

EUROPEAN HUMAN RIGHTS COURT RULES AGAINST RUSSIA IN GAY RIGHTS CASE

A unanimous 8-member chamber of the European Court of Human Rights ruled on October 21 that the Russian government violated the European Convention on Human Rights when the Moscow city government at the direction of Mayor Luzhkov denied permission for three consecutive years for the holding of a gay rights parade and demonstration in that city. Ruling on three applications to the court filed by Nicolas Alekseyev, the leader of the Russian gay rights group in Moscow, the court found violations of Articles 11, 13 and 14 of the Convention. *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09.

There were recent reports from Russia that government agents had briefly kidnapped Mr. Alekseyev to try to persuade him to withdraw these applications to the Court, but he refused and was eventually released. Russian President Medvedev recently removed Moscow Mayor Luzhkov from office and appointed a replacement, whose views on the holding of gay rights parades have yet to be tested. There are also reports that recently some Russian courts, perhaps anticipating the European Court's ruling, have held that Alekseyev's organization is entitled to hold such events in the future.

Much of the court's opinion is devoted to a detailed chronological account of the events at issue, concerning attempts by Mr. Alekseyev's organization to stage demonstrations in support of gay rights on May 27, 2006, January 29, 2007, February 14, 2008, and March 10, 2009. In each case, the city refused to allow the event. Responding to the first such request, in 2006, a spokesperson for Mayor Luzhkov indicated that the mayor "has firmly declared: the government of the capital city will not allow a gay parade to be held in any form, whether openly or disguised [as a human rights demonstration], and any attempt to hold any unauthorised action will be severely repressed." Later news reports quoted the mayor as saying he did not want "to stir up society, which is ill-disposed to such occurrences of life" and that he considered homosexuality to be "unnatural" although he "tried to treat everything that happens in human society with tolerance."

In rejecting requests for permission to hold the events, the mayor cited opposition to the

events from religious authorities, and local courts repeatedly rejected attempts by the organizers to have the mayor's actions overruled. Defending its actions before the European court, the Russian government argued that the denial of authorization for a gay pride parade was justified on public safety and public moralistic grounds.

The court took up the allegations of violations of particular articles of the Convention *seriatim*.

Article 11 provides for freedom of peaceful assembly and freedom of association, and mandates that no "restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society." The article allows the state to restrict assembly and association rights when necessary for national security, public safety, the prevention of disorder or crime, the protection of health or morals, or "for the protection of the rights and freedoms of others."

The Russian government argued that these exceptions applied, stressing that the Mayor had received objections to the holding of gay pride events from the leaders of the religious community. "In the Government's view," wrote the court, summarizing the argument, "in Moscow the public was not yet ready to accept the holding of gay parades in the city, unlike in Western countries, where such celebrations were regular occurrences. It was thus the authorities' duty to demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality." The government noted that one of the religious authorities had threatened that there would be mass protests, and that one Muslim religious leader had state that "homosexuals must be stoned to death." The government also relied on a statement attributed to a European Human Rights Commissioner in a news report that the prohibition of gay rights parades in Moscow was supported by the Council of Europe, a news report that has been repudiated by the Commissioner who was allegedly quoted.

Countering the government's argument, Mr. Alekseyev pointed out the peaceful nature of the contemplated event, and noted that Russian statutes concerning such events did not author-

ize banning them, but did provide that the government might suggest alternative venues for proposed activities to avoid public disorder. In this case, however, the government was imposing a complete ban, and was unwilling to negotiate about venue. He argued that the government's emphasis on protecting public morals ran counter to the protection of diversity and pluralism required by the law, and pointed out further that his organization was not proposing an event that would involve any sexually explicit or provocative behavior or public nudity.

The court found that there was "no doubt that there has been an interference with the exercise of the applicant's freedom of peaceful assembly guaranteed by Article 11, Section 1 of the Convention. . . [I]rrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society." The court repeatedly noted a prior decision in a similar case arising in Poland, where it had found the government's refusal to allow a gay pride parade as violating Article 11.

Quoting from the Polish case, the court said: "Referring to the hallmarks of a democratic society," the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

Responding to the government's public safety argument, the court wrote that it had previously "stressed in this connection that freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. The Court cannot accept the Government's argument that these petitions [from religious leaders opposing the gay pride events] should be viewed as a general indication that the Pride March and the picketing had the potential to cause public disorder." Indeed, the court indicated that the religious protests were more appropriately addressed in response to the government's second argument in support of its actions: protection of morals. "In the present case," said the court, "the Court cannot

LESBIAN/GAY LAW NOTES

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accept the Government's assertion that the threat was so great as to require such a drastic measure as banning the event altogether; let alone doing so repeatedly over a period of three years. Furthermore, it appears from the public statements made by the Mayor of Moscow, as well as from the Government's observations, that if security risks played any role in the authorities' decision to impose the ban, they were in any event secondary to considerations of public morals."

Turning to the public morals justification, the court noted the Government's argument that "such events should be banned as a matter of principle, because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults. The Court observes, however, that these reasons do not constitute grounds under domestic law for banning or otherwise restricting a public event," as a result of which these arguments were not even made in the local court proceedings that Alekseyev had initiated. "The Court is not convinced that the Government may at this stage substitute one Convention-protected legitimate aim for another one which never formed part of the domestic balancing exercise. Moreover," the court continued, "it considers that in any event the ban was disproportionate to either of the two alleged aims."

Recurring to its holding on the earlier point, the court asserted that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's right to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention." In light of the articulated purpose of the event, "to promote respect for human rights and freedoms and to call for tolerance towards sexual minorities," the

court found the government's concerns about public morals to be overstated.

The court decisively rejected the government's argument that in light of cultural factors it should be accorded a wide margin of appreciation for its decision about dealing with gay rights issues in Russia. "There is ample case-law reflecting a long-standing European consensus" on a wide array of gay rights issues, wrote the court, listing a long string of decisions dating back to 1988. "There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly."

In this case, the court faulted the government's failure to engage in a realistic assessment of the public safety issues, as well as its apparent decision-making based solely on "public opposition to the event" and the officials' "own view of morals."

Article 13 of the Convention requires that contracting states afford an effective remedy for human rights violations. In this case, the government argued that Alekseyev could submit his grievances to the local courts, but he argued that this did not provide an effective remedy in the circumstances, inasmuch as the city's rules provided a narrow time window during which parade applications could be submitted shortly before the event, that the city would announce its denial of the permits very shortly before the event, and that local court rulings rejecting Alekseyev's challenges to the city's actions were announced so shortly before the event as to provide no time to appeal. As the dates for the proposed events were chosen for symbolic reasons and carrying out these events required planning, the available judicial mechanism for seeking relief was inadequate from the point of view of time, and the court so found.

Finally, Article 14 is the Convention's anti-discrimination provision. The court rejected the government's argument that Article 14 did

not apply because the ban was not discriminatory on a ground specified in the Convention. "The court reiterates that sexual orientation is a concept covered by Article 14," wrote the court. "Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances." Translating into U.S. constitutional terms, the court was saying, in effect, that sexual orientation is a suspect classification under the Convention, meaning that governmental actions that discriminate based on sexual orientation are subject to something like strict scrutiny.

"It has been established above that the main reason for the ban imposed on the events organized by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality," the court concluded. "In particular, the Court cannot disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between these statements and the ban. In the light of these findings, the Court also considered it established that the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention."

The court awarded damages to Alekseyev of 12,000 euros, which translates to somewhere between \$16,000 and \$17,000, and awarded costs and expenses of the litigation in the amount of 17,510 euros, or about \$24,000. Interest will accumulate on these amounts at the marginal lending rate of the European Central Bank plus three percent until the damages and expenses are paid. The judgment announced on October 21 is subject to editorial revision and possible appeal to a larger tribunal. A.S.L.

LESBIAN/GAY LEGAL NEWS

Don't Ask, Don't Tell: On Again, Off Again, On Again?

On October 12, U.S. District Judge Virginia A. Phillips (C.D.Cal.) filed her judgment and permanent injunction in the case of *Log Cabin Republicans v. United States*, No. CV-04-08425-VAP, following up on opinions previously issued in the case, which may be found on Westlaw: 2010 WL 3526272 (September 9, 2010) and 2010 WL 3960791 (October 12, 2010), as reported in the October issue of *Law Notes*. As we went to press, Judge Phillips' injunction had been temporarily stayed by the

motion panel of the 9th Circuit as it considers whether to stay the injunction throughout the appellate process in the 9th Circuit, which could stretch things out for months or even years with the policy still in place unless Congress acts to authorize its repeal.

Rejecting the Justice Department's request that the remedy ordered in the case be limited to the parties, such that the Defense Department could continue to enforce the "Don't Ask, Don't Tell" military policy against all persons except members of LCR, Judge Phillips issued a wide-ranging order, permanently enjoining the government "from enforcing or applying"

the policy and its implementing regulations "against any person under their jurisdiction or command," and also ordering the immediate suspension and discontinuance of any "investigation, or discharge, separation, or other proceeding" that might have been commenced under the policy on or prior to October 12. She also granted LCR's request to apply for attorneys' fees and costs in the matter.

The Defense Department, after some brief hesitation and a warning letter about potential contempt of court triggered by a recruiting office turning away a gay veteran who wanted to sign up, instructed its recruiting offices to com-

ply with the order, while the Justice Department determined how to proceed. The Justice Department filed an Application with Judge Phillips for the Entry of an Emergency Stay on October 14, signaling its intention to appeal the ruling to the 9th Circuit. On October 19, Judge Phillips issued a brief order and memorandum denying the Application.

After noting that DOJ did not “present any of the evidence or arguments now advanced before the injunction issued,” even though the court had given DOJ time after filing its first opinion on September 9 to offer evidence and argument about the scope of the proposed remedy, the court characterized the evidence presented in support of this “emergency” application as “conclusory and unpersuasive. It is belied by the uncontroverted evidence presented at trial regarding the Don’t Ask, Don’t Tell Act’s effect on military readiness and unit cohesion.”

In a nutshell, the court determined that issuing any stay would be contrary to the court’s conclusions, on the merits, that the policy as applied was actually harmful to national security. In seeking the stay, DOJ was not seeking to argue that the policy was constitutional, but rather that suddenly suspending the policy was unworkable because it implicated a host of concerns about such things as housing, benefits, re-accession (i.e., allowing personnel discharged under the policy to reapply), military equal opportunity, anti-harassment policies, standards of conduct, and the rights and obligations of the chaplain corps. Judge Phillips stressed that her injunction “affects the discharge and separation from service of members of the armed forces pursuant to the Don’t Ask, Don’t Tell Act,” and did not in any way “impede the Defendants’ stated goals of amending policies and regulations and developing education and training programs.” In effect, she opined, the Defense Department could just allow gays to enlist and stop processing them for discharge based on the policy and be in compliance with her injunction, while taking whatever time they needed to adjust these ancillary policies to accommodate the presence of openly gay people in the armed forces.

