Will the Lame Duck Congress Authorize Repeal of “Don’t Ask, Don’t Tell”?

The Senate Armed Services Committee began hearings on December 2 on a proposal to repeal the “don’t ask, don’t tell” policy, under which lesbians, gay men and bisexuals serving in the Armed Forces are required to conceal their sexuality upon pain of removal from the service. The policy, adopted in 1993 in reaction to newly-elected President Bill Clinton’s statement shortly after the 1992 election that he intended to keep his promise to end the existing regulatory ban on military service by gay people, has resulted in the expulsion of thousands of military personnel over the intervening years, although the pace of expulsions slowed dramatically after the commencement of hostilities in Iraq. However, even with two wars raging and staffing shortages in many critical military roles, individuals continued to be processed for discharge under the policy.

Last spring, the House included an amendment in the annual National Defense Authorization Act bill that would remove the policy from the U.S. Code, essentially returning the issue of military service by gays back to the Pentagon for resolution. The House passed this measure after hearing testimony from Defense Secretary Robert Gates and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen that it was time to end the policy, the only barrier being the existing statute and the formulation and adoption of appropriate policies for the conduct of military operations with openly lesbian, gay and bisexual members. Under the measure passed by the House, the Defense Department would not be able to rescind the existing policy until the President and top Defense officials certified to Congress that the change could be made without harming national security.

During the House hearings in February, Defense Secretary Robert Gates appointed a special Working Group co-chaired by Jeh Charles Johnson, the Defense Department’s General Counsel, and General Carter F. Ham of the Army, with a mandate to undertake a “review of the issues associated with properly implementing a repeal of the Don’t Ask, Don’t Tell policy” and to report back to the Secretary by December 1. After the House passed its version of the Defense Authorization Act and sent it to the Senate, opponents of ending the ban as well as some who were still “on the fence” urged that the Senate delay taking up the issue until after the Working Group Report was issued. An attempt to bring the matter to a vote before the November 2 general elections faltered, as all Senate Republicans and a handful of Democrats voted against cloture.

The Working Group undertook the most extensive study ever done on the subject, and conducted a survey of personnel and family attitudes that embraced hundreds of thousands of participants, including several thousand current and former service members who are lesbian or gay. The Working Group’s report, whose contents had been leaked to news media in the weeks leading up to the release on November 30, indicated that an overwhelming majority of military personnel believed that the current policy, under which military personnel discovered to be gay were mandated to be discharged in the name of unit cohesion and morale, could be abandoned without any serious consequence. However, significant minorities of respondents, especially those assigned to units engaged in combat operations, expressed reservations about whether the policy could be abandoned without adverse effect. The Working Group itself concluded that while there might be minor, isolated disruptions, overall they would expect implementation to go smoothly, and that appropriate leadership from officers could overcome any difficulties. They found that most service members knew or believed that they were already serving alongside lesbians or gay men, and that they had no problem with this. Indeed, 92% of those who responded that they knew lesbians or gay men in their units expressed the view that ending the policy would have a positive or neutral effect.

The Working Group did not recommend that DoD include sexual orientation together with other characteristics listed in various equal opportunity policies of the Department, taking the position that ending the existing policy would go most smoothly if there was no perception that gays were being elevated to some sort of “protected class,” but instead stressing equality of treatment. They noted that due to the Defense of Marriage Act, the military would not be able to treat same-sex spouses or partners of personnel as the equivalent of spouses for most benefits purposes, although they did point out some discretionary areas where changes in policy could be made without regard to DOMA.

The Report, which was available for downloading from the Defense Department’s website on a page specially dedicated to the DADT issue, came with statistical tables of the survey results and extended discussion of all aspects of the process of transitioning to a military force in which lesbians and gay men can be open about their sexuality. Drawing on the experience of other countries, the Working Group reported that it was unlikely that an end of the DADT policy would lead to any sort of mass “coming out,” since it was likely that most lesbian or gay personnel would be reasonably discrete about their sexuality in order to “fit in” with their unit and not call undue attention to themselves. The Report set out a roadmap for adopting appropriate policies to accommodate the recommended changes.

During the first day of hearings, Secretary Gates, Admiral Mullen and the co-chairs of the Committee provided a summary of the report to the Armed Services Committee and urged passage of the pending bill. Secretary Gates and General Counsel Johnson emphasized that if Congress did not repeal the statutory policy, thus allowing the Pentagon to proceed with implementing the change in an orderly fashion, it was likely that it would be held unconstitutional by the courts, requiring immediate compliance and less well thought-out and implemented response that could be more disruptive to military operations. The second day of hearings was to be devoted to the Chiefs of each of the uniformed services, who are notably less enthusiastic about the change, whose burden of implementation would fall largely upon them. Congressional opponents, led by Republican Senator John McCain of Arizona, criticized the study as not having directly asked the troops whether the policy should be changed, a suggestion rejected by Secretary Gates as inappropriately deciding policy by referendum of the troops — something that would be entirely without precedent and a total departure from civilian control of the military. McCain’s rationale for opposing change seemed to be changing from day to day, with little if any connection to reality.

