within a normal range of appearance, and there is no documentation concerning petitioner’s comfort level with her breasts ‘in the social gender role.’” The court disregarded testimony from O’Donnabhain’s physician that her breasts were deformed, and stated that surgery to improve the appearance of her breasts was no different than cosmetic procedures undertaken by a non-transgender woman.

Attorneys on both sides were: Karen L. Loewy, Bennett H. Klein, Jennifer L. Levi, William E. Halfmin, David J. Nagle, and Amy E. Sheridan, for petitioner. Mary P. Hamilton, John R. Mikalchus, Erika B. Cormier, and Molly H. Donohue, for respondent. Daniel Redman

“Flamboyant” Gay Homeland Security Employee Loses Title VII Discrimination Claim

Richard Anderson has become the latest victim of Congress’s failure to provide relief for sexual orientation discrimination. In Anderson v. Napoleonito, Case No.: 09–60744 (U.S.Dist. Ct., S.D.Fla., Feb. 8, 2010), the gay former Air Marshal suffered summary judgment of his gender discrimination and retaliation claims, brought after he was demoted by his openly homophobic boss.

District Judge Huck’s opinion recounts an unfortunately typical pattern of anti-gay bias in the workplace. An Air Marshal in the Department of Homeland Security since 2000, Anderson transferred to the Miami field office in 2001 after a promotion to a supervisory position. His new boss, Special Agent-in-Charge James Bauer, soon learned of Anderson’s homosexuality and seemed to have instigated a campaign of harassment. Anderson alleges blatant abuse by his superiors; that he was shunned within the office, called “a fag,” and that he was “too flamboyant.” Bauer told co-workers to avoid socializing with Anderson and risk “career suicide,” and as a result he was isolated and tormented within the office. After Anderson and Bauer discussed complaints of racial harassment made by a number of subordinates, Bauer blew off the claims and told Anderson, “Because you’re gay you’re super sensitive to issues of discrimination.”

Fed up with his treatment, Anderson sought counseling from the Equal Employment Opportunity Commission (EEOC), the agency that enforces anti-discrimination laws in federal workplaces, and filed a sexual orientation discrimination complaint in 2006. Bauer learned of the complaint, though it is unclear from the opinion when or how this occurred. The EEOC claim was unsuccessful in any case, because there is no valid cause of action for sexual orientation discrimination under federal statutory law, and Anderson had no choice but to return to the status quo under Bauer’s supervision.

The situation did not improve, and soon Anderson began to feel that his employment record was being sabotaged. The court noted two separate incidents that tarnished Anderson’s record. In one, Anderson “went AWOL” and left his shift two hours early without telling his supervisor. The full story, however, seems to be that Anderson started work two hours early so that he could leave early and still satisfy his required hours. On another occasion he lied about performing one of his daily duties, and after being caught took full responsibility. In both instances Bauer made sure Anderson paid for his mistakes, refusing to allow him to “get away with” what other employees impliedly also did. Anderson was convinced that Bauer's overzealous rule enforcement was a reaction to the first EEOC complaint, so he filed a claim for retaliation. Soon after, citing Anderson’s transgressions, Bauer recommended his demotion. The recommendation was accepted and subsequently affirmed by a review board.

In January 2009, Anderson’s EEOC retaliation claims were denied, and he soon after retired on medical disability. The EEOC issued him the usual 90–day right to sue letter, and in May 2009, he filed a Title VII suit in the Southern District of Florida, alleging (1) retaliation for filing an EEOC complaint, a protected activity, and (2) sex discrimination based on gender stereotyping.

After outlining the facts leading up to this suit, Judge Huck handily disposed of Anderson’s retaliation claim. The claim, based solely on the timing of Bauer’s overzealous rule enforcement in relation to the EEOC complaint, is reviewed under the McDonnell Douglas model which requires Anderson to show: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some causal relation between the two events. As to the first two requirements, both the court and the defendants conceded he had carried his burden. Anderson engaged in protected expression by filing a complaint, and he later suffered a reduction in status and pay at his job. However, Judge Huck noted well-settled law that to establish causation solely by examining two events’ temporal proximity, the events must be extremely close in time. The year-long gap between Anderson’s EEOC claim and his demotion precludes any finding of a causal connection, and he therefore failed to establish a prima facie case. A number of cases have held that even three months is too long a gap between the protected expression and adverse employment action, so the court’s conclusion is hardly surprising.

Even if a prima facie case of retaliation were shown, the burden would shift to the government, which likely could have shown a legitimate reason for his demotion. Anderson claims that Bauer trumped up the AWOL charge in an effort to get back at him, but apparently that charge played little role in the government’s employment decision. A footnote points out that the review board to which Anderson originally appealed determined it was his lack of truthfulness — something he freely admitted — that primarily warranted his reduction in status.

Huck devoted much more time to the discrimination claim. While Title VII bars discrimination based on a person’s non-conformity with gender stereotypes, the law offers no relief for discrimination based on sexual orientation. In an opinion filled with all too common mental gymnastics, Judge Huck determined that any harassment or discrimination Anderson suffered was solely because of his sexual orientation and was therefore not a valid cause of action.

The opinion goes out of its way to explain that being called “flamboyant” is a result of sexual orientation stereotypes — that gay men are effeminate — rather than stereotypes of gender. Huck distinguished this case from Proveel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009), where the defendant suffered harassment because of his interest in interior design, the manner in which he dressed and his habit of pressing machine buttons with “pizzazz.” While the defendants in Proveel mocked the plaintiff for acting in a feminine manner, Anderson was harassed because his “flamboyant” characteristics were the perceived mani-
festations of his homosexuality. Huck’s opinion, while maddening, completely comports with the law. Indeed it seems Bauer was not name-calling because of Anderson’s characteristics themselves, but because of what those characteristics implied about his sexual orientation.

Huck rejected Anderson’s implied argument that the stereotype of gay men as effeminate and flamboyant in comparison to straight men is based on the assumption that men normally conform to a masculine, non-effeminate, heterosexual gender stereotype. The opinion recasted this argument as implying “that all gay men fail to comply with male stereotypes simply because they are gay.” This is an unaccept-able proposition, as it means any case of sexual orientation discrimination would create a cause of action for gender discrimination, which result runs counter to Congressional intent in enacting a ban on sex discrimination. Huck had little choice but to grant summary judgment against Anderson’s claims, and until Congress rethinks its decision not to make sexual orienta-
tion discrimination cognizable under Title VII, “flamboyant” plaintiffs will continue to suffer the same fate. Stephen E. Woods

Federal Judge in Texas Refuses to Dismiss Gay Defamation Claim

Is it still defamatory to call somebody gay…. after Lawrence v. Texas? Under American tort law, a statement about somebody is defamatory if it would tend to harm their reputation, or, as the saying goes, might “expose a person to public hatred, contempt or ridicule.” Of course, one is privileged to utter the truth without being liable for defamation, even if a statement is defamatory. In many jurisdictions, truth is an affirmative defense, while in some jurisdictions, the plaintiff has to allege that the statement is false as part of the prima facie case. Now the question has arisen in Texas, as a result of a talk radio broadcast making fun of an airport security guard, in Robinson v. Radio One, Inc., 2010 WL 606683 (N.D.Tex., Feb. 19, 2010).