DOJ argued that all these changes had to be accomplished *before* the policy could be suspended, or else there would be a chaotic situation, and presented an affidavit from Undersecretary of Defense Clifford Stanley in support of its arguments, but Judge Phillips found the Stanley document to be vague and “belied by evidence at trial that Defendants chose not to rebut.”

She also reviewed the standards prescribed by the Supreme Court and the 9th Circuit for determining whether to stay a trial order pending appeal, and found that they were not met in this case. In light of her decisive opinion on constitutionality, she rejected the argument that

DOJ had demonstrated a likelihood of success on the merits on appeal, finding outmoded or distinguishable the prior court decisions they cited. She contended that the Stanley Declaration was insufficient to show that there would be irreparable harm to Defendants from having to comply with the injunction, based on pure speculation and vague assertions, while staying the court’s order would irreparably injure service members by infringing their constitutional rights. Finally, given her findings after trial that the policy was harming rather than helping the national security of the United States, it was not surprising that she found the public interest weighed in favor of allowing her injunction to stay in effect.

DOJ promptly applied to the 9th Circuit’s motion panel, and within a few days had obtained a temporary stay, with orders to LRC to file its opposition papers by October 25. Although various news sources stated that the panel would announce its disposition of the application for a stay pending appeal on October 29, no ruling was issued by the end of business that day, suggesting that a ruling would not be forthcoming until November, possibly after the election on November 2. During the few days between Judge Phillips’ issuance of her injunction and the 9th Circuit motion panel’s issuance of its temporary stay, service members were warned against “coming out” and a few gay veterans — most notably, Dan Choi — who sought to re-enlist were warned about the hazards in light of uncertainty about whether the policy would be in effect or would not be in effect during the appeal process. A.S.L.

Florida Adoption Ban Ended — For Now

In the oddly-named *Florida Department of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G.*, 2010 WL 3655782, 35 Fla. L. Weekly D2107 (Fla.App. 3rd Dist., Sept. 22, 2010), a 3rd District Court of Appeal panel unanimously ruled last month that the state statutory ban on “homosexuals” adopting children violated the Equal Protection Clause of the Florida Constitution, rejecting the validity of evidence supporting the ban offered by the expert witnesses that the state presented at trial. This set up a one-month period of suspense over whether the state would appeal the ruling to the Florida Supreme Court.

The greatest doubt about appeal was generated by the testimony of the defendant, Florida Department of Children and Families, which has been unenthusiastic about enforcing the statutory ban as there are many more children available for adoption in Florida than there have been qualified adults seeking to adopt them, and because the available scientific evidence provides no support for categorically excluding gay applicants from adopting. Soon af-

ter the ruling was announced, the Department indicated that it did not want to appeal.

“We had weighed an appeal to the Florida Supreme Court to achieve an ultimate certainty and finality for all parties,” the Department announced. “But the depth, clarity and unanimity of the DCA opinion — and that of Miami-Dade Judge Cindy Lederman’s original circuit court decision — has made it evident that an appeal would have a less than limited chance of a different outcome. The DCA opinion is binding on all trial courts and therefore provides statewide uniformity. The ban on gay adoption is unconstitutional statewide. We have created and implemented new application forms that drop the question about sexual orientation from adoption proceedings.”

The other shoe did not drop until the very deadline day of October 22, when Attorney General Bill McCollum released the following statement:

“The constitutionality of the Florida law banning adoption by homosexuals is a divisive matter of great public interest. As such, the final determination should rest with the Florida Supreme court, not a lower appellate court. But after reviewing the merits of independently seeking Supreme Court review, following the decision of our client the Department of Children and Families not to appeal the decision of the Third District Court of Appeal, it is clear that this is not the right case to take to the Supreme Court for its determination. No doubt someday a more suitable case will give the Supreme Court the opportunity to uphold the constitutionality of this law.”

Sore loser, we say!

The following week, taking care of pending business, the 3rd District court issued a per curiam affirmance without opinion in another pending appeal by the Department of a ruling by a trial judge, Maria I. Sampedro-Iglesia of Miami-Dade Circuit Court, granting a gay adoption. *Florida Department of Children and Families v. E.L.A.*, 2010 WL 4227310 (Oct. 27, 2010).

So, for now, there is an appellate ruling with statewide effect over trial courts, the deadline for appeal having passed. As all trial courts are bound to follow it, there can be no categorical exclusion of gay adults who seek to adopt, but the trial courts will make case-by-case determinations on individual qualifications, and if a matter is contested and appealed to a different District Court of Appeal a different result might be possible, bringing the matter before the state Supreme Court. The most likely scenario for that happening, we speculate, is if a local office of the Department arranges the placement of a child with a gay adoptive parent over the protest of the child’s birth parent, who then seeks some kind of court order against it and appeals any denial of such an order. Since the birth parent’s legal parental rights would have been termi-

nated prior to the placement, there would undoubtedly be a serious question of standing that could preclude a merits ruling. But opponents of adoptions by gay people may yet devise a way to get the matter back into the courts. In the meantime, the ban is inoperative, and what would make the most sense in light of the court's ruling would be for the legislature to repeal the unconstitutional provision, which it has now been given judicial "cover" to do. A.S.L.

Former U.K. Child Support Regulations Violate European Human Rights Convention

The European Court of Human Rights has held that the United Kingdom violated the Convention for the Protection of Human Rights and Fundamental Freedoms when the 1991 regulations for determining child maintenance payments were, in 2001-2002, applied to treat a person in a same-sex relationship differently from a person in a similarly situated opposite-sex relationship. *J.M. v. the United Kingdom Judgment*, Application no. 37060/06 (September 27, 2010). However, a majority of the Court declined to rule on the controversial question whether same-sex relationships should be considered "family life" within the specific protection of the Convention, instead premising their ruling on the provision against unjustified discrimination.

J.M., a divorced mother of two, had, subsequent to her divorce, lived in a "close, loving and monogamous" same-sex relationship since 1998. In 2001-2002, in applying the complex child maintenance regulations to J.M., it was found that she was required to pay GBP 46.97 per week in maintenance to her ex-husband, which she believed was a greater amount than if she had been in an opposite-sex relationship.

J.M. appealed the assessment and advanced two main theories: that the regulations violated Article 14 of the Convention (the right to the freedoms set forth in the Convention without discrimination on an enumerated ground) in conjunction with Article 1 (right against deprivation of property) in that she was unfairly discriminated against on the basis of her sexual orientation and forced to pay more in maintenance as a result of the discrimination, and that the regulations violated Article 14 in conjunction with Article 8 (right to respect for private and family life), in that she was discriminated against on the basis of her sexual orientation and that her rights to respect for her private and family life were violated.

The case passed through various U.K. appellate bodies, including an Appeals Tribunal, the Child Support Commissioner, and the Court of Appeal before finally reaching the House of Lords, which held on March 8, 2006, in a 4-to-1 decision, that the Convention had not been violated under either theory.

On appeal to the European Court of Human Rights, a majority of the justices adopted a decision which first summarized the facts and procedural history below and set forth the relevant domestic law. The Court rejected the Government's argument that J.M. could not claim herself to be a "victim" on the fact that, in 2003, the maintenance during the period in question was readjusted for J.M. such that she suffered no actual financial loss, and allowed J.M.'s complaint to proceed as "essentially one of principle, i.e. that the State discriminated against her on the basis of her sexual orientation by failing to recognize the relationship she entered into after her divorce when setting the level of child maintenance she was required to pay."

In assessing whether Article 14 had been violated in conjunction with Article 8, the Court articulated J.M.'s three theories on appeal: 1) that differential treatment of J.M. due to her sexual orientation demonstrated a lack of respect for an important component of her private life; 2) that the treatment interfered with her right to establish and develop relationships with other human beings; 3) that the treatment interfered with J.M.'s right to respect for the family life she enjoyed with her partner. The Court noted its prior decision in *Mata Estevez*, a case which left open the issue of whether same-sex relationships constituted "family life" within individual States who are parties to the Convention, but also noted that U.K. courts had subsequently repeatedly affirmed that same-sex relationships could constitute "family life." Finally, the Court noted that J.M. also argued that her right to peaceful enjoyment of possessions was violated by the obligation to pay higher child maintenance as a result of the discrimination. The Equality and Human Rights Commission also submitted arguments that the Court should rule that "same-sex couples can enjoy family life in the same way as opposite-sex couples."

The U.K. Government argued that during the 2001-2002 period, under *Mata Estevez*, the U.K. was permitted to define "family life" to exclude same-sex relationships, and that further, Article 1 was not intended to guard against interference in the financial responsibilities of parents.

In assessing whether the situation fell within the ambit of Article 1, the Court held that although the child maintenance payments were not an issue of taxation which would clearly fall within the ambit of Article 1, the payments were "contributions," the payment of which was required by the relevant legislative provisions and enforced through the relevant U.K. agency, and that therefore Article 14 was applicable.

The Court declined to decide whether or not the case fell within the ambit of Article 8 or to revisit its holding in *Mata Estevez*, stating that "having regard to its conclusion that the case in

any event falls within the ambit of Article 1 the Court does not find it necessary to decide whether the facts of the case also fall within the ambit of Article 8 of the Convention in its family life aspect [or its] private life aspect."

The Court held that discrimination violates Article 14 if it "does not pursue a legitimate aim or there is no reasonable relationship of proportionality between the means employed and the aim pursued," but that when the discrimination was on the basis of sexual orientation, the State must be able to "point to particularly convincing and weighty reasons to justify such a difference in treatment." The Court rejected the U.K.'s argument that, at the time, the situation fell within its "margin of appreciation," and stated that "reforms introduced by the Civil Partnership Act some years later, however laudable, have no bearing on the matter."

After finding J.M. a victim of Article 14 discrimination, the Court awarded her EUR 3,000 in non-pecuniary damages (distress, damage and injury caused by the existence of the discriminatory rule and the Government's conduct before the Court in defending the discrimination), and awarded her EUR 18,000 to cover costs and expenses including professional and legal fees.

Several Judges concurred in the decision of the majority, but wrote separately to state that the Court should have considered the complaint under Article 14 in conjunction with Article 8, "admit its own mistakes," and reverse *Mata Estevez* to hold that "today, in 2010, the notion of family life can no longer be restricted to heterosexual couples alone." *Bryan C. Johnson*

9th Circuit En Banc Panel Splinters Over San Francisco Adoption Resolution

A sharply divided 11-judge panel of the U.S. Court of Appeals for the 9th Circuit concluded that a Catholic advocacy organization had Article III standing to bring suit challenging a San Francisco Board of Supervisors resolution condemning the Catholic Church's opposition to adoption of children by gays as violating the Establishment Clause of the First Amendment, but affirmed the district court's decision to dismiss the case, as a similar majority could not be summoned to find a plausible Establishment Clause claim. *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 2010 WL 4138432 (Oct. 22, 2010). A minority of the panel favored dismissal on standing grounds and when those who found no valid claim on the merits were cumulated with those who found no standing, the result was a judgment to affirm the trial court's dismissal of the case.