* * * Another country heard from: In a CNN interview with Larry King broadcast on December 1, Russian Prime Minister Vladimir Putin was asked whether lesbians and gay men are allowed to serve openly in the Russian military. His response was that “There are no prohibitions.” A.S.L.
New Strategy to Attack DOMA Unfolds in Federal Court

Early challenges to the constitutionality of the federal Defense of Marriage Act (DOMA) were all unsuccessful. The Act, passed in 1996, provides that no state is required to recognize same-sex marriages contracted in another state (Section 2), and that no federal law may be interpreted to recognize same-sex marriages (Section 3). The new strategy focuses on Section 3, and narrowly targets the section’s specific applications rather than launching a broadside facial challenge.

DOMA as enacted by Congress does not itself state any policy justification for the federal government refusing to recognize same-sex marriages that have been lawfully contracted in those jurisdictions that authorize such marriages, but in the legislative history (committee reports), four reasons are asserted: (1) advancing the government’s interest in defending and nurturing the institution of traditional heterosexual marriage; (2) advancing and defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce governmental resources.

In the early cases, all arising from private litigation, mostly in the years immediately after passage of the Act, federal judges rejected the challenges, finding that the law was subject only to the most undemanding rationality test, and finding one or more of the purposes articulated in the legislative history as sufficient. Also, challenges by couples who were not actually married were tossed out on standing grounds. Significantly, those early challenges predated the Supreme Court’s 2003 ruling in Lawrence v. Texas, holding that a state may not attach criminal penalties to consensual homosexual sexual conduct between adults because such conduct falls within the sphere of liberty protected under the Due Process Clause of the 14th Amendment, and insinuating in dicta that it was improper for the government to place significant obstacles in the way of adult intimate family relationships.

After Lawrence and the subsequent rulings in favor of same-sex marriage in Canada and Massachusetts, the LGBT rights litigation groups devised a new strategy for challenging DOMA in the courts. Individuals who had actually married and had been denied some federal right or benefit as a result of DOMA would file suit, represented by one of the public interest law firms, contesting the constitutionality of DOMA as applied to their claim.

The first fruits of this strategy were harvested in Boston over the summer of 2010 in Gill v. Office of Personnel Management, 699 ESupp.2d 374 (D. Mass. 2010), a lawsuit brought by Gay & Lesbian Advocates & Defenders (GLAD), and in a companion case filed by the Massachusetts Attorney General, Martha Coakley, challenging several specific instances in which the ability of Massachusetts to accord equal treatment to same-sex marriages had been curtailed by federal policies required by DOMA. In his rulings in the two cases, Judge Joseph Taulo, a veteran federal trial judge appointed to the bench by Republican President Richard Nixon, found that the unequal treatment required by DOMA was not justified, and that the law improperly invaded the sovereignty of Massachusetts. The Justice Department has appealed those rulings to the 1st Circuit Court of Appeals. The parties agreed to stay the judge’s orders pending appeal.

Meanwhile, however, buoyed by the initial success of this strategy, LGBT rights organizations have filed additional lawsuits. GLAD has recently filed suit in the U.S. District Court in Connecticut on behalf of same-sex couples who had married in Connecticut, Vermont, and New Hampshire, challenging the refusal of federal agency employers to extend family coverage to new same-sex spouses and the denial of spousal benefits under the Social Security Act. One of the plaintiffs in Pedersen v. Office of Personnel Management was also denied a survivor annuity under a private employer’s benefit plan, the employer asserting that the plan would lose its preferred tax status under federal law if the benefit were to be extended, due to DOMA.

It will be interesting to see whether the Attorneys General of Connecticut, Vermont, and New Hampshire will be inspired by the example of their Massachusetts neighbor to file suits vindicating their states’ authority to extend equal treatment to same-sex couples.

In the meantime, another federal suit was filed, this time in the Southern District of New York, by the ACLU’s LGBT Rights Project and the NY Civil Liberties Union, on behalf of a woman seeking a refund from the federal government of the substantial estate tax payment made by the estate of her deceased same-sex spouse (they were married in Toronto, Canada) — a payment that would not have been required had their marriage been recognized by the Internal Revenue Service, which declined to do so citing DOMA. Although New York State does not make same-sex marriages available within the state, a growing body of case law and executive decisions provides that such marriages contracted elsewhere are recognized in New York. As in the cases from Massachusetts and Connecticut, the plaintiff in Windsor v. United States is arguing that the unequal treatment mandated by DOMA with respect to her inheritance from her wife is unconstitutional and cannot be justified.