This writer remembers being outraged in my bar review course in 1977 when the instructor was reviewing the law of defamation and stated that calling somebody gay was per se defamatory under New York law, which means the law would presume injury in such a case because calling somebody gay was always considered to be harmful to their reputation. Back then only a handful of states (not including New York) had decriminalized consensual sodomy, which re-
aained a felony in many states, there were no laws against sexual orientation discrimination, and there were only a handful of openly gay people practicing law in the entire United States, or being “out of the closet” in any profession. Just a few years before then, a New York trial court had rejected a proposed corpo-
rate charter for Lambda Legal Defense Fund on the ground that advocating for the rights of gay people did not qualify as a “charitable pur-
pose” for a “public interest” organization, although the Court of Appeals subsequently ruled in favor of Lambda’s application.) But we’ve come a long way. In 2003, in Lawrence v. Texas, the U.S. Supreme Court found that the Due Process Clause protects the right of gay adults to have consensual sex in private, states comprising about half the population of the country now prohibit sexual orientation discrimination, and five states let same-sex couples marry, while the media is full of depictions of gay characters and openly gay celebrities abound. Should it still be considered defama-
tory to call somebody gay?

In Robinson, U.S. District Judge Reed O’Connor answers that question with a firm “maybe.” Henry Robinson was working as a security guard at Love Field Airport in Dallas when Rickey Smiley, a local talk radio personality, got off a flight there in February 2009. Robinson approached Smiley and asked to have his picture taken with the celebrity. When Robinson asked for a second picture, Smiley “became abusive, calling him ‘the gay security guard’ and ‘faggot.’” Smiley told Plaintiff that he was going to put him ‘on blast,’ which Plaintiff understood to mean Smiley would refer to him during a broadcast.” Sure enough, a few days later, during a radio broadcast of his show, Smiley “made reference to Robinson by name, again calling him ‘the gay security guard.’ After that broadcast, people began calling Plaintiff ‘gay.’” Robinson sued Smiley and his radio sta-
tion, asserting that he was not gay and claiming that he had been defamed.

Ruling on the motion to dismiss the case, Judge O’Connor confronted the defendants’ argu-
ment that calling somebody “gay” could no longer be considered defamatory, despite exist-
ting Texas precedents that would support a con-
trary finding (all of which pre-date Lawrence v. Texas). The question on a motion to dismiss is whether the statement could be capable of a de-


9th Circuit Rules California “Indecent Exposure” Statute Does Not Always Involve a Crime of Moral Turpitude

On February 10, 2020, a divided panel of the Ninth Circuit Court of Appeals reversed an Im-
migration Judge’s ruling regarding crimes of moral turpitude and remanded the case for fur-
writing for the majority, ruled that under the California criminal code, the crime of “indecent exposure” is not necessarily one of moral turpitude. Judge Bybee, in dissent, interpreted the statute differently and argued that a conviction under the statute necessarily involves moral turpitude.

In 1993, Victor Oceguera Nunez entered the country illegally at the age of 15. Over the next ten years, Nunez married a U.S. citizen and had three children, all U.S. citizens. In 2003, the government began removal proceedings against Nunez and Nunez moved to cancel those proceedings, arguing that removal would create undue hardship to his family. The day before Nunez’s hearing, the government moved to pretermit, arguing that Nunez was ineligible for cancellation of removal because he was previously convicted of two crimes of moral turpitude: petty theft and indecent exposure. The Immigration Judge refused Nunez’s efforts to establish that indecent exposure was not a crime of moral turpitude and the Board of Immigration Appeals upheld this decision on appeal.

After defining the elements of indecent exposure under California law, Judge Reinhardt turned to the definition of moral turpitude, a concept possessing “inherent ambiguity.” In addition to the traditional definition of fraud or “base, vile, and depraved” conduct that shocks the conscious, Judge Reinhardt noted that non-fraudulent crimes of moral turpitude usually involved “an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim.”

Having fleshed out the definition of “moral turpitude,” the court’s next task was to determine whether the “full range of conduct” falling under the criminal statute could fit within that definition. Judge Reinhardt noted that nude dancing in an establishment serving alcohol has been prosecuted in California as indecent exposure. However, nude dancing, a “prototypical victimless crime,” fails to shock the conscious and was even recognized as deserving some limited First Amendment protections by the Supreme Court in City of Erie v. Pap’s A.M. An act deserving of at least some constitutional protection cannot also be “base, vile, and depraved.” Judge Reinhardt therefore found that the crime of indecent exposure under California law embraces conduct not involving moral turpitude. The Immigration Judge was thus shown to have erred when it refused Nunez’s attempt to enter evidence showing that his particular conviction did not involve conduct of moral turpitude.

Judge Bybee, writing in dissent, argued that the majority’s example, nude dancing in a bar, was based upon an old case that had been subsequently disapproved and forgotten and was thus no longer good law. Judge Bybee went on to argue that the majority was focusing on mere

### Federal Civil Litigation Notes

**Supreme Court** — The Supreme Court refused to consider whether a biological parent’s constitutional due process rights are violated when a state court requires the parent to allow child visitation with the parent’s former same-sex partner. Rejecting a certiorari petition filed by Liberty Counsel, a right-wing advocacy law firm that customarily litigates against gay rights, the court left standing a ruling in *Cha- risma R. v. Kristina S.*, 96 Cal.Rptr.3d 26, 175 Cal.App.4th 361 (Cal. 1st Dist., Ct. App. 2009), which had been denied review by the California Supreme Court on September 9, 2009. The Supreme Court denied the petition without comment; see 2010 WL 596568 (Feb. 22, 2010). Supreme Court precedents provide that a biological parent has strong due process rights to custody and care of their child, including the right to decide with whom the child associates.

Courts in California and some other states have held that same-sex partners of parents may in appropriate cases be considered legal parents of the children whom they were co-parenting while in a relationship with the child’s biological parent. In some cases, the co-parent and the biological parent had planned for the conception and birth of the child through donor insemination, surrogacy or adoption, and California has taken the lead in developing a jurisprudence of “intentional parenthood” in appropriate cases. Liberty Counsel argues in its certiorari petition that this violates the due process rights of the biological parent, but did not succeed in tempting the Supreme Court to become involved in this issue. National Center for Lesbian Rights provided legal representation for co-parent Charisma R. in her successful appeal of an adverse standing ruling by a trial judge.

**Eleventh Circuit** — Federal courts continue to hold that the Supreme Court’s ruling in *Lawrence v. Texas* (2003) cannot be construed to invalidate federal obscenity statutes. See, most recently, *United States v. Little*, 2010 WL 357953 (11th Cir., Feb. 2, 2010). Responding to defendants’ argument that the due process privacy right identified in *Lawrence* would embrace the right to produce and distribute obscene DVDs, the court stated, per curiam, “Lawrence was limited to the issue of ‘whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.’”