In 2003, the Congregation for the Doctrine of the Faith of the Roman Catholic Church adopted a strong statement opposing same-sex

marriage and the adoption of children by same-sex couples. Implementing this statement, Cardinal William Joseph Levada, head of the Congregation and formerly a leader of the church in San Francisco, directed the Archdiocese of San Francisco that Catholic adoption agencies should not place children for adoption in “homosexual households.” The San Francisco Board of Supervisors immediately responded by adopting a resolution characterizing the Church’s directive as an “insult to all San Franciscans,” characterizing Levada’s directive as “unacceptable to the citizenry of San Francisco,” asserting that “same-sex couples are just as qualified to be parents as are heterosexual couples,” and urging Levada to “withdraw” his directive. The Catholic League for Religious and Civil Rights then filed suit in federal district court, claiming that the Board’s resolution violated the Establishment Clause because it conveyed a government message of disapproval and hostility towards the religious beliefs of the plaintiffs.

The fracture of the en banc panel required the court to issue a paragraph at the beginning of the opinion sorting things out for the reader. Part II of the opinion, the ruling on standing, was written by Circuit Judge Andrew J. Kleinfeld, and achieved the concurrence of Judges Thomas, Silverman, Clifton, Bybee and Ikuta, thus representing the views on standing of a bare majority of the panel. Part III of Judge Kleinfeld’s opinion is a dissent on the merits, finding an Establishment Clause violation, and was joined by Judges Bybee and Ikuta. Judge Susan P. Gruber wrote an opinion on behalf of the remainder of the panel, including Chief Judge Alex Kozinski and Judges Rymer, Hawkins and McKeown, arguing that the plaintiffs lacked standing, and thus affirming dismissal on that ground. Finally, Judge Barry G. Silverman wrote an opinion, joined by Judges Thomas and Clifton, concurred in affirming dismissal on the merits, while agreeing with the Kleinfeld “group” that the plaintiffs have standing.

On the issue of standing as embraced by a majority of the panel, Kleinfeld listed a variety of past Supreme Court rulings in which adherents of a particular faith were found to have standing to challenge government expressions of hostility towards some aspect of their faith. “The harm to the plaintiffs in those cases was spiritual or psychological harm. That is the harm plaintiffs claim here,” he wrote. “If we conclude that plaintiffs in the case before us have standing, we need not decide whether those cases retain their vitality or are overruled, because our conclusion would be consistent with them. But if we reject standing for plaintiffs in this case, then those cases must somehow be distinguished convincingly (a difficult task), or overruled.”

Kleinfeld concluded, “The concreteness of injury is sufficiently pleaded here because plaintiffs aver that: (1) they live in San Francisco; (2) they are Catholics; (3) they have come in contact with the resolution; (4) the resolution conveys a government message of disapproval and hostility toward their religious beliefs; that (5) sends a clear message’ that they are outsiders, not full members of the political community’; (6) thereby chilling their access to the government’; and (7) forcing them to curtail their political activities to lessen their contact with defendants.” He asserted that issuing the requested relief, a declaratory judgment as to the unconstitutionality of the resolution, would effectively condemn the resolution, meeting the requirement of “redressability.”

Then Kleinfeld went on to describe why he and minority of the panel believe that the resolution violates the Establishment Clause, pointing out that the Supreme Court has ruled in past cases that the Establishment Clause requires government neutrality on issues of religious doctrine, so the Board should not be taking official positions on questions of Catholic doctrine. He argued that the resolution went beyond taking a position on a secular question when it called on Cardinal Levada to “withdraw” his directive to the Archdiocese, and thus would convey to the reasonable reader a disapproval of the plaintiff’s religious beliefs. “Though it is hard to imagine that government condemnation of the Catholic Church would generate a pogrom against Catholics as it might at another time or for a religion with fewer and more defenseless adherents,” he wrote, “the risk of serious consequences cannot be disregarded,” and concluded: “There are very good reasons why the Constitution directs government to stay out of religious matters.”

Judge Silverman, while agreeing Kleinfeld’s opinion on the standing issue, argued for himself and two other judges that on the merits there was no Establishment Clause violation. “In my opinion,” he wrote, “the district court correctly dismissed the plaintiffs’ lawsuit because duly-elected government officials have the right to speak out in their official capacities on matters of secular concern to their constituents, even if their statements offend the religious feelings of some of their other constituents. The key here is that the resolution in question had a primarily secular purpose and effect and addressed a matter of indisputably civic concern.”

Silverman emphasized that the resolution did not condemn Catholicism as such, but rather expressed the Board’s disapproval of the Church’s directive to local Catholic adoption agencies that they should violate the city’s non-discrimination laws by denying adoption services to same-sex couples. He noted that the resolution did not criticize the Church’s action on theological grounds, but rather on

purely secular grounds, and that a “reasonable observer,” taking account of the history of the gay rights struggle as it has played out in San Francisco, would read the resolution in that light and would “conclude that the primary purpose behind the resolution was secular — to promote same-sex adoption.” He also rejected the notion that the resolution would excessively entangle the city with religion, calling it “an isolated, non-binding expression of the Board of Supervisors’ opinion on a secular matter, which the plaintiffs have not alleged even potentially interfered with the inner workings of the Catholic Church.”

Judge Graver’s opinion disputed the majority’s ruling on standing, concurring in the decision to affirm the dismissal, but on the ground that plaintiffs lacked standing to bring the case. “Plaintiffs do not allege any form of concrete and particularized injury resulting from the resolution,” she wrote. “They allege only a deep and genuine offense. It is a bedrock principle of federal courts’ limited jurisdiction that a person’s deep and genuine offense to a defendant’s actions, without more, generally does not suffice to confer standing. Here, Plaintiffs do not allege more.” She disputed the majority’s characterization of a lengthy string of past cases as having established standing for a case like this. “The majority . . . concludes that, because the courts have addressed those issues, a finding of standing in this case is consistent with those cases. But standing focuses on *the plaintiff*, not on *the issue*. That this case raises an interesting constitutional issue similar to issues addressed in previous cases is, quite simply, beside the point. The relevant questions are whether the plaintiff has suffered a cognizable injury and whether that injury is redressable.” She found the resolution placed no restraint on the plaintiffs’ practice of their faith, required no change in their own behavior, and thus did not inflict such an injury, a prerequisite to Article III standing. The resolution urged Cardinal Levada to rescind a directive, but did not purport to require him to do so, and it did not directly compel or prohibit any action by any member of the plaintiff organization.

Thus, the bottom line is that although a bare majority of the en banc panel found that the plaintiffs had standing, those who found no standing added to those additional judges who found no valid claim on the merits combined to produce an affirmance of the district court’s dismissal of the case. Given the nature of the dispute and the litigants, this might turn into a Supreme Court case. A.S.L.

California Appeal Court Finds Firefighters Were Sexually Harassed at Pride Parade

The California 4th District Court of Appeals affirmed a trial court’s finding that four firefighters who were ordered by their superiors to par-

ticipate in the San Diego Pride Parade (Pride Parade) experienced sexual harassment before and during the parade in violation of the Fair Employment and Housing Act (FEHA). *Ghiotto v. City of San Diego*, 2010 WL 4018644 (Oct. 14, 2010). The opinion, written by Judge Irion, also affirmed the trial court's denial of the firemen's second claim that by being ordered to participate in the parade, the firefighters were denied their right under the California Constitution to freedom of speech. On July 21, 2007, John Ghiotto, Chad Allison, Jason Hewitt, and Alexander Kane, all firefighters with Fire Station 5 in San Diego, were ordered by their battalion chief to drive one of the station's fire engines in the Pride Parade. Around 20 members of the City of San Diego Fire-Rescue Department (Department) had already volunteered to participate in the parade. The parade organizers had also requested that a fire engine be driven in the parade. A crew from another fire station, Station 25, volunteered to drive the fire engine, but withdrew from the parade when the engineer, the only member of a crew qualified to drive an engine, had a family emergency. The substitute engineer for Station 25 did not want to participate in the parade, so a replacement crew had to be assigned. At the time, no written policy existed concerning the staffing of parades, but the general custom was to assign whichever crew was on duty in the neighborhood where the parade took place. On the day of the Pride Parade, the crew on duty was that of Station 5.

Although all four men informed their superiors that they did not want to participate in the parade, Assistant Fire Chief Jeffrey Carle directed the battalion chief to give the men a direct order to participate. The firefighters assert that many sexual comments were directed at them both before the parade as they waited in the staging area and during the parade. Some of the comments made included such statements as, "show me your hose" and "give me mouth-to-mouth." Similar comments were repeated over and over again throughout the parade. One of the firefighters, Kane, stated that, "At first it was kind of funny, but when they add up, they become really frustrating and difficult to handle."

In addition, the firefighters saw parade spectators and participants behaving in sexually suggestive manners with each other. Some spectators also engaged in such activity directed at the firefighters. For example, when the firefighters waved from the fire engine, some parade spectators responded by grabbing their own crotches and licking their lips at them. The firefighters also stated that they witnessed people in various states of undress. The firefighters asserted during the trial, that they do not object to "serving the gay community," nor do they have any objection to same-sex couples in general. From these statements, the

Court of Appeals determined that the trial court could have reasonably determined that the firefighters' claim was not based on sexual orientation discrimination, but rather on the blatant sexual and disrespectful nature of the comments directed at them.

After the parade, Ghiotto filed a complaint with the City of San Diego's equal employment investigation office and informed his supervisor that the crew required stress debriefing. In reaction to the complaints, the Fire Chief Tracy Jarman held a meeting with the petitioners and the Assistant Fire Chiefs at which the petitioners demanded that the Fire Department promise that no one would be forced to march in the Pride Parade again. While Jarman could not make such a promise at the time, the Department did issue a temporary parade staffing policy on August 9, 2007, followed by a permanent policy on July 1, 2008. Although the temporary policy established a method for staffing parades, the permanent policy went a step further, stating that "no employee will be forced to participate in any parade."

In their complaint brought against the City of San Diego (City), the firefighters assert that they experienced sexual harassment in violation of FEHA and that their rights to freedom of speech under the California Constitution were violated by being forced to participate in the parade. The original complaint also contained claims of negligent infliction of emotional distress and invasion of privacy, but the trial court granted the City's demurrer regarding these claims. The amended complaint also combined the petitioner's three causes of action concerning sexual harassment into a single claim. At trial, the sexual harassment claim was decided by a jury, while the state constitution claim was referred to the court. The court found that the petitioners did not carry their burden of proof to establish a cause of action under the state constitution claim. In the case of the sexual harassment claim, the court declared a mistrial. At a second trial, the jury found that the petitioners did experience sexual harassment during their participation in the parade. Each petitioner was awarded \$5,000 to \$19,000 in damages as well as attorney fees and costs.