These challenges to DOMA proceed under the Due Process Clause of the 5th Amendment of the Bill of Rights, which has been held by the Supreme Court to be binding on the federal government and to incorporate an “equal protection of the laws” requirement co-extensive with that expressly imposed on the state governments under the 14th Amendment. The argument goes that after Lawrence v. Texas, and the prior Supreme Court ruling in Romer v. Evans (1996), one can argue that unequal treatment on the basis of sexual orientation mandates heightened scrutiny by the court, which means the challenged policy should be struck down unless it significantly advances an important policy interest of the government.

In both of the recently-filed lawsuits, plaintiffs argue that the grounds articulated in the Congressional report are insufficient for this purpose, and that the additional arguments the Justice Department made in the Massachusetts case — all rejected by Judge Taulo — are equally insufficient. Those arguments centered on a contention that DOMA was Congress’s attempt to stoke out a neutral stance on the hotly contested issue of same-sex marriage, and to achieve uniformity in federal law by having the same definition of marriage apply throughout the country for purposes of federal policy. But DOMA is hardly neutral, as it places the federal government on the anti-same-sex-marriage side in the debate, and it is hard to argue that achieving uniformity in federal law is an important goal, when the government now accommodates a regime under which marriage laws do vary from state to state in some particulars, so that couples who could marry in one state are barred from marrying in another yet the federal government recognizes all of those marriages that are lawfully contracted — unless they involve same-sex couples.

In addition to these new lawsuits, another important case is pending on the West Coast, as Lambda Legal is pursuing the claim of a California woman who married her same-sex spouse in that state prior to the passage of Proposition 8. The plaintiff seeks to include her spouse under her federal employer’s health insurance program. Karen Golinski, an attorney on the staff of the 9th Circuit Court of Appeals, won a ruling in the court’s internal grievance procedure from Chief Judge Alex Kozinski (appointed to the court by President Ronald Reagan), who avoided ruling on the constitutionality of DOMA by finding an alternative interpretive route involving enforcement of the 9th Circuit’s internal non-discrimination policy. As the Office of Personnel Management defied the judge’s ruling and instructed the insur-
Lambda makes many of the same arguments that the plaintiffs make in the cases just filed on the East Coast. The telling point in all these cases is that the denial of the benefits being claimed has no rational connection with the reasons being advanced by the Justice Department for upholding the statute. Indeed, it is hard to know what important federal policy is served by denying equal treatment to married, tax-paying, lawful residents — in some of these cases long-time federal employees — just because they have married spouses of the same sex. As with the New England litigation, it will be interesting to see whether the newly-elected New York Attorney General, Eric Schneiderman, a strong supporter of same-sex marriage, might be stirred to file an amicus brief in the case, or even commence litigation on behalf of the State Tax Department, which has failed to line up with other New York state agencies in recognizing same-sex partners because the state’s tax laws are intertwined with the federal tax code. Certainly the argument could be made, as it was made in Massachusetts, that the application of DOMA to restrict recognition of same-sex couples is requiring New York to deny such recognition under its tax code in violation of state sovereignty.

DOMA was a hysterical congressional response to litigation in Hawai‘i, where the state Supreme Court had ruled in 1993 that a denial of marriage to same-sex couples might violate the state constitution. DOMA was enacted in 1996 as a trial was about to be held on that claim in Hawai‘i on remand from the state supreme court. A few months after DOMA was enacted, the trial court ruled in favor of same-sex marriage, but the decision was ultimately mooted when a state legislative compromise and a subsequent public referendum took away from the court the right to decide whether same-sex couples could marry, while enacting a law providing a limited legal status and limited menu of rights for same-sex partners. So, ironically, at the time DOMA passed, same-sex couples could not actually marry anywhere in the world, the right to same-sex marriage was not established anywhere until after the turn of the century, in the Netherlands, then Canada, then Massachusetts. It was not based on any kind of systematic analysis of its potential impact should same-sex marriage eventually become available in some jurisdictions. (The famous Government Accountability Office study counting more than a thousand provisions of federal law that might be affected was not produced until after the statute was enacted, in response to a request by a member of Congress opposed to the law.)

It seems past time for Congress to rethink the issue, although pending legislation to repeal DOMA introduced by Rep. Tammy Baldwin (D-Wis.) does not appear to have sufficient support to move forward at present. So the matter falls to the courts, and the questions of the day are: Will the new strategy of chipping away at DOMA in narrowly focused as-applied attacks result eventually in a definitive declaration of unconstitutionality from the Supreme Court, obviating the need for heavy lifting in Congress? Or will an accumulating body of successful trial court decisions spark a congressional back-lash, putting the infamous Federal Marriage Amendment back on the legislative agenda? Only time will tell. A.S.L.