**Michigan** — People who think that it is wrong for the federal government to penalize hate crimes against gay people have filed suit in
U.S. District Court in Bay City, Michigan, seeking a declaration that the recently-enacted federal hate crimes provisions violate their first amendment rights. The plaintiffs in *Glenna v. Holder* include Gary Glenn, head of the American Family Association of Michigan, Reverend Rene B. Ouellette, senior pastor of First Baptist Church in Bridgeport Township, Rev. Jim Combs, pastor of Faith Baptist Church in Waterford Township, and Levon R. Yuille, pastor of The Bible Church in Ypsilanti. They are represented by attorney Robert J. Muise of the Ann Arbor-based Thomas More Law Center. *Bay City Times*, Feb. 4. The Thomas More Center is named after a lawyer who was declared a saint by the Catholic Church. More, then Lord Chancellor of England, was responsible for presiding over the execution of Protestant heretics during the reign of Henry VIII. More, who had these heretics disemboweled, drawn and quartered, and burned at the stake, was himself beheaded for refusing to sign a declaration acknowledging Henry VIII as head of the Church of England and Ann Boleyn as Henry’s lawful wife. We are bemused by the irony that these Baptist preachers are being represented by an organization named for a person who would have advocated their excruciatingly painful execution as heretics.

**New York** — Magistrate Judge James C. Francis IV ruled on February 17 that Professor Dean Spade of Seattle University School of Law could testify as an expert witness about the problems created by the failure of the NY City Policy Department to have an appropriate policy for dealing with treatment of transgender arrestees who will be held in sex-segregated facilities. *Tikkun v. City of New York*, 2010 WL 530542 (S.D.N.Y.). The plaintiff is suing the city about treatment she experienced when arrested at protests during the Republican National Convention held in New York City in 2004. She claims constitutional violations. In support of her case, Professor Spade, founder and former staff attorney at the Sylvia Rivera Law Project (SRLP), was offered as an expert witness to testify as to the necessity of policy departments developing appropriate policies for such situations and the consequences of failing to do so. During a pre-trial deposition, he referred to intake files of SRLP as one source of data upon which he relied to form his expert opinion. However, Spade and SRLP refused to disclose those intake files to the attorneys for the City, claiming they were protected by attorney-client privilege, whereupon the City moved to have Spade disqualified as an expert witness, under a rule that makes discoverable, regardless of any privilege claim, data that an expert relies upon for his testimony. Magistrate Francis ruled that the intake files need not be disclosed, finding that the disclosure requirement did not properly apply to this situation, and that the rule was appropriately applied to claims of attorney-client privilege by the party presenting the expert witness, not by non-party organizations. SRLP could not perform its important function of providing legal assistance to transgendered individuals if it could not promise the protection of attorney-client privilege for information the clients reveal to the Project’s attorneys during intake interviews.

**New York** — There were mixed results on pretrial dismissal motions in *Pratesi v. New York State Unified Court System*, 2010 WL 502950 (E.D.N.Y., Feb. 9, 2010), a discrimination and hostile environment suit brought by a lesbian state court employee in Nassau County against the Unified Court System and two named individuals, Ken Roll, Chief Clerk of the District Courts, and Judge Anthony Marano, Supervising Judge for the Nassau County District. Dona Pratesi claims to have experienced a hostile environment and discriminatory denials of promotions due to her sex and sexual orientation, and asserted claims under 42 USC 1983, Title VII and Title VII of the federal Civil Rights Act, and the New York State Human Rights Law. Senior Judge Hurley found that 11th Amendment immunity barred her claims in federal court against the state court system as such, and that many of the claims against individual named defendants were time-barred or failed due to lack of sufficient allegations of personal involvement on their part, however Hurley ruled that her hostile environment claim under the state Human Rights Law would not be dismissed, so the case is still alive. Thomas Ricotta of Leeds, Morelli & Brown, Carle Place, represents Pratesi. • • • We have frequently commented in reporting on gay discrimination cases brought in federal court under Title VII in states that have bans on sexual orientation discrimination that it would be more sensible to bring these cases in state court, but in this case there is the obvious problem that the state court in which the case would be brought would be the defendant, so as a practical and strategic matter going into federal court appears sensible. A.S.L.

**State Civil Litigation Notes**

**California** — On February 18, a panel of the 2nd Circuit Court of Appeal reversed a $6+ million jury verdict that had been rendered in a discrimination suit brought by an African-American lesbian firefighter against the City of Los Angeles and various named Fire Department officers under the California Fair Employment and Housing Act. *Lee v. City of Los Angeles*, 2010 WL 553022 (not officially published). Lee had filed charges with the Commission in 2004 alleging various forms of discrimination, and was issued a right to sue letter. After the letter was issued, she continued to experience discrimination, even after being transferred away from the Fire Station about which she had originally complained, and her employment by the Department ultimately ended on contested grounds. When she filed her lawsuit, she stated the legal theories listed in her original complaint to the Commission, but her factual allegations included events that occurred after the right to sue letter was issued, and thus which had not been investigated by the Commission. The trial judge rejected the City’s argument that the case must be restricted to incidents occurring up to the time the administrative charge was filed and allowed the jury to hear about everything, resulting in an overwhelming verdict for Lee on her claims of race, sex, and sexual orientation discrimination. But the Court of Appeal, in an unpublished opinion by Judge Victoria Chavez, concluded that the trial court’s denial of the City’s motion to limit the evidence was an abuse of discretion, requiring reversal of the verdict and a remand for a new trial, limited to the incidents that were the subject of the administrative charge. The court pointed out that the legislature required exhaustion of administrative remedies as a jurisdictional prerequisite to a lawsuit. Judge Chavez’s opinion sets out in gory detail the full range of Lee’s story, which shows that, at least as of the relevant period of 2002–2005, there were serious violations of the Fair Employment Housing Code going on in Station 96 and in other stations to which Lee was subsequently assigned. Regardless of the outcome of this case, top officials of the LA Fire Department should be taking action on the basis of the facts that were established before the jury in the first trial. There is more at stake in this case than the immediate concerns of the plaintiff, as the evidence summarized by the court suggests systemic problems in the Fire Department. See *BNA Daily Labor Report* No. 33, A–10 (Feb. 22, 2010). An Associated Press story about the court of appeal decision mentioned that a subsequent EEOC investigation produced a letter to the Fire Department indicating that there was sufficient evidence to find race and sex discrimination in Lee’s case, and that the Fire Chief had taken early retirement as a result of allegations of discrimination within the Department. But there was no mention of any steps taken to address the system problems within the department, including a system under which grievances are required to submit their discrimination claims to the very supervisors against whom they are complaining. (Under federal precedents, an employer maintaining such a system would be vicariously liable for any discrimination committed by the supervisors, because its system for dealing with discrimination complaints would be deemed insufficient to meet its obligations under Title VII.)