In her opinion, Judge Irion first briefly addresses the firefighters' claim that the trial court erred in denying their state constitutional claim. The trial court held that the firefighters failed to establish that being required to march in the parade violated their freedom of speech. Also, the trial court stated that even if the firefighters could prove such a violation, injunctive relief had already effectively been granted because the Department had established a written parade staffing policy prohibiting the forcing of anyone to participate in any parade. The Court of Appeals did not address whether or not the firefighters' rights to free speech had been vio-

lated, but rather affirmed the decision based on the lack of injunctive relief available, thus avoiding any discussion of a state constitutional question. The only relief sought by the firefighters on this claim was injunctive, and the trial court based its ruling on the principle that injunctive relief should only be granted if the circumstances are likely to reoccur. Here, the Fire Department's creation of a parade policy that prohibits the forcing of people to participate in parades means that no firefighter in San Diego will be again forced to attend a parade against their wishes, and thus a similar circumstance cannot reoccur.

In addition to the firefighters' appeal, the City also filed an appeal stating that the trial court incorrectly found in favor of the firefighters concerning their claim of sexual harassment. Under FEHA, a sexual harassment claim must be based either on the submission by an employee to sexual advances in order to remain employed or be promoted or on the creation of a "hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment." The firefighters' claim of sexual harassment was based on the claim of a hostile work environment. Also, under this act, an employer is responsible for the actions of nonemployees towards employees if the employer should have reasonably been aware that such behavior could occur. The City conceded responsibility for the actions of third parties when a city employee is acting under orders given by the City, and did not argue that it should not be held responsible for the actions of spectators at the parade. Rather, the City's argument rested primarily on the fact that the actions being cited as sexual harassment were neither reoccurring nor severe enough to meet the requirements of a sexual harassment claim. The City argued that the parade lasted only three hours, and at no time did any of the parade spectators touch or physically assault any of the four firefighters.

Judge Irion agreed that usually for a sexual harassment claim based on a hostile work environment to succeed, "the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." However, a hostile environment can be found to have been created, if the sexually offensive behavior was "severe in the extreme." Here, the court found that the City's definition of severe sexual harassment as only including unwanted physical contact to be unpersuasive. Severe sexual harassment is not restrained to actual unwanted physical touching, but can encompass actions and verbal statements that are "directly targeted" at a person. In this case, the court held that the comments made by the spectators to the firefighters, though perhaps not severe when taken individually, when considered as a whole in combination with the sexually suggestive actions taken in front of the firefight-

ers, qualify as severe enough to outweigh the typical requirement of repeated behavior.

In its appeal, the City asserted that the trial court had erred in refusing to grant a requested jury instruction and in allowing certain evidence and testimony to be presented to the jury. The requested jury instruction stated that while an employer was responsible for the behavior of nonemployees toward employees if the employer had reason to be aware of the behavior, “the extent of the employer’s control” over the situation should be taken into consideration. The Court of Appeal affirmed the denial of this instruction, finding that it could confuse the jurors by “render[ing] the instruction back into the legalese that [the Judicial Council of California Civil Jury Instructions were] designed to avoid.”

The Court of Appeal also held that the trial court did not err in allowing both the testimony by the firefighters’ expert witness and photographs depicting previous Pride Parades to be entered as evidence. The expert witness, Kevin Williams, was presented as an expert on employer compliance with sexual harassment policies and testified primarily on the manual used by compliance officers when determining if employers have acted appropriately under FEHA. The City argued that Williams’ testimony concerning the Fire Department’s compliance with FEHA consisted of legal conclusions, not simply information, and therefore should have been excluded. The court found that none of Williams’ statements, including a reference to the severe nature of the harassment, to be a legal conclusion and therefore “any error in admitting Williams’s testimony was harmless.”

Similarly, the court found that no error occurred when the trial court allowed pictures from previous Pride Parades to be submitted as evidence of the types of sexually suggestive behavior that occurred at the 2007 parade. The City argued that some of these pictures could have misled jurors to believe that these activities took place during the 2007 parade. The photographs were allowed as evidence because witnesses testified that they had seen something similar occur at the parade under discussion. The trial court determined that if a witness stated that the picture depicted a scene similar to what they had seen at the 2007 parade, then the pictures were neither misleading nor prejudicial. The Court of Appeal agreed.

The remaining portion of the decision is concerned with each party’s appeals concerning the trial court’s awarding of costs and attorney fees. While the City asserted that the trial court had erred in awarding the firefighters attorney costs and fees, the firefighters argued that the trial court erred in not awarding them costs and fees for the first trial which had resulted in a mistrial. The court denied each appeal, affirm-

ing the awards granted by the trial court. In particular, the firefighters’ appeal was denied because the court found that an award could not be granted for a trial in which none of the firefighters’ claims succeeded. The Court of Appeal did, however, agree with the firefighters that because they received attorney fees at the trial level, they could receive attorney fees and costs accrued during appeal. The court thus remanded the case to the trial court so that the appropriate fees could be determined. — *Kelly Garner*

Federal Circuit Courts Rebel Against Draconian Sentences for Child Pornography Downloaders

The U.S. Court of Appeals for the 3rd Circuit released an opinion on October 26 affirming a substantial downward departure from the federal sentencing guidelines in a child pornography case, *United States v. Grober*, 2010 WL 4188237, agreeing with U.S. District Judge Katharine S. Hayden (D.N.J.), that the sentence within the guidelines sought by the Justice Department, within the range of 235-293 months, was “outrageously high” — indeed, “truly remarkable punishment” for a crime that did not in this instance involve violence or massive theft and as to which the court determined that the defendant’s danger to society was minimal.

In affirming a 5 year (60 months) sentence, Circuit Judge Barry referred to the 2nd Circuit’s recent decision in *United States v. Dorvee*, 616 F.3d 174 (Aug. 4, 2010), which had vacated one of these draconian sentences in a similar case, upon finding that the district court mistakenly thought it was obligated to sentence within the low end of the sentencing guidelines — guidelines that the Supreme Court has held are non-mandatory — and that the resulting sentence was “substantively unreasonable.”

In the *Grober* case, District Judge Hayden was so disturbed at the magnitude of the sentence sought by DOJ that she undertook an extensive inquiry into the guidelines and how they came to recommend such extraordinarily long sentences for a non-violent, non-economic crime of this sort. (The crime, essentially, is downloading child pornography from the internet and/or sharing electronic files containing such materials with others.) Her conclusion after extensive hearings and review of case law and documentary evidence, was stated succinctly: “Sec. 2G2.2 leads to a sentence that is too severe in a downloading case.”

Amplifying, she wrote: “To review, then, the Court has learned that actual working judges have decided to give these child pornography guidelines less weight in downloading cases; an experienced law professor which a widely used sentencing blog has been unable to probe the Commission’s thinking why it sentences downloaders this way; and an influential article makes persuasive arguments against the ration-

ality of sec. 2G2.2 in downloading cases. Also, reported cases demonstrate that bad people involved with child pornography can get long sentences without using Sec. 2G2.2 as the basis.” Judge Hayden found that for a “typical” downloading case, such as that involving defendant Grober, the five-year mandatory minimum specified in the statute would be appropriate, and any more would be “unfair and unreasonable.”

Judge Barry quoted from *Dorvee*, in which the 2nd Circuit characterized sentences within the guidelines range as “manifestly unjust,” and criticized the sentencing Commission for having prescribed these extraordinarily lengthy sentences without taking the kind of careful approach it had used for sentences for other federal crimes, piling up enhancement factors that were so utterly typical of the usual run of cases as to drastically increase the recommended sentences for virtually any case involving downloading of child pornography. The court found that Judge Hayden had adequately justified her conclusion that the guidelines should not be followed, finding that this conclusion was not an “abuse of discretion” in light of her findings, which were adequately explained in her detailed written opinion, and that materials that had become available since Judge Hayden issued her opinion placed it on “even stronger ground” than when it was written. A.S.L.

Ohio Appeals Court Rejects Challenge to Cleveland DP Registry

The Alliance Defense Fund, an organization dedicated to opposing gay rights in the courts, has struck out in the Court of Appeals of Ohio (8th Appellate District) in its challenge to the city of Cleveland’s domestic partnership registry ordinance. The court ruled unanimously on September 30 in *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, 2010-Ohio-4685, that Ohio’s anti-gay marriage amendment did not deprive the Cleveland city government of the ability to establish a domestic partnership registry. The city’s legal staff successfully defended the local law, with amicus assistance from the ACLU of Ohio and Lambda Legal’s Midwest Office in Chicago and cooperating attorneys from Cleveland.

The city enacted its ordinance on December 8, 2008. Couples can file their declarations of domestic partnership with the city if they meet specific criteria, thus generating a document that attests to their status as domestic partners recognized by the city of Cleveland. The ordinance does not provide any specific benefits to registered partners apart from the municipal recognition of their relationship.

But ADL promptly acted to stir up litigation, claiming that the ordinance violates Section 11, Article XV, of the Ohio Constitution, the marriage amendment whose passage was secured

by opponents of same-sex marriage. That provision states: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁷⁰ The plaintiffs’ argument, as summarized by the court of appeals, was that if domestic partnerships recognized by Cleveland “approximate just some of the enumerated aspects of marriage, then the domestic partners ordinance is unconstitutional.⁷⁰ The trial court rejected this argument, and denied injunctive relief against operation of the registry. The court of appeals agreed with the trial court.

Writing for the unanimous three-judge panel, Judge Colleen Conway Cooney looked to a prior ruling by the Ohio Supreme Court, *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007), rejecting the argument that because of this amendment, the state could not address domestic violence within same-sex couples under its criminal law. According to the Supreme Court, being married is “a status” that “gives a person certain legal rights, duties, and liabilities.” In light of this, the court concluded that “the second sentence of the amendment means that the state cannot create or recognize a legal status for unmarried persons that bears all the attributes of marriage — a marriage substitute.” In other words, the amendment would likely prohibit Ohio from establishing civil unions or domestic partnerships that carry all or virtually all of the state-law rights associated with marriage, but it does not stand in the way of the state, or its political subdivisions, extending lesser degrees of recognition to same-sex relationships in regard to particular policy issues.

Or, as Judge Cooney interprets the *Carswell* decision, “the Ohio Supreme Court explained that any legally established relationship bearing less than all the attributes of marriage is constitutional.”

The Cleveland ordinance falls far short of even that. Although its qualifying criteria require domestic partners to reside together, to maintain a “committed relationship,” and to “share responsibility for each other’s common welfare,” there is no enforcement mechanism. A domestic partner would not be able to bring his or her partner to court on a claim that they were failing to meet the obligations to which they swore when filing the partnership declaration. “Domestic partners who separate cannot take advantage of the domestic relations laws that govern divorce, alimony, child support, child custody, and equitable distribution,” Cooney observed. In addition to not receiving many of the affirmative benefits accorded to married couples by the city and state, the court pointed out, as Lambda argued in its amicus

brief, “the term ‘domestic partner’ completely lacks the social and emotive resonance of ‘husband’ and ‘wife’” and “domestic partnerships are not given the same respect by society as a married couple, and they share none of marriage’s history and traditions.”