**Illinois Legislature Votes to Approve Gender-Neutral Civil Unions**

In an interesting twist on the emerging trend in legal recognition for same-sex couples, the Illinois legislature voted to approve a Civil Union law that will make the state law equivalent of marriage available to both same-sex and different-sex couples. The vote in the House on November 28 was 61-32, and Senate approval came on December 1 by a vote of 32-24. Governor Patrick Quinn (Dem.), a supporter of the bill who was re-elected in November by a narrow margin, promised to sign the measure into law.

The bill provides that two people who enter a civil union would have the same treatment under Illinois law that is given to marital spouses. The federal government does not recognize or give any legal significance to state-sanctioned civil unions, so those who enter into such relationships will not derive any of the rights or benefits available to marital spouses under federal law.

When the measure goes into effect later next year, Illinois will become the eleventh state (and twelfth jurisdiction, when the District of Columbia is counted) to provide a legal framework of recognition for same-sex couples that approximates the state law rights of married couples, Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and Washington, D.C. allow same-sex couples to marry, (New York and Maryland recognize out-of-state same-sex marriages, although they do not provide for such marriages to take place within the state.), California, Nevada, New Jersey, Oregon, and Washington State provide either civil unions or domestic partnerships carrying the state law rights of marriage.

The best predictions are that Rhode Island may legislate for same-sex marriage during 2011, as the legislature has been poised to do so for some time, but the effort was blocked by firm opposition from the Republican governor. On November 2, Lincoln Chafee, a former Republican Senator from Rhode Island, was elected governor as an Independent candidate publicly supporting same-sex marriage rights, which may break the legislative log-jam. A.S.L.

**Vermont Supreme Court Approves Custody Transfer in Long-Running Miller-Jenkins Dispute**

On October 29, the Vermont Supreme Court issued its ruling unanimously affirming the decision by Rutland Family Court Judge William D. Cohen that it is in the best interest of minor child IMJ to be in the sole physical and legal custody of Janet Miller-Jenkins rather than Lisa Miller-Jenkins, her birth mother and Janet’s former civil union partner. *Miller-Jenkins v. Miller-Jenkins*, 2010 VT 98. It is uncertain what this will mean in the real world, as Lisa and the child have disappeared — at the oral argument, her attorneys disavowed any knowledge about where their client and the child are located — and Lisa seems determined to prevent Janet from re-establishing a parental relationship with IMJ, even if that makes her and her child fugitives from justice.

The decision was issued in the name of the court, signed by all the justices, without being attributed to any individual justice, with a brief additional concurring opinion authored by Justice Marilyn S. Skoglund.

Lisa and Janet, then residents of Virginia, formed a civil union in Vermont in December 2000, then decided to have a child together. Lisa became pregnant through donor insemination, and the child, IMJ, was born in April 2002. At the time, Lisa and Janet were living in Virginia, but they moved to Vermont in August 2002. They raised the child together for the first 17 months of its life, but then separated, and in September 2003 Janet helped Lisa to move back to Virginia with the child, while Janet remained in Vermont.

Soon after this move, Lisa filed an action in Vermont Family Court to dissolve the civil union. Under Vermont law, as the child was born while the civil union was in effect, both women were equally legal parents of the child. As part of that action, the family court determined that Lisa, the biological mother, should have legal and physical custody of the child, but that Janet should have visitation rights. However, it quickly became clear that Lisa was not enthusiastic about letting Janet continue in any parental role, as she blocked contact after an initial visit. On September 2, 2004, the Vermont Family Court found Lisa in contempt of court for failing to comply with the court’s visitation orders, as Janet had been thwarted in her at-
tempts to visit the child and Lisa had interfered with telephone contact.

Lisa, who renounced lesbianism and came under the sway of anti-gay Christianity, apparently decided that Janet should have no further contact with the child. She brought suit in Virginia seeking to end Janet’s rights, and also appealed the Vermont rulings. In litigation proceedings in parallel in both states, their appellate courts concluded that the Vermont Family Court properly had jurisdiction of the child custody issue, Lisa having initiated the action in the Vermont court at a time when Janet resided in that state and Lisa and the child’s residence there was recent, and that the Virginia courts would defer to the Vermont courts on the merits pursuant to a controlling federal statute on interstate custody disputes.

Once it became clear that Lisa had little hope of cutting Janet out legally, she disappeared with the child as the final appeals went forward in Vermont. Rutland Family Court Judge William D. Cohen found, in the most recent hearing, that it was no longer in the child’s best interest to be in the legal and physical custody of Lisa, who was determined to prevent Janet from any contact with her child, and ordered a change of custody, which Lisa’s attorneys appealed.

In its October 29 ruling, the Vermont Supreme Court found no error in Judge Cohen’s legal conclusions, noting the time that has passed since Janet has seen the child, and pointed out that before actual custody to Janet