**Hawaii** — After the Hawai’i House of Representatives took a voice vote on January 29 to put off indefinitely any consideration of the Civil Union Bill that had been approved by the State
Senate, Lambda Legal and the ACLU of Hawai‘i announced that they would be filing a lawsuit seeking a ruling by the Hawai‘i courts that denying same-sex couples a legal status equivalent to marriage violates the Hawai‘i constitution. Because the constitution was amended in the 1990s to deprive the courts of jurisdiction to order same-sex marriages, the lawsuit cannot seek same-sex marriage. However, the Hawaii Supreme Court did rule in 1993 in *Baehr v. Leavitt* that failing to allow same-sex couples to marry raised a serious state constitutional issue, and that ruling should provide a precedent for contending that denying the vast panoply of rights accorded married couples under state law to same-sex couples violates the state constitution’s equality requirement. The “Reciprocal Beneficiaries” law that the legislature passed to provide a limited menu of rights for same-sex couples is a dramatic evidence of unequal treatment for what it excludes. The refusal of the House to take the last step to vote on a civil union law was characterized by Lambda Legal attorney Jennifer C. Pizer as “irresponsible.” The House had approved an earlier version of the bill last spring, but the Senate made some modifications before its vote, requiring a new vote in the House, which has now been put off without explanation.

**New York** — On February 17, the state’s highest court, the Court of Appeals, heard oral argument in *Debra R. v. Janice R.*, in which the Appellate Division, 1st Department, applying the Court of Appeals’ infamous ruling in *Alison D. v. Virginia M.* (1991), held that a lesbian co-parent was a legal stranger who could not seek custody or visitation after the break-up of her relationship with the child’s biological mother. See 877 N.Y.S.2d 259 (1st Dept. 2009). This is the first time in the nearly two decades since Alison D. that the Court of Appeals has agreed to consider a similar case, with the question of overruling Alison D. squarely before the court. Lambda Legal represents the co-parent, as it did in Alison D.. Lambda attorney Susan Sommer argued for the appellant, attorney Jennifer Colyer argued on behalf of the child, in support of the plaintiff’s appeal, and Sherri Lee Eisenpress argued on behalf of the respondent, the biological mother. The seven-member court was a very hot bench, frequently interrupting counsel in mid-sentence. Judge Robert Smith, author of the court’s plurality opinion in *Hernandez v. Robles* rejecting the state constitutional claim for same-sex marriage, was the most aggressive and persistent questioner, pushing for somebody to articulate a “bright-line test” (other than the Alison D. test that restricts parental status to biological or adoptive parents) that could be used in cases involving unmarried couples in such a way that there would not have to be an individualized determination through litigation based on the facts of each case. Attorney Eisenpress stressed that as a result of the court’s post-Alison D. ruling that same-sex co-parents can adopt, there is a way to deal with this issue without overruling Alison D., while attorneys Sommer and Colyer both noted that other states have successfully used a test devised by the Wisconsin courts for identifying those situations in which co-parents should be allowed to assert parental rights. A few members of the court asked no questions, so it is difficult to predict the outcome, but it appeared that some of the Republican appointees (who make up a majority of the 7 member court) might be amenable to reconsidering whether the absolutism of Alison D. should prevail in light of the complicated demographics of New York families. It certainly appeared that Chief Judge Jonathan Lippman favored overruling Alison D. in favor of some sort of functional test, the question being whether at least one member of the Republican-appointed majority could be drawn across the line... The Court of Appeals usually issues decisions within a few months of oral argument.

**Texas** — The Texas Attorney General’s Office has ruled that the City of Fort Worth’s legal department may not refuse to release the names of witnesses it has interviewed concerning the June 28 incident at the Rainbow Lounge, a gay bar, where police allegedly mistreated custodians of the bar. The Ft. Worth Star-Telegram requested the names of witnesses for its continuing news coverage of the incident, and sought the ruling from the Attorney General when the city refused to disclose the names. The Texas Alcoholic Beverage Commission, also investigating the incident, has released the names of witnesses it interview. One of the concerns expressed by the city had been that gay military members who were in the bar and who were interviewed as witnesses might incur detrimental consequences if their names were made public, in light rules banning military service by openly gay personnel. *Star-Telegram*, Feb. 10.

**Vermont/Virginia** — As Vermont Family Court Judge William Cohen (Rutland County) was issuing a new contempt order and authorizing the arrest of Lisa Miller for failing to surrender her child for visitation with co-parent Janet Jenkins, the Court of Appeals of Virginia,* in Alexandria, was issuing yet another ruling rejecting an attempt by Miller to re-litigate the case. *Miller v. Jenkins*, No. 0705-09-4 (Feb. 23, 2010). Miller and Jenkins were Virginia Civil Union partners who had a child together. When Miller, the biological mother, wanted to end the relationship, she filed an action in Vermont Family Court to terminate the civil union and determine custody. That court determined that Jenkins should be entitled to visitation with the child. Meanwhile, Miller moved with the child to Virginia, renounced homosexuality, becoming a self-described “Christian”, and sought to evade the visitation order by getting an order from a Virginia court that it would not be enforceable in that state. Litigation proceeded in parallel in both states, ultimately producing final appellate rulings that the Vermont court had original jurisdiction to determine custody and visitation, and that Virginia courts were obligated to accord full faith and credit to that court order, based on federal statutes and the Constitution. Miller continued to resist, and has disappeared with the child while continuing to file appeals in the Virginia court system at every stage of Jenkins’ attempts to enforce the visitation order. Now the Vermont Family Court has awarded custody to Jenkins and a nationwide hunt for the child and Miller is under way. The February 23 ruling from the Court of Appeals of Virginia concludes that “rule of the case” principles govern and no further appeal on the merits is possible. A.S.L.

**Criminal Litigation Notes**

**Federal — 11th Circuit** — In *United States v. Little*, 2010 WL 357933 (Feb. 2, 2010), a panel of the U.S. Court of Appeals for the 11th Circuit rejected a defendant’s argument that federal obscenity laws are unconstitutional in light of *Lawrence v. Texas*. The per curiam panel noted the defendant’s argument that Lawrence supports “their theory that the Supreme Court has established a right to sexual privacy. However,” continued the court, “Lawrence was limited to the issue of whether the petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. (emphasis added).” The court also approved the district court’s decision to apply a sentencing enhancement in this case because the alleged obscene matter contained “sadistic, masochistic, or other violent depictions.” Commented the court, “It does not matter if the persons depicted in the materials actually were sadists or masochists or whether they were actually harmed. The focus of the enhancement is whether the material portrays such conduct. Appellants’ websites and the DVDs portrayed sadistic and masochistic conduct.”