In light of the Ohio Supreme Court’s limiting construction of the constitutional language — which could have been construed to have broader effect — the court of appeals’ ruling in the case was a foregone conclusion, and one wonders why ADL bothered bringing the case, other than to raise the flag, raise some money, and try to make some propaganda against equal rights for gay people.

ADF had also raised what seems a make-weight argument, that Cleveland exceeded its home rule power by enacting the amendment. This argument ran aground on the inconvenient fact (inconvenient for ADF, at least), that this same court had previously rejected a home rule argument that was raised to challenge a domestic partnership ordinance enacted by Cleveland Heights several years before the marriage amendment was passed. *Cleveland Hts. Ex. Rel. Hicks v. Cleveland Hts.*, 832 N.E.2d 1275 (Ohio App. 2005). The court pointed out that the Cleveland registry, like the Cleveland Heights registry, did no more than give recognition to the relationship, providing no affirmative rights and being completely paid for by the applicants’ fees so the municipalities bore no expenses from providing the registry. In addition, and most notably, no private entity is required by these ordinances to give any recognition to domestic partnerships, although it has proven that some employers and businesses have decided to adjust their policies to recognize registered domestic partners voluntarily.

Judge Christine T. McMonagle concurred in Judge Cooney’s opinion. Judge Sean C. Gallagher also voted to affirm the trial judge, but without specifically concurring in the text of Cooney’s opinion. He provided no explanation for his limited concurrence.

If it acts true to form, ADF will seek to appeal this to the Supreme Court of Ohio. A.S.L.

Federal Civil Litigation Notes

9th Circuit — Amidst the flurry of filing of briefs and amicus briefs in the pending appeal of *Perry v. Schwarzenegger*, 704 F.2d 921 (N.D.Cal., Aug. 4, 2010), which ruled that California Proposition 8, banning same-sex marriages, violates the 14th Amendment’s Due Process and Equal Protection Clauses, one amicus brief filed late in October appeared to raise a new issue from far out in left field: whether the California initiative amendment process itself was validly established. Jon B. Eisenberg, a partner in the firm of Eisenberg & Hancock in Oakland, filed his brief on October 25, arguing that the method by which the cur-

rent process for initiative amendments was itself adopted violated the California Constitution. Eisenberg urges the 9th Circuit to refer this question to the California Supreme Court for an advisory opinion, seizing upon the issue that was most hotly debated in the state court litigation over the adoption of Proposition 8: whether that ballot measure was more properly described as an “amendment” or a “revision” of the state constitution. Eisenberg argues that because the constitutional provision establishing the method for amending the state constitution through popular initiative was itself adopted using the amendment process rather than the revision process, it was not validly adopted. Constitutional scholars commenting to the *National Law Journal* (Oct. 27) about Eisenberg’s argument expressed doubts that the California Supreme Court would willingly reopen the question of the validity of the amendment process, especially as in the years since this process was adopted in 1911 the Court has rejected challenges to a variety of initiative amendments that were adopted pursuant to its procedures. Eisenberg notes the critical comments that Chief Justice Ronald George has made about the initiative amendment process, and said his brief was inspired by the California court’s ruling in that case, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

3rd Circuit — A 3rd Circuit panel affirmed a decision by the Board of Immigration Appeals to deny the asylum claim of a Chinese woman who claimed to be a lesbian who fear persecution if she were sent back to China. *Chang v. Attorney General*, 2010 WL 4017038 (Oct. 14, 2010) (not officially published). Ms. Chang entered the U.S. without proper document, having evidently been apprehended in the custody of a smuggler. At the time, she told immigration officials that she feared returning to China because she had a son and authorities would require her to allow implantation of an intrauterine device to prevent conception. She was detained and at a subsequent “credible fear” interview reiterated this story. Then she applied for asylum, and this time changed her story to allege that she was a lesbian who had been persecuted in China and feared persecution if returned. The Immigration Judge found that her testimony was not credible, finding she had not established that she is a lesbian (despite a letter from the pastor of a gay church attesting to her membership and participation in a gay rights parade) or that she had a reasonable fear of persecution on that ground if returned to China. The court found that Chang failed to establish on the record that there is a pattern or practice of the government persecuting homosexuals in China, and that the single incident of police harassment she claims to have experience is insufficient to meet the high standard for asylum, withholding of removal, or

protection under the Convention Against Torture.

2nd Circuit — On October 12, the U.S. Court of Appeals for the 2nd Circuit rejected a petition for en banc review in *Amore v. Novarro*, 610 F.3d 155 (2010), in which a three-judge panel recently held that a City of Ithaca police officer enjoyed qualified immunity from liability for arresting a man for soliciting sex in a public park where the statute under which the man was charged had been declared unconstitutional by the New York Court of Appeals many years ago but not removed from the Penal Code by the legislature. Seeking en banc review, the N.Y. Civil Liberties Union argued that the decision appeared to create a broad categorical exemption from liability for the enforcement of statutes that had been previously held unconstitutional when the state legislature had failed to remove them from the statute books. Unfortunately, our dysfunctional New York State legislature seems not to have any sort of established procedure for translating court decisions into timely legislative revision. Coincident with the full court denying en banc review, the three-judge panel issued a revised opinion in the case, 2010 WL 3960574 (Oct. 12, 2010), adding a comment that “it is the unusual case where a police officer’s enforcement of an unconstitutional statute will be immune” and striving to limit its ruling “to the particular facts of the case,” pointing out that the officer in question had actually borrowed a current copy of the unannotated Penal code that is distributed to police officers in order to check the appropriate provision for charging the plaintiff, thus reinforcing the panel’s justification for excusing him from personal liability. At the same time, the revised opinion suggests, without deciding, that these particular facts may support the plaintiff’s remaining liability claim against the municipality for failure to train the police officer on current law. A detailed account of the case by Christopher Dunn of the NY Civil Liberties Union can be found in the Oct. 26 issue of the *New York Law Journal* (see below). On a happy final note: this summer, in the face of multiple lawsuits raising this issue of continued enforcement of unconstitutional statutes, the legislature finally repealed the offending loitering statute.

Massachusetts — On October 12, the Justice Department filed its notice that it would appeal the rulings by U.S. District Judge Joseph Tauro finding Section 3 of the Defense of Marriage Act to be unconstitutional, violating the equal protection rights of same-sex marriage couples in Massachusetts and also violating the right of the state to recognize and provide equal treatment to those marriages. The appeal was not unexpected, but as the time for appeal stretched out without word from the Justice Department, there was some hope that the Obama Administration, which officially supports legis-

lation pending in the House to repeal DOMA, would make a strategic decision to comply with the district court decision and not formally appeal. The President has taken a firm position in favor of having the Justice Department officially defend challenged statutes — perhaps from fear that a departure from precedent in this regard would open the way for a succeeding administration to refuse to defend Obama’s major legislative accomplishments, all under attack in the courts — although it has been pointed out that the Justice Department has from time to time declined to defend particular statutes that were widely believed to be unconstitutional. Putting the bright side on this appeal, some commentators noted that until a federal court of appeals endorsed Judge Tauro’s ruling, it was of limited use as a precedent beyond the particularized disputes brought by the plaintiffs in the case.

Massachusetts — According to an Oct. 27 report online by the *National Law Journal*, U.S. District Judge Rya Zobel (D. Mass.), issued a preliminary injunction in *American Booksellers foundation for Free Expression v. Coakley*, blocking the enforcement of a recent amendment to Massachusetts law banning internet distribution of material deemed “harmful to minors.” The plaintiffs cited numerous constitutional provisions in support of their argument that the law impermissibly deprives both adults and minors of access to material on the internet to which they are entitled to have access unfettered by government censorship. Judge Zobel rejected the state’s argument that the statute could be narrowly construed in light of a 2006 Massachusetts Supreme Judicial Court ruling, *Commonwealth v. Belcher*, impoting a knowledge requirement into the law, pointing out that the *Belcher* ruling did not address all the constitutional issues raised by the law. According to the *Journal* report, this was just the latest of similar rulings concerning similar laws passed in Alaska, Arizona, Michigan, New Mexico, South Carolina, Vermont and Virginia.

Mississippi — The *New York Times* reported on October 26 that U.S. District Judge Glen H. Davidson has awarded \$81,000 in attorneys fees to Constance McMillen, the lesbian high schooler who had sued Itawamba County School District over discrimination regarding attendance at the high school senior prom. Davidson ruled in favor of McMillen on her first amendment claim, but had refused to order the school district to allow her to attend the prom in her desired tuxedo attire with her same-sex date, on representations that the prom had been cancelled but that a private parents’ group was putting together a prom that McMillen and her date would be welcome to attend. In the event, the so-called private prom was a joke, as only a handful of students were there while a larger group of students held their own event to which McMillen was not invited.

New York - Various news sources reported on October 26 that U.S. District Judge Richard Arcara (W.D.N.Y.), rejected an attempt by the anti-gay National Organization for Marriage (NOM) to get advance permission from the court to evade a New York State law that would require NOM to disclose the identity of its donors if it ran advertisements in support of the campaign of Carl Paladino, the Republican candidate for governor who has come out strongly against same-sex marriage. According to the news report, Arcara found the lawsuit to be “premature” because NOM has not actually attempted to run any advertisements. New York Law requires not-for-profit advocacy groups to register with the state and disclose the identity of donors supporting political advertising. *Advocate.com* reported online on October 1 that NOM lost a similar case in U.S. District Court in Rhode Island, where it sought to run advertisements in support of the Republican candidate for governor, John Robitaille, who opposes same-sex marriage. New York and Rhode Island are jurisdictions where it is possible that same-sex marriage proposals will come up for a vote before the legislatures elected this November, and NOM is eager to secure the election of governors who will veto such measures.

New York — U.S. District Judge David G. Larimer granted a motion to dismiss claims against the City of Rochester and various public officials brought by four police officers who were subjected to a disciplinary process after it was alleged that they had engaged in “gay bashing” while dealing with a street altercation in the city. *MacFall v. City of Rochester*, 2010 WL 4236803 (W.D.N.Y., Oct. 27, 2010). The plaintiff officers responded to a report of a fight in the area of South Goodman and Harvard Streets in the early hours of June 1. It appears that the one of the two groups involved in the altercation were gay, or at least perceived as such by the police, and it was alleged that in breaking up the fight the police officers used “profane and/or discourteous remarks” and had failed to prepare an appropriate crime report on the incident. Local media focused on the story as a police “gay bashing.” The officers were suspended and threatened with discipline, although ultimately they were sent back to work, while the disciplinary charges remained pending against them. The police officers filed this lawsuit, claiming their constitutional rights had been violated, but the court found that there had been no deprivation of rights by the city, as the police officers were accorded all the requirements of due process within the disciplinary process. Using the narrow definition of protected speech by public officials stemming from *Garcetti v. Cebalos*, 547 U.S. 410, the court found that subjecting the officers to investigation and possible discipline based on what they said while performing their duties raised no First Amendment issue.

Oregon — A former county clerk's office employee who was discharged because she objected to handling domestic partnership filings is entitled to a trial of her religious discrimination claim, ruled U.S. Magistrate Judge Thomas M. Coffin, rejecting cross-motions for summary judgment in *Slater v. Douglas County*, 2010 WL 3834564 (D. Or., Sept. 24, 2010). Oregon adopted its Family Fairness Act in May 2007, to go into effect early in 2008. It authorized same-sex domestic partners to register their partnerships in county clerk offices. Registration would entitle the partners to most of the rights of married couples under state law. Kathy Slater, a clerk in the Douglas County Clerk's Office, requested to be excused from handling domestic partnership filings, based on her religious belief that homosexuality is a sin. The county offered to let her transfer out of the office if another position opened, but took the position that all clerks in the office had to be available to cover all functions. When no transfer eventuated as the effective date of the statute drew near, the County terminated Slater's employment. She was not replaced, the office continuing to function with one fewer clerk. During 2008, 29 partnership filings were processed in the Douglas County Clerk's office, and eight were processed in 2009. The court found that each registration takes about 10 minutes, so processing these applications took about 6 hours spread over a period of almost two years. Rejecting the motions for summary judgment, Judge Coffin noted that under laws banning discrimination on the basis of religion, Slater had stated a prima facie case and the burden was on the defendant to show that accommodating Slater by excusing her from this work would cause an undue hardship to the Clerk's office. Judge Coffin decided this could not be determined without a hearing on the merits.

Puerto Rico — The U.S. District Court granted summary judgment to the employer in *Rosado v. American Airlines*, 2010 WL 4015789 (D. Puerto Rico, Oct. 14, 2010), on claims by a gay HIV+ baggage handler with a cocaine addiction problem that he was terminated in violation of the Americans With Disabilities Act and local laws prohibiting gender discrimination. The court found that the employer had adequately justified the discharge on safety grounds in light of Rosado's addiction. As to hostile environment sexual harassment claims, the court found that any harassment occurred due to Rosado's sexual orientation, rejecting his attempt to squeeze his case into the context of gender stereotyping. Since the applicable statutes do not ban sexual orientation discrimination, his claim was not actionable. A.S.L.

State Civil Litigation Notes

Mississippi — Sometimes government officials are open and above-board about discriminating against gay people. The American Civil Liberties Union has filed suit in federal court on behalf of a gay man who was discharged from a position as a county corrections officer because he is gay. Andre D. Cooley was dismissed from his position after police intervention in his home to deal with a domestic violation situation involving his same-sex partner led the Chief of Corrections to learn for the first time that Cooley is gay. Cooley had told some co-workers that he was gay, but was not really "out" on the job and had said nothing to the Forrest County Sheriff. In a parallel proceeding, the sheriff's department contested Cooley's claim for unemployment benefits, but the initial denial was overturned by an administrative law judge, who noted that Cooley was not discharged for misconduct. He was told that he was being dismissed because of the "type of situation" (i.e., living with a same-sex partner) in which he was involved. Co-workers told Cooley that an officer had stated that Cooley was fired because he "turned out to be a faggot." Mississippi has no law banning sexual orientation discrimination, but presumably the 14th Amendment's Equal Protection Clause requires more substantive grounds to sustain a public employee discharge. *Hattiesburg American*, Oct. 19.

New Jersey — The New Jersey Appellate Division has upheld a determination by the State Health Benefits Commission that a transgender participant in the State Health Benefits Program covered under the HMO option was not entitled to reimbursement for the cost of gender reassignment surgery that she incurred in Canada. In *the Matter of H.S.*, 2010 WL 4054186 (N.J. Super. A.D., July 14, 2010). H.S. had telephoned the HMO to inquire whether her gender transition procedure would be covered, and was told that it would not be. She went to Canada to have the procedure performed and then sought reimbursement for her expenses. Reimbursement was denied by the HMO on the grounds that such procedures are not covered, she had gone out-of-network without a referral from her primary care physicians, and that the exception for emergency treatment while outside the country did not apply. This decision was approved through several stages of internal appeal, and when she had exhausted plan remedies, by the State Health Benefits Commission. "Since appellant selected an HMO, she is subject to its terms," wrote the court. "The plain language of appellant's medical benefit plan required that services must be performed by in-network physicians in order to be covered, absent an emergency situation. As the Commission noted, it is undisputed the physician and facility utilized by appellant were outside of CIGNA's network of providers, the services

were provided in a foreign country, and the services were not due to an emergency." The court faulted H.S. for failing to present more details in support of her allegation that she was "barred" from following CIGNA's internal policies because of what she was told on the phone call, and for failing to present any support of her claim that there were no in-network physicians competent to render the services she needed. Consequently, the court concluded that it could affirm the Commission's ruling without getting into the question whether the exclusion of coverage for gender reassignment was in itself legal. To place that issue into contention, H.S. would have had to appeal a denial of advance authorization for coverage of the procedure, rather than to seek a reimbursement for out-of-network treatment.

New York — In *Santos v. Brookdale Hospital Medical Center*, NYLJ, Oct. 19, 2010 (Supreme Ct., Kings Co., September 17, 2010), N.Y. Supreme Court Justice Mark I. Parnow rejected a motion to dismiss a same-sex hostile environment sexual harassment brought by a former employee of a subcontractor who worked one day a week at the defendant hospital. The male plaintiff alleged that a male employee of the hospital who had supervisory authority over the plaintiff had subjected him to harassing conduct of a sexual nature, including "leering" at him and making some sexual propositions. In its motion to dismiss, the defendant argued that it was not the plaintiff's employer and that the conduct alleged was neither sufficient severe nor pervasive to meet the legal requirement for a finding of hostile environment sexual harassment. The court noted that the standard for hostile environment under the NYC Human Rights Law is not as demanding as the standard under federal or state law, and that the plaintiff's allegations would suffice to survive a motion to dismiss, where there were disputed factual issues over whether the hospital and the contractor could be considered joint employers. A.S.L.

Criminal Litigation Notes

Indiana — In a triumphant victory for the forces of public morality, the Indiana Court of Appeals ruled on September 16 in *C.T. v. State*, 2010 WL 3624420, that a state law making it a crime for a woman to expose her breast in public does not violate the equal protection clause of the 14th Amendment. The issue arose from the conviction of C.T., a teenage girl, on charges of "public nudity," a misdemeanor. C.T. was found to have exposed her breast in public to a passing vehicle, based on the testimony of a police officer who observed her exposing her nipple, which seems to be the test of public nudity in Indiana. On appeal, C.T. argued that by criminalizing a woman's exposure of her nipples but not a man's, the state had offended the

requirement of equal protection of the law. Rejecting this argument, Judge Bradford wrote, "We do not believe that it can be seriously disputed (and C.T. does not) that Hoosier society, in general, considers the female breast to be an erogenous zone and does not consider the male breast to be one: public display of the former is almost certain to cause offense and unease while public display of the latter is not." As a gay man, your editor doth protest! Anyway, the court held that from the perspective of "Hoosiers" there was so significant a difference between the two that the state would be justified in criminalizing exposure of one and not the other. "In the end," said the court, "C.T. would have us declare by judicial fiat that the public display of fully-uncovered female breasts is no different than the public display of male breasts, when the citizens of Indiana, speaking through their elected representatives, say otherwise. This we will not do. We conclude that Indiana's public nudity statute furthers the goal of protecting the moral sensibilities of that substantial portion of Hoosiers who do not wish to be exposed to erogenous zones in public." We suppose that there are no Calvin Klein billboards in Indiana. Their loss. A.S.L.

Legislative Notes

Federal — In what is likely to be just a symbolic gesture for now, Senator Robert Menendez (D-N.J.) introduced the Comprehensive Immigration Reform Act of 2010 (S. 3932), intended to overhaul U.S. immigration law by addressing gaps in existing programs and creating a pathway to citizenship for foreign workers in the U.S. The law would also directly address, for the first time, the reality of same-sex binational partners and provide a mechanism for them to be able to live together in the U.S. This is assertedly the first large general immigration reform bill introduced in Congress that specifically addresses this problem.

Indiana — South Bend — The South Bend Common Council voted 6-3 on Oct. 25 to reject a proposal to ban employment discrimination on the basis of sexual orientation in the city. The council president, Derek Dieter, reportedly justified his opposition to the measure by asserting that he saw no evidence that anti-gay workplace discrimination existed in the city, which is home to the University of Notre Dame, a Catholic institution. Mr. Dieter asserted that no discrimination had been documented, and that the measure "would cause harm more than good to small businesses." *Advocate.com* reported this development on October 29 based on an article in the *South Bend Tribune*.

Nebraska — Omaha — A proposed ordinance to ban sexual orientation and gender identity discrimination in Omaha, Nebraska, failed on a 3-3 tie vote. One member of the seven-member City Council abstained, taking

the position that the proposal presented a policy issue that should be decided by the public in a referendum, not by the Council. As dust settled from the October 26 vote, which followed a heated public hearing, the Council turned to a proposal by its abstaining member that the matter be put on the ballot as an amendment to the City Charter. A vote on that proposal was expected early in November. *Omaha World-Herald*, Oct. 27.

Utah — Cedar City — After an emotional public hearing on October 20 on proposed ordinances banning discrimination on the basis of sexual orientation or gender identity in housing and employment, the Cedar City Council rejected the proposed ordinances on October 27, but one opponent proposed in their place a resolution by which the council would encourage individuals and businesses not to discriminate on those bases. The resolution will be voted on at the Council's November 3 meeting. *The Spectrum* (St. George, UT), Oct. 28.

Wisconsin — Oshkosh — The Board of Education voted 5-2 to approve a new collective bargaining agreement with the teachers' union that would allow employees with same-sex partners to purchase family health insurance coverage as part of their employee benefits package. The vote came during a heated meeting on October 27, with some members of the Board and the public inveighing against using tax-payer money to subsidize same-sex partner benefits. (Of course, they were not speaking in favor of rebating tax money to gay taxpayers to avoid requiring them to subsidize benefits for married employees of the school district.) *Oshkosh Northwestern*, Oct. 29. A.S.L.