**Federal — District of Columbia** — Refusing to dismiss a federal obscenity prosecution in *United States v. Stagliano*, 2010 WL 617364 (D.D.C., February 19, 2010), U.S. District Judge Richard J. Leon refuted the defendants’ argument that Lawrence recognized a constitutional right that would invalidate federal obscenity laws on Due Process grounds. He wrote: “I reject the notion that the liberty interest announced in Lawrence somehow includes a right to obtain or distribute obscenity. The defendants misconstrue the nature of the liberty interest at stake in that case. What is evident from the Supreme Court’s decision is its intent to prevent the state from burdening...
certain intimate, consensual relationships by criminalizing the private sexual acts that are instrumental to those relationships. In defining the contours of the liberty interest, the Supreme Court made a point to note that the statutes challenged in Lawrence 'seek to control a personal relationship that ... is within the liberty of persons to choose without being punished as criminals.' 539 U.S. at 567. The defendants, in effect, demeant this liberty interest by defining it as a right to sexual privacy, when it is really about the right to form meaningful, personal bonds that find expression in sexual intimacy. As the Supreme Court put it: 'When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexuals persons the right to make this choice.' Id. The possession and use of obscenity are hardly analogous to the sexual acts that the Lawrence Court found to be so instrumental to the relationships of homosexual persons. Indeed, the liberty interest that the defendants claim pales in comparison to the liberty interest at stake in Lawrence. Similarly, the purported right to obtain or distribute obscenity does not remotely approach the fundamental liberty interests implicated in Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), where the Supreme Court held that the right to decide whether to bear or beget a child includes the right to obtain contraceptives. As a result, I reject the defendants' contention that Lawrence and its predecessors created a so-called right to sexual privacy so fundamental and so sweeping that it includes the right to obtain, as well as the correlative right to distribute, obscene materials in the public marketplace, which the post-Stanley cases repeatedly rejected. Thus, absent clear support in the constitutional text or in Supreme Court case law, I will neither certify the defendants' gold-toned constitutional concoction, nor conjure one up on my own."

Illinois — Newspapers in Chicago reported on Feb. 25 that three men charged with beating up a gay man who intervened in their activity in the subway system will be prosecuted for hate crimes, despite their argument that they did not select their victim due to his actual or perceived sexual orientation but rather because he provoked them. Prosecutors urged that the matter be handled as a hate crime because the defendants allegedly taunted the victim as a "faggot" and asked him whether they would get AIDS from exposure to his blood as they were beating him up. Cook county Judge Ramon Ocasio III rejected a defense bit to reject the prosecutions request to the court to upgrade the case from misdemeanor to felony hate crime and aggravated battery charges. The defendants are Sean Little, Kevin McAndrew and Benjamin Eder; the victim is Daniel Hauff. According to the prosecutor, Hauff confronted the defendants when he heard one of them bullying another gay rider on the train.

Michigan — The Michigan Court of Appeals rejected all of defendants' objections to their conviction on first degree murder charges arising from the beating deaths of two gay men in 1988. People v. Luna & Leos, 2010 WL 539835 (Feb. 16, 2010). According to the court's opinion, the bodies of the two gay men were found buried in the woods, but the investigation at the time went nowhere. However, many years later, advances in forensic science made it possible to test blood samples that had been taken from the corpses and to make connections to the defendants, and subsequent investigations produced eyewitnesses who had failed to come forward during the earlier investigation. It seems that one of the victims had been the boyfriend of Leos; Leos discovered he was cheating when he found him in bed with the man who became the other victim. Leos alleged made a deal with Luna, who is not gay, to dispose of these two men. The eyewitnesses testified to the savage beating of both men by Leos and Luna and the subsequent disposal of the bodies with the help of the eye-witnesses. The two men were sentenced to life in prison upon their conviction. The court of appeals rejected their contentions that there was insufficient evidence to support the convictions, that the eye-witnesses were intimidated into testifying by the police, that their counsel was ineffective in defending them, or that the court erred by admitting various inculpatory statements made by Luna to other inmates. A.S.L.

Legislative Notes

Federal — U.S. Senator Joseph Lieberman, an Independent who used to be a Democrat from Connecticut, was expected to introduce in the Senate and be the lead sponsor of a measure intended to repeal the "don't ask, don't tell" military policy. Other members of the Senate are considering alternative ways to chip away at the policy, including defunding its enforcement in the Defense Appropriations Bill. Senator Carl Levin, who presided on Armed Services Committee hearings and is a proponent of repealing the policy, has expressed reservations about pushing for a vote until after the Pentagon has concluded its implementation study, expressing fear that premature vote to repeal the policy could lead to defeat in the Senate. • • • In the House, on Feb. 22 Rep. Alcee L. Hastings (D-Fla) introduced a resolution with 26 original co-sponsors urging the Pentagon Working Group established by the Obama Administration to study implementation of ending the anti-gay military policy to deliver an implementation plan to Congress as soon as possible. • • • Secretary of Defense Robert Gates and Joint Chiefs of Staff Chair Admiral Michael Mullen testified before the Senate Armed Services Committee that the policy should be ended, but only after a prolonged implementation study has been conducted. Various service chiefs testified, and seemed less enthusiastic about ending the policy, most especially Army General George Casey, who expressed reservations about making any change while the country is engaged in "two wars," and marine General James T. Conway, who insisted that the current policy "is working." Conway expressed concern that national security might become secondary to the discussion. The service chiefs appear oblivious to studies showing that rapid policy change to allow openly-gay people to serve in uniform was successful among all of our major military allies. But then, "military intelligence" has long been considered an oxymoron by some.

Hawaii — On February 19, the Hawaii Senate voted 18–7 in favor of a proposed civil unions bill, which would make such unions available to same-sex and different-sex couples. The measure had a veto-proof majority in the Senate, but it was uncertain whether the House could muster a similar majority. Such a majority was considered necessary because the Republican governor of the state, Linda Lingle, has not stated support for the measure, although there is no pending explicit veto threat, either. Honolulu Advertiser, Feb. 19.

Illinois — Opponents of same-sex marriage tried various stratagems to get a measure opposing such marriages out of committee in both houses of the state legislature, but were unsuccessful, so the earliest that a public referendum could be taken to attempt to reverse the state supreme court's Varnum decision would be 2014 — and meanwhile same-sex marriages continue in the state.

New Hampshire — The New Hampshire House Judiciary Committee rejected proposed bills early in February that would have either repealed the same-sex marriage law passed last year or put it to a repeal referendum vote. WHUR.com, Feb. 9. Towards the end of the month, the full House agreed with its Judiciary Committee, voting 201–135 to reject a constitutional amendment restricting the definition of marriage and 210–109 against a bill to repeal the statute that enacted same-sex marriage in the state last year. Concord Monitor, Feb. 18.

New Mexico — The Senate Finance committee voted 7–4 to table a proposed domestic partnership law that had been supported by Governor Bill Richardson as part of his legislative agenda for this year. Supporters vowed that the measure would be reintroduced in 2011.

New York — On February 24 the New York State Senate gave final approval to the Family Health Care Decisions Act, which will allow a patient’s family members to make health care decisions when the patient is not able to do so. The Senate had passed an earlier version of the
bill last summer. The Assembly passed an amended version of the bill in January, requiring a new vote in the Senate before sending the measure to Governor David Paterson, a supporter, who is expected to sign it. In all but a handful of states, family members have this authority either by statute or judicial decisions.