Law & Society Notes

U.S. Department of Education — Responding to increasing news reports about suicides of gay teens in response to intense bullying at school, the U.S. Department of Education announced that it would be sending a notice to all public schools concerning their legal obligations to respond to student harassment. Although the notice, which was issued over the signature of Assistant Secretary for Civil rights Russlynn Ali, does not break any ground in terms of adopting new legal requirements, which would require formal rule-making under existing statutes or new legislation, there is actually significant case law now holding that under the constitution and existing statutes and regulations, school districts may be liable for failing to address effectively issues of harassment and bullying that are brought to their attention. A reminder from the federal government may be helpful in moving districts to become more proactive in dealing with the problem. *Washington Post*, Oct. 26. * * * Also on October 26, the leaders of the House LGBT Equality Caucus, Representatives Jerrold Nadler (D-NY), Bar-

ney Frank (D-MA), Tammy Baldwin (D-WI) and Jared Polis (D-CO), sent a joint letter to Pamela S. Hyde, Administrator of the Substance Abuse and Mental Health Services Administration in the Department of Health and Human Services, requesting that her office provide assistance in treating the bullying problem and resulting suicides as a public health issue. The issue was kept alive as new suicide cases were reported, some school districts began visibly engaging in internal procedures to investigate bullying charges, and some state legislators announced the introduction of legislative proposals on the issue, most notably in New Jersey.

U.S. Forest Service — The *BNA Daily Labor Report*, 208 DLR A-11, reported on Oct. 29 that the U.S. Forest Service had agreed to a bargaining demand by the National Federation of Federal Employees to recognize domestic partners for the purposes of family and medical leave under the agency's employment policies. The agreement was responsive to President Obama's June 2009 memorandum directing federal agencies to extend benefits to domestic partners to the degree compatible with existing law.

Military Policy — President Barack Obama briefly dropped in on a closed meeting between White House staff members and leaders of LGBT rights groups seeking an end to the "Don't Ask, Don't Tell" military policy on October 26. In a meeting with a handful of "progressive" bloggers in the White House on October 27, the president refused to be pinned down on whether he considers DADT to be unconstitutional, but reiterated his support for its repeal and said it would be done during the lame duck session of Congress. He called for the Log Cabin Republicans, who are funding the current lawsuit challenging the policy (see above), to get to work on securing the votes of a few Republican senators, which will be necessary to break a threatened filibuster by sore loser 2008 Republican president candidate John McCain. Meanwhile, news organizations reported on October 29 that the Pentagon survey of military personnel has reportedly found that a majority of personnel have no objections to serving alongside openly gay members, but that a minority is very strongly opposed. Some in the minority said they would quit the service if openly gay people could serve. It is worth remembering that prior to the lifting of the gay ban by the British military, surveys indicated that many members would resign over the issue, but after the ban was lifted, there was no report of an increase in the rate of resignation from the forces; neither was there any report of significant disruptions of order or morale, or even of any sort of mass coming-out phenomenon among LGBT service members. Subsequent to the lifting of the U.K. ban, however, there was litigation on behalf of some service members who had been

discharged for being gay, and some were awarded monetary compensation for the forced ending of their careers.

New York — Brooklyn — The *New York Law Journal* reported on October 29 that Brooklyn District Attorney Charles Hynes has established a special task force in his office to deal with anti-gay violence cases. As part of this effort, a hotline was established to provide services and counseling for victims of anti-gay violence, and to make it easier for victims to report incidents directly to the district attorney's office if they feel uncomfortable with contacting the police department.

North Carolina — Legal Ethics — The North Carolina State Bar's Ethics Committee voted 19-9 on October 28 to approve a change to the preamble of the state's rules of professional conduct for lawyers to provide that lawyers should not discriminate in their work on the basis of eight forbidden grounds, including sexual orientation and gender identity. The proponents pointed out that materials in the preamble are admonitions rather than rules enforced through disciplinary action, and the intent was merely to signal a professional responsibility not to discriminate unfairly in law practice. *Asheville Citizen-Times*, Oct. 29. A.S.L.

International Notes

Australia — WayOut, a gay social group, sued The Brethren Church, owners of Philip Island Adventure Resort, for refusing to let WayOut rent the premises because it is a pro-gay group. The Victorian Civil and Administrative Tribunal found unlawful discrimination and ordered the defendant to pay \$5,000 Australian dollars in compensation. *ABC Premium News*, Oct. 11.

China — Hong Kong — On October 5 a Hong Kong court ruled against a marriage between a male-to-female transsexual and her boyfriend. The court premised its ruling on the petitioner's birth certificate, which still designates her as male. High Court Judge Andrew Cheung said there was not sufficient evidence "to demonstrate a shifted societal consensus in present-day Hong Kong regarding marriage to encompass a post-operative transsexual." The court continued: "It is hoped that this case will serve as a catalyst for the government to conduct general public consultation on gender identity, sexual orientation and the specific problems and difficulties faced by transsexual people, including their right to marry." *China Daily, South China Morning Post*, Oct. 6.

India — The Unique Identification Authority of India, which issues official identity pa-

pers, announced that it will alter its forms to provide for individuals to identify themselves as male, female, or transgender. This follows on a similar move earlier in the year announced by the Election Commission for modification of voter enrollment and registration forms. *Indian Express*, Oct. 11.

Ireland — A 5-judge panel of Ireland's Supreme Court is expected to hear arguments in February on a claim by a lesbian couple that they have a right to marry. The case is being brought by Dr. Katherine Zappone and Dr. Ann Louise Gilligan, whose claim was rejected in a High Court ruling. *Irish Times*, Oct. 22.

Russian — ILGA-Europe reports that the decision by the Ministry of Justice for Arkhangelsk Region to refuse registration of a local gay social organization has been upheld on September 22 by a district court. Local officials contended that allowing registration of the group — and thus legalizing its activities — would undermine the security of Russian society and lead to "fomentation of social, religious hatred and animosity" against heterosexuals!

Serbia — A gay pride march in Belgrade on October 10 turned ugly when mobs of right-wing extremists went on the attack, tangling with state security forces that had been dispatched to guard the parade. The parade continued but cars were torched, stores were looted, hundreds were arrested, and many police officers sustained physical injuries. President Boris Tadic condemned the vandalism, and pledged that rioters would be prosecuted. *Serbia will guarantee human rights for all its citizens, regardless of the differences among them," he vowed, "and no attempt to revoke these freedoms with violence will be allowed."* *The Independent (UK), New York Times*, Oct. 11.

Spain — The Justice Ministry overturned a ruling by a Valencia court that had not allowed a same-sex couple to register the twins they have acquired through a surrogacy agreement with a California woman. The problem arose when the men tried to register the twins in Spain, designating only themselves as the parents. The Valencia registrar would not accept the form without the name of the biological mother filled in, but instead listing two fathers. *El Pais (English edition)*, Oct. 11, 2010.

Uganda — The Ugandan newspaper *Rolling Stone* caused consternation and worse when it published an article, under the headline "Hang Them," purporting to name the "top 100 homosexuals" in the country, claiming that a deadly disease was attacking Ugandan homosexuals and that they were out recruiting children to homosexuality by raiding schools. According to

local activist, several of those named in the article have been attacked by mobs throwing stones, and many are afraid to go out of their houses. Previously, a member of Parliament had introduced a bill to impose draconian penalties for homosexual acts — including the death penalty in some cases — but the measure was withdrawn under international pressure. Reporting on the situation, *The Independent*, a UK newspaper, commented on Oct. 22 that "Homophobia is rife in many African societies, with gay behavior condemned by both traditional values and missionary-brand Christianity. Many states on the continent have also not changed the punitive legal attitude to homosexuality that they inherited from colonial powers at independence," and noted that Nigeria, the continent's most populous country, punishes homosexual conduct by death or imprisonment. A.S.L.

Professional Notes

There were recent reports that U.S. Senator Charles Schumer had recommended an openly gay man, *Daniel Alter*, to the White House as a potential federal judicial appointee for the U.S. District Court, Southern District of New York. If he were appointed by the President, he would be the first openly gay man to be nominated for such a position. But the *Washington Blade* reported that the White House rejected Senator Schumer's recommendation, on the ground of comments attributed to Alter in news reports about a lawsuit challenging the phrase "under God" in the Pledge of Allegiance and a comment suggesting that businesses should not wish customers "Merry Christmas" during the holiday season. These comments were seen as "anti-Christian" and thus disqualifying. So much for Art. VI, Sec. 3 of the Constitution. On October 29, the *New York Law Journal* ran a front-page story about the crash and burn of the Alter appointment, including Mr. Alter's statement that he had not made the remarks that were improperly attributed to him. Nonetheless, the White House won't go forward with his appointment. * * * At the same time, the *Law Journal* reported that Senator Schumer had recommended another openly gay lawyer to the White House for an Southern District of New York appointment: *J. Paul Oetken*, associate general counsel at Cablevision. Mr. Oetken was co-author of an amicus brief filed in *Lawrence v. Texas* and was described by Sen. Schumer as "a member of and a strong advocate for the LGBT community" who has been involved with Lambda Legal and the ACLU LGBT Rights Project. A.S.L.

AIDS & RELATED LEGAL NOTES

California Appeals Court Quashes Discovery Order, Reaffirming Strict Construction of State HIV Confidentiality Law

An unanimous panel of the California 1st District Court of Appeal ruled in *Children's Hospital & Research Center Oakland v. Workers' Compensation Appeals Board*, 2010 WL 3936050 (Oct. 8, 2010) (not reported in Cal.Rptr.3d), that the Workers' Compensation Appeals Board erred in ordering a hospital to provide statistical data drawn from patient files on the possible presence of HIV+ infants at the hospital during the years 1981-1999 as part of discovery in a Workers' Compensation case brought by an HIV+ former child care worker who claimed to have been infected on the job. The court ruled that California Health and Safety Code sec. 120975 absolutely prohibits the discovery order. (We will identify the former child care worker by her initials to preserve her confidentiality, although the court used her full name throughout its unofficially published opinion.)

S.M., the real party in interest, worked in the petitioner hospital's Parent Infant Program (PIP) during the years in question. She did not know the HIV status of any infants in the program. She began to experience what might, in retrospect, be considered symptoms of HIV infection in 1996, but did not undergo HIV testing at that time. As various symptoms mounted in subsequent years, she finally was diagnosed HIV+ in 2002, several years after she had ceased working in the program. She filed a claim for Workers' Compensation benefits, alleging based on her lifestyle and work history that she was most likely infected through contact with the blood of infants in the program, reciting at least two incidents of actual blood exposure during her employment. She alleged that she is a married, monogamous woman who had not experienced any of the other potential blood exposures that might lead to HIV infection, and that her husband had tested negative for HIV.