Virginia — Staying true to his campaign position that the state government should not have a policy banning anti-gay discrimination within its ranks, recently-inaugurated Governor Robert F. McDonnell, a Republican, signed a new executive order prohibiting employment discrimination within the executive branch of the state government, removing sexual orientation as a forbidden ground of discrimination. Sexual orientation had been included in the similar executive order issued by his Democratic predecessor, Tim Kaine. McDonnell’s rationale is that there is no legislative basis for including sexual orientation. On February 8, the Virginia Senate approved a bill to protect state employees from discrimination based on sexual orientation or gender identity, but its chances of final passage over an expected veto by the governor, who is a proudly unrepentant homophobe, appears unlikely, and the measure died in a House subcommittee on February 9. The subcommittee also rejected a general ban on sexual orientation discrimination for the state. Virginia Pilot & Ledger-Star, Feb. 10. Perhaps it is time for gay Virginians and gay-owned businesses to disinvest from the state and move to neighboring gay-friendly jurisdictions such as the District of Columbia and Maryland. After all, Virginia’s government is intent on signaling that it finds gay people to be undesirable.

A.S.L.

Law & Society Notes

California — The University of California at Berkeley has received a $16 million donation from the Evelyn and Walter Haas Jr. Fund that will be used to fund five new faculty chairs in diversity-related research, one of which will be an endowed chair on lesbian, gay, bisexual and transgender equity issues. This will reportedly be the first fully-endowed chair in LGBT studies in the U.S., according to a Feb. 19 report in the Los Angeles Times.

California — The American Psychological Association, scheduled to hold its August 2010 convention in San Diego, has decided to move its Council of Representatives meeting out of the Manchester Hyatt Hotel. The Hotel is the target of boycotts by gay rights advocates because its proprietor was a major donor to the 2008 Proposition 8 campaign, which amended the California Constitution to prohibit same-sex marriages in the state. According to a press release released by the APA on Feb. 23, the Association is not calling for a general boycott of the hotel, but is going to schedule official meet-

ings for the Convention elsewhere to avoid putting members to the decision of whether to attend a meeting or to violate their convictions. The press release also stated that “APA plans to use the meeting to highlight the Association’s policy statement in support of same-sex marriage and the science that supports that position.”

Florida — While the state continues to defend its statutory ban on gay people adopting children in court, the Department of Children & Families has confronted reality and on Feb. 9 agreed to extend to a boy adopted by a gay man in Key West pursuant to a trial court order (which has not been appealed) various government benefits that are ordinarily extended to children who are adopted out of state care. Lawyers for the Department signed an agreement to provide the boy with subsidized college tuition assistance, health insurance under the state’s Medicaid program, and other benefits typically provided in such situations. Miami Herald, Feb. 10.

Maine — The Lewiston Sun Journal reported on Feb. 24 that the Maine Human Rights Commission is set to issue guidelines under the Maine Human Rights Act to advise schools about how to deal with transgender students. The Commission announced that the guidelines were derived from several rulings it had made in individual cases since 2006. The guidelines will not have the force of law, but the Maine School Management Association and the Maine Principals’ Association expressed concern that the guidelines might hold to set a standard, departure from which could subject the public schools to lawsuits.

New York — The New York City Bar Association has released a report by its Committees on Lesbian, Gay, Bisexual & Transgender Rights, Civil Rights, and Military Affairs and Justice, calling on Congress to repeal the “don’t ask, don’t tell” military policy, describing it as “legally unsupportable and unsound as a matter of policy.” The report states: “The City Bar urges the Pentagon and Congress to act swiftly to determine an effective implementation plan and include repeal language in the next Defense Authorization bill, and urges President Obama to follow through on his promise to end this discriminatory policy.”

Rhode Island — On February 11, members of the Rhode Island House of Representatives elected Gordon Fox to be Speaker of the House, the first openly gay legislator to hold such a position. According to a news report Feb. 12 in Boston.com, “He will preside over a veto-proof Democratic majority and have wide sway over which bills come to a vote and which bills die.”

Wisconsin — On February 20, the John Knox Presbytery of the Presbyterian Church (USA) voted to ordain a gay man from Madison, Wisconsin, who has a long-term same-sex partner, in defiance of national church policy. Openly gay candidates have been ordained, but not those who were open about being engaged in a same-sex relationship. This action is expected to spark major controversy within the church.

International Notes

European Court of Human Rights — The Court was scheduled to hold its first hearing on the question whether same-sex couples are entitled as a matter of European Human Rights Law to have equal access to marriage, in the case of Schalk & Kopf v. Austria, in Strasbourg (France) on February 25. In prior litigation, the Court determined that transgender individuals are entitled to marry a person of the opposite sex to their post-operative sex in Goodwin v. UK (2002). Goodwin was the fourth time the issue had been brought before the Court. The plaintiffs are relying on Articles 12, 14 and 8 of the European Convention on Human Rights, Occasional Law Notes contributing writer Robert Wintemute, Professor of Human Rights Law at King’s College London, will be arguing on behalf of third-party intervenors, public interest organizations based in Europe that support the right to same-sex marriage.

Albania — On February 4, the legislature approved an anti-discrimination bill proposed by the government that bans discrimination on the basis of sexual orientation and gender identity, according to a February 16 press release by Human Rights Watch, which sent a message of congratulations to Prime Minister Sali Berisha.

Australia — The government of New South Wales has announced that it will introduce legislation to create a partnerships registry for same-sex couples, similar to those in effect in Victoria, Tasmania, and the Australian Capitol District, but the state does not plan to provide civil unions. According to NSW Attorney General John Hatzistergos, “What we’re trying to do here is provide a simple and dignified mechanism for people to be able to have their relationships recorded, whether they are same-sex or heterosexual, and to be able to facilitate access to the family court system, but also to various entitlements under state and federal law.” ABC Premium News, Feb. 23.

Australia — A bill presented in the Senate by Greens Senator Sarah Hanson-Young to amend the Marriage Act to end discrimination based on sexual orientation or gender identity in access to the institution of marriage went down to defeat on February 25 by an overwhelming margin, with speakers from the government, the opposition, and the Family First party all speaking in opposition. ABC Premium News, Feb. 25; Sydney Daily Telegraph, Feb. 26.

Fiji — Fiji has decriminalized consensual gay sex. The government has put a new Crime Decree in place to replace the old Criminal Pe-
nal Code. Under the new law, private consensual sodomy is not specified as a crime, but prostitution and indecent public behavior remain crimes. According to a Feb. 26 report in the Fiji Times, “Under the sexual offenses provision in the Crime Decree, the only time homosexuality is considered a crime is when there is sex without consent therefore suggesting rape.”

Macedonia — Hoping to be granted membership in the European Union, Macedonia is considering adopting anti-discrimination legislation, but references to sexual orientation in earlier drafts disappeared in the revised draft announced by the government on Jan. 29. The European Parliament’s Intergroup on LGBT Rights criticized this change, rejecting the argument that gays would still be covered under the rubric of “other grounds” mentioned in the list of prohibited grounds for discrimination. Membership requirements for admission to the European Union require applicant countries to have human rights policies consistent with the European Union.