The Workers' Compensation judge in her case appointed a special master to take evidence and make a recommendation concerning her discovery request for statistical information about HIV+ patients in the program. Dueling experts testified. The hospital's expert testified that the possibility she could have been infected through occupational exposure was vanishingly small. Her own expert testified there was a theoretical possibility that she was exposed occupationally. She emphasized in her discovery request that she was not requesting identifying information about clients of the program who might have been HIV+, but rather merely statistical data about the presence of HIV+ clients so that she could make an argu-

ment that the most likely explanation for her infection was occupational exposure. The hospital agreed in the context of the special master proceeding that it would review its patient records for the years 1994-1996, the most likely time period, based on S.M.'s recollection of her symptoms, when there might have been occupational exposure. The review found that no HIV+ infants were in the program during the relevant years. McKnight came back with a new request for a similar review covering all the years she was working in the program, but the hospital balked, arguing that any further discovery would violate section 120975 and would also raise state constitutional privacy issues.

The special master recommended that the hospital be required to conduct the requested review, the hospital objected, and the matter came before the workers' compensation judge at a status conference in August 2009. The judge adopted the special master's recommendation, emphasizing in his ruling that S.M.'s discovery request did not require revealing the individual identity of any HIV+ child. The hospital appealed to the Appeals Board, which denied the petition for review, and the petition to the Court of Appeal followed.

The court found that section 120975 contains some specific narrow exceptions, but that this case did not fall within them. "Importantly," wrote Justice Ruvolo for the court, "there is no exception to section 120975 permitting disclosure of HIV-related blood test information because it has relevance to the issues in an unknown third-party's legal proceeding. To the contrary, the statute specifically protects this information from disclosure in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings...." If section 120975 is violated, there are strict penalties, including civil and criminal liability, for the disclosure of HIV-related test information in a manner that provides the identity or provides identifying characteristics of the person to whom the test results apply. Each disclosure is a separate, actionable offense."

S.M. had consistently argued that she was requesting statistical data about the presence of HIV+ children in the program, and was not requesting that any individual HIV+ child be identified. But the court rejected this argument, referring to its early and historic HIV-confidentiality ruling in *Irwin Memorial Blood Centers v. Superior Court*, 229 Cal.App.3d 151 (1991). There a trial court's discovery order had permitted depositions of HIV+ blood donors with arrangements made to preserve their anonymity, but on appeal the court rejected the process, finding that even with precautions to prevent the identity of the donors being revealed to the plaintiffs in that case, their very

participation in the deposition process meant that their identity would be revealed to personnel who were implementing the process. So here, the process of combing through patient records and extracting data meant that the personnel who would be carrying out the discovery order would necessarily learn the identity of individual patients who were HIV+, against the explicit guarantee in the statute that such identity would be revealed to nobody for the purpose of discovery in civil litigation.

Furthermore, S.M.'s data request asked for certain demographic breakdowns of the data, such as gender of HIV+ patients. Thus, wrote Justice Ruvolo, "even though the discovery order did not require the disclosure of the names of the individuals who have tested HIV+, the order still required the production of sufficient identifying information so that the overarching purpose behind section 120975 — the absolute protection of the identity and privacy of individual who have taken a blood test to determine their HIV status — would be jeopardized if we allowed this order to be enforce."

Consequently, the court ordered that a writ of mandate issue vacating the Workers Compensation Appeals Board order and annulling its decision. A.S.L.

9th Circuit Upholds Termination of Disability Benefits for HIV+ Man

In *Muniz v. AMEC Construction Co.*, 2010 WL 4227877 (9th Cir., Oct. 27, 2010), the U.S. Court of Appeals for the 9th Circuit affirmed a decision by U.S. District Judge Christina A. Snyder to uphold Connecticut General Life Insurance Company's termination of plaintiff Dierro Muniz's long-term disability benefits. Muniz, who was diagnosed HIV+ in 1989, and had been receiving total disability benefits under his employer's benefit plan through CGLIC since 1992, was found by the insurer to no longer be totally disabled when his benefits came up for review in 2005, and the court upheld the process and determination that led to that conclusion.

Muniz had ceased working on August 1, 1991, due to complications from his HIV infection, and, as noted, was found to be qualified for disability benefits, which he began drawing in 1992. Continuation of his benefits came up for review in 2005. Muniz completed forms sent by the insurer, and his doctor, William Towner, also completed forms. Based on its review of the forms, CGLIC decided that Muniz was capable of performing "sedentary employment" and was thus no longer entitled to be receiving benefits for total disability. The case manager found that the "current medical record does not

support the severity of symptoms as stated by Muniz.”

Thus began an arduous process of appeal involving Muniz and his doctor, who insisted that Muniz was not able to work. As the process dragged on, the insurer evidently became exasperated with its difficulty in contacting Muniz and getting him to comply with the review procedure. When the insurer persisted in holding that Muniz could work and terminated his benefits effective September 8, 2006, he filed an administrative appeal to exhaust his remedies under the employee benefit plan, and then took the case to federal district court.

The court engaged in de novo review, because the benefit plan did not give CGLIC any discretion in administering the plan. The court found, contrary to Muniz’s arguments, that his was the burden of proving continued eligibility for benefits, and that he had failed to meet this burden, and held that he failed to prove that he remained totally disabled. The 9th Circuit affirmed this ruling, in an opinion by Circuit Judge Clifton, who began his review of the opinion by stating that the district court’s finding was not “clearly erroneous” in light of the evidence presented. Muniz had argued that the medical records did not show a change in his condition over the years when he had been receiving disability benefits, but the court found this argument besides the point, which was whether Muniz was disabled at the time the claims review process was undertaken. The court rejected all attempts by Muniz to attack the validity of the procedures used by the insurer to determine his eligibility status. A.S.L.

AIDS Litigation Notes

Supreme Court — On October 18, Justice Sotomayor filed a dissenting to the Court’s denial of certiorari in *Pitre v. Cain*, 2010 WL 4053955, in which plaintiff, an HIV+ Louisiana state prisoner, alleges that his 8th Amendment rights were violated by the prison when he was assigned to onerous physical tasks in retaliation for his refusal to take prescribed HIV medications. The district judge had rejected the 8th Amendment allegation, saying that Pitre had been “hoist by his own petard,” as his refusal to take prescribed medications precluded him from asserting “deliberate indifference” by prison officials to his medical condition. “Even assuming respondents had a legitimate penological interest that outweighed a right to refuse HIV medication,” she wrote, “that interest would not permit respondents to punish Pitre, or to attempt to coerce him to take medication, by subjecting him to hard labor that they knew posed a substantial risk of serious harm.” To determine whether prison officials’ conduct violates the Eighth Amendment in the context of prison conditions, we ask whether the officials involved acted with “deliberate indifference” to the inmates’ health or safety.’ Pitre’s complaint alleges that respondents subjected him to labor that they knew posed a substantial risk of serious harm’ to his health notwithstanding his pleas for a more appropriate assignment, and he even attaches a letter from a prison official implying as much. This is more than sufficient to state a claim of deliberate indifference.” Do we detect the dreaded “empathy” here? No fear that any of the other Justices

might alarm the minority members of the Senate Judiciary Committee by exhibiting such soft-heartedness. . .

Oklahoma- In *Hardeman v. Sanders*, 2010 WL 3836135 (Oct. 4, 2010) (not officially published), a 10th Circuit affirmed a decision by the U.S. District Court in Oklahoma to dismiss statutory and constitutional claims by an HIV+ inmate who claims to have been sexually assaulted by a prison guard, and then to have suffered retaliation when he complained about the assault. The case turned on the inmate’s failure to comply with all the detailed rules for administrative grievances and appeals. The court apparently accepted the prison authorities’ argument that placing the inmate into segregation was necessary to protect other inmates from HIV exposure, in light of his history of promiscuity in prison, and that the prison’s investigation had failed to substantiate the claim that the guard had sexually assaulted him. The opinion never deals with the merits of the inmate’s claim that the prison officials to whom he complained about the assault proceeded to reveal the inmate’s HIV status to those that were questioned in the investigation of the assault claim. The opinion for the court by Judge Baldock also includes an odd and obscure reference to an argument about whether “unprotected sex in prison by HIV-positive inmates” is “a major life activity under the ADA.” We’re still puzzling over that one and its potential relevance to the case. The opinion mentions that the inmate alleged that the breach of confidentiality concerning his HIV status violated the ADA. How that relates to sexual activity is not made clear in the opinion. It’s a puzzle.... A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

Lambda Legal is seeking a new national director for its HIV Project. Applicants for the *HIV Project Director* position should have a minimum of five years of experience as a practicing attorney, including substantial experience with HIV-related law. Supervisory experience preferred. Applicants should possess a high level of independence and initiative, excellent speaking and writing abilities, the ability to produce the highest caliber legal and policy work, creativity, good judgment and a willingness to work with others toward the most effective strategies and initiatives to advance civil rights. In addition, the successful candidate will have the ability to talk and write about legal, scientific, and other complex issues in clear, persuasive terms for non-lawyer audiences. Working at Lambda Legal requires a demonstrated awareness of and commitment to the concerns of the communities Lambda Legal represents, and a commitment to diversity within Lambda Legal and in the work that we

do. Prior work on behalf of the LGBT community and/or people living with HIV is highly desirable. Spanish language fluency is a definite plus. The position is open until filled. Interviews may start as early as October 15, 2010. Send resume, brief writing sample (preferably including discussion of a constitutional, discrimination, federal courts or other complex issue), and a letter or email explaining your interest in the position, how you learned of the job opening and to which office you are applying to: Katy Tokieda, Legal Administrative Manager, Lambda Legal Defense and Education Fund, 120 Wall Street, Suite 1500, New York, NY 10005-3904. email: ktokieda@lambdalegal.org. Include the words “HIV Project Director Position” on the first line of the address of the envelope or the subject line of the email transmitting your application materials. No phone inquiries, please.

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Zupcofska, Peter F., *Drafting Considerations for Same-Sex Couples*, 27 GPSOLO (ABA) No. 6, 14 (September 2010).

Specially Noted:

The Fall 2010 issue of the *Northwestern Journal of Law & Social Policy* includes a series of articles dealing with the vexing question of recognizing the constitutional protection for free exercise of religion with the growing trend towards state establishment of legal status for same-sex couples, sometimes in the form of same-sex marriage. The authors take various positions on whether and to what extent religiously-based objections to same-sex marriage or other forms of legal recognition should privilege individuals or institutions to refuse to provide services or goods that might implicate them in such recognition. Individual articles noted above.

Lambda Legal has released a special Tax Guide for same-sex couples who live in community-property jurisdictions, providing answers to frequently-asked questions about the impact of a shift in federal policy by the Obama Administration. Contrary to approach taken by the Internal Revenue Service during the Bush Administration, the IRS will now recognize jointly-owned community property income earned by California registered domestic partners the same way it does for married couples filing separate federal income tax forms. (IRS does not allow joint filing by same-sex couple, regardless of their status under state law, due to the Defense of Marriage Act.) Copies of Lambda's publication can be downloaded from its website: www.lambdalegal.org/ttp-community-property.

AIDS & RELATED LEGAL ISSUES:

Frautschi, Schuyler, *Understanding HIV-Specific Laws in Central America*, 38 Int'l J. Legal Inf. 43 (Spring 2010).

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 Le-GaL 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.