Macedonia is considering adopting anti-discrimination legislation, but references to sexual orientation in earlier drafts disappeared in the revised draft announced by the government on Jan. 29. The European Parliament’s Intergroup on LGBT Rights criticized this change, rejecting the argument that gays would still be covered under the rubric of “other grounds” mentioned in the list of prohibited grounds for discrimination. Membership requirements for admission to the European Union require applicant countries to have human rights policies consistent with the norms of the European Union, which now include non-discrimination on the basis of sexual orientation.

Malawi/Uganda — In the wake of a prosecution of two men for holding a wedding ceremony, it appears that the government of Malawi may have undertaken a crackdown and round-up of gay people in that country. Despite criticism by international human rights groups, the government seems committed to pursuing a harshly anti-gay course, at a time when legislation is pending in the neighboring African country of Uganda to significantly increase criminal penalties for homosexual conduct, in some cases imposing a death penalty. According to a Feb. 17 report on the situation in Africa in the Guardian, gay sex is illegal in 36 countries in Africa, and the only country that is officially tolerant of homosexuality, forbids sexual orientation discrimination, and allows same-sex marriages, is the Republic of South Africa, where gay rights activists played an important role within the African National Congress in combating the apartheid regime, and were rewarded with a constitutional provision banning sexual orientation discrimination upon which subsequent legal gains have been built. The situation in Uganda has aroused widespread international concern. A bipartisan group of U.S. Senators — Democrats Russ Feingold and Ben Cardin and Republicans Tom Coburn and Susan Collins — introduced a resolution in the Senate calling on the Uganda Parliament to reject the proposed Anti-Homosexuality Bill, which President Obama has spoken publicly against the bill, and Secretary of State Hillary Clinton has called the president of Uganda to urge that the bill be withdrawn.

Mexico — Reacting to the December 21 passage of a local law allowing same-sex marriages in Mexico City, five of Mexico’s 32 states have joined with the attorney general in a legal action challenging the authority of the city government to enact the measure. Their claim is that it is barred by a constitutional provision that states: “Men and women are equal before the law. The law will protect the organization and development of the family.” The argument is that this provision assumes a family unit headed by a husband and wife, and that forbidding same-sex marriages is necessary to “protect” the family and safeguard children. The Mexico City law was enacted by the city’s Legislative Assembly by a 39–20 vote on December 21, redefining marriage as “the free uniting of two people.” WOckner International News #824, Feb. 8.

United Kingdom — The General Synod of the Church of England voted on February 12 to allow survivors of same-sex civil partnerships among its clergy to enjoy the same pension rights as other spouses, while continuing to maintain a ban on any church blessing for such partnerships. The participants voted against amendments that would have extended equal pension rights to all relatives of clergy who might live in their households for five years, or conversely to limit same-sex partner survivor benefits to hardship cases for which individual applications would have to be made. The U.K. provides civil partnership for same-sex couples that carry all the legal rights and status of marriage.

United Kingdom — On February 15, Ray Gosling, a veteran broadcast journalist and gay rights advocate, revealed on a local BBC News documentary program that back in the early 1980s he had smothered his lover to death in a hospital bed after doctors concluded that the AIDS-stricken man was beyond medical help and was experiencing severe pain. This was long before the discovery of effective treatments for HIV. On February 16, responding to the frenzy of media attention the story had attracted, detectives from the Nottinghamshire police department’s homicide unit visited the production offices where the documentary was made, to determine whether it was appropriate to bring criminal charges against Mr. Gosling. So far, the only “evidence” in the case is documentary footage of Mr. Gosling relating the incident from more than twenty years ago. He could be charged with homicide or assisted suicide, depending whether investigators believe his statement that he and his lover had an understanding that motivated his actions. Independent, Feb. 17.

United Kingdom — Conservative Party Leader David Cameron has been taking visible steps in anticipation of the next national election to try to win the support of LGBT voters for his party, which has under past leaders had a strongly anti-gay cast. (Conservatives fought many of the steps taken over the past half century to liberalize British law on homosexuality.) In support of this campaign, Cameron recently called for a revision to British asylum law so as to end the practice of deporting gay men to their native African countries with draconian anti-gay laws. The attitude of British immigration officials has been that homosexuality is a trait that can be concealed, so gay men can be deported back to Africa with the admonition to stay in the closet in order to avoid persecution. Cameron has criticized this position, and has also come out for an end to the categorical ban on gay men being blood donors. He has also called on Rowan Williams, Archbishop of Canterbury and chief cleric of the Church of England and the Anglican Communion, to move the church in a more gay-friendly direction, and he has apologized for the Conservative Party’s past support of Section 28, a provision that blocked national funds for any schools that engaged in “promotion” of homosexuality. The measure was repealed under the Blair (Labour) Government. According to Cameron, “I think we can look gay people in the eye and say: ‘You can now back us — because we now support gay equality.’” A.S.L.

Professional Notes

G.O.P. Stalls Lesbian Judicial Appointment — President Obama’s first nomination of an openly LGBT candidate for a judicial appointment is being stalled by Senator Jim DeMint (R-S.C.), who has made it his business to stall the confirmation votes on any nominee of the president whom he regards as too far to the left politically. In this case, Marisa Demor, appointed to be a judge of the District of Columbia Superior Court, is described by DeMint as having “a history of very leftist activism.” This is based on her having been an attorney with the Mexican-American Legal Defense & Education Fund early in her career, and with her past membership in such groups as Human Rights Campaign and GAYLAW, the D.C. LGBT bar association, for which she served as co-president in 1998–99. In other words, as far as Sen. DeMint is concerned, attorneys who have
been affiliated with civil rights organizations and/or LGBT rights organizations are disqualified from serving as federal judges. Gay Republicans, go to work....

LeGaL Member (and LeGaL Foundation Board Member) Lynn R. Rotter has been inducted as a Judge of the Civil Court of the City of New York.

U.S. Senator Charles Schumer (D-N.Y.) announced on Feb. 8 that he had recommended the appointment of Daniel Alter, an openly-gay former federal prosecutor, to the U.S. District Court for the Southern District of New York. If nominated and confirmed, Alter would be the first openly gay man to be seated as a federal judge. Alter graduated from Yale Law School, clerked in the 2nd Circuit for Judge Walker and Calabresi, and after his service as a prosecutor and a period of private practice, he became the national director of the Civil Rights Division of the Anti-Defamation League. The Southern District already boasts the first openly-lesbian woman to be confirmed and seated as a federal judge, the Honorable Deborah Batts, appointed by President Bill Clinton. Of course, as the story below indicates, there are other gay federal judges, just none who were confirmed as openly-gay nominees.

An open secret is no longer a secret... The San Francisco Chronicle published an article on February 7, 2010, titled “Judge Being Gay a Nonissue During Prop. 8 Trial.” If it wasn’t an issue that Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California is gay, why did the Chronicle think it was newsworthy to publish the article? Perhaps what they thought was newsworthy was that nobody publicly connected with the case of Perry v. Schwarzenegger, a constitutional challenge to the state constitutional amendment that rescinded the right of same-sex couples to marry, would say on-the-record that they thought it would make any difference to the outcome. Walker is known in San Francisco as a judicial conservative who, while still in private practice, represented the U.S. Olympic Committee (USOC) when it filed suit against the organizers of the Gay Olympics to force them to abandon use of the term “Olympics” for fear that people might think that the event was officially sanctioned by the USOC. Walker’s firm won that case. Walker was subsequently appointed to the district court by President George H.W. Bush, a Republican, and gay activists lobbied against his confirmation, pointing to this representation as evidence of anti-gay bias. According to the Chronicle article, gay community leaders and lawyers who have dealt with Walker professionally state that he has never disguised or advertised his sexual orientation.

So, how to classify him? For years, we have been hearing that Judge Deborah Batts of the Southern District of New York was the first openly gay federal judge, because she was the first to disclose her sexual orientation during her confirmation process, although we’d heard tell of quite a few closeted members of the federal bench. With this article, would it be appropriate to classify Judge Walker as an openly gay federal judge? And to note this about him in the section of Law Notes which generally reports about openly gay members of the legal profession? Well, it seems that we’ve done so. A.S.L.

AIDS & RELATED LEGAL NOTES

Gay HIV+ Pilot Wins New Hearing in 9th Circuit on Privacy Act Damages

A unanimous panel of the U.S. Court of Appeals for the 9th Circuit ruled on February 22 that Stanmore Cawthon Cooper, a gay pilot whose Social Security Disability medical file was unlawfully shared by the Social Security Administration with investigators from the Federal Aviation Administration and the Department of Transportation, was entitled to seek damages for non-pecuniary injuries under the federal Privacy Act. The ruling in Cooper v. FAA, 2010 WL 597486, reverses a determination by U.S. District Judge Vaughn Walker (N.D.Cal.) that the statute’s authorization of damages for “actual injuries” must be narrowly construed to be limited only to pecuniary losses resulting from a violation of the statute.

Cooper, who had a pilot’s license beginning in 1964, learned he was HIV+ in 1985, but decided not to disclose this to the FAA, because he was concerned about confidentiality concerning his sexual orientation and HIV status. He actually allowed his medical certification from the FAA to lapse at one point, knowing that the agency was grounding pilots who were taking anti-retroviral medications. In 1994, he re-applied for a medical certificate from the FAA, but did not disclose his HIV status or medication situation on the application, and a new certificate was issued. However, his HIV-related symptoms worsened and in 1995 Cooper applied to the Social Security Administration for disability benefits, which were awarded to him from August 1995 to August 1996. Cooper did not notify the FAA about this development concerning his health.

In July 2002, the FAA launched an investigation into possible fraud by pilots failing to disclose adverse health information to the agency. They launched a data-matching program in Northern California, where they sent a list of all holders of active FAA medical certifications, together with their social security numbers, to the Social Security Administration, which then reported back to them all of the pilots on the list who had sought disability benefits. Cooper’s name was on the list. He was subsequently confronted with this, and pled guilty to a count of making and delivering a false official writing, a misdemeanor for which he was fined $1,000. Upset that the Social Security Administration had disclosed medical information to the FAA that was supposed to be confidential, Cooper launched this lawsuit, and won a ruling from the district court that the agencies had violated the Privacy Act by failing to get his authorization to disclose his Social Security medical records. But Judge Walker, as noted above, refused to award damages, since Cooper’s injuries were entirely psychological (emotional distress, etc.).

The court of appeals found that there is a split of circuit authority on the question whether non-pecuniary injuries are compensable under the Privacy Act, but that it was a question of first impression for the 9th Circuit. The panel unanimously concluded that in light of the purpose and function of the statute, it was clear that such injuries should be compensable. Indeed, elsewhere in the statute in relating the legislative purposes, the law mentions compensating “all injuries,” and there is a clear recognition in other privacy statutes and in the Supreme Court’s constitutional privacy jurisprudence that frequently the main injury resulting from a breach of privacy is embarrassment or emotional distress. Consequently, it would be unreasonable to construe the statute to deny compensation for such injuries. The case was remanded to Judge Walker for a determination whether the disclosure caused any non-pecuniary injuries to Cooper that should be compensated. If any qualifying injury is shown, the statute authorizes damages of at least $1,000.

Given the split of circuit authority, it is possible that the government will seek en banc review and/or an appeal to the Supreme Court. Cooper is represented on the appeal by Raymond A. Cardozo, Tiffany Renee Thomas, James M. Wood and David J. Bird from the firm of Reed Smith LLP. A.S.L.
county jail. When medication did not resume after he entered the state system, he filed a grievance which eventually came to the attention of these officials, who ascertained that Leavitt was being tested and evaluated and would receive medication if his CD4 count fell below the range specified in federal treatment guidelines. Magistrate Judge Kravchuk provides an exhaustive chronology, which demonstrates that when Leavitt’s CD4 count fell into the danger range, medication was promptly prescribed and he quickly responded with an increase in CD4 count and viral load reduced to undetectable. At some points along the way he experienced some physical symptoms of immune suppression, but Kravchuk concluded based on the extensive medical record before her that he had not suffered any serious consequences from the delays in resuming his medication. She thus recommended granting summary judgment to the prison officials. This summary judgment motion did not concern the complaint against Correctional Medical Services, the subcontractor that provides health care for Maine inmates. A.S.L.

**PUBLICATIONS NOTED & ANNOUNCEMENTS**

**Movement Position Announcement**

The ACLU LGBT & AIDS Project has announced a staff attorney opening in the New York City Office. Qualifications include significant litigation experience, familiarity with LGBT rights and HIV/AIDS and civil liberties issues, and superior experience and skills. Interested persons should submit a cover letter, resume, legal writing sample, three references, and law school transcript, by email to hrjobs@aclu.org. The reference on the subject line of the email should read [LGBT–14]. Applications can also be sent by surface mail to: Human Resources, ACLU, Re: [LGBT–14], 125 Broadway, 18th Floor, New York, NY 10004. Applications should be submitted to arrive well before March 24, 2010, which is the earliest date on which the position may be filled. The cover letter should indicate where the applicant found this job listing.

**LESBIAN & GAY & RELATED LEGAL ISSUES:**


Curry,Summer Ian, *Interstate Recognition of Same-Sex Relationships in Europe*, 13 J. Gender, Race & Justice 59 (Fall 2009).


Jenkins, Ellen A., *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate Univ. L. Rev. 67 (Fall 2009).


Merrigan, Armen, H., Henkvev Gregory: A Landmark Struggle Against Student Gay Bashing, 16 Cardozo J. L. & Gender 41 (Fall 2009).


**Specially Noted:**


**AIDS & RELATED LEGAL ISSUES:**

Leonard, John W., *Defining Disabled: A Study of the ADA Amendments Act of 2008 in Elimi-
nating the Consideration of Certain Mitigating Measures, 26 J. Contemp. Health L. & Pol’y 125 (Fall 2009).

Strong, Alissa J., “But He Told Me It Was Safe!”: The Expanding Tort of Negligent Misrepresentation, 40 Univ. Memphis L. Rev. 105 (Fall 2009).

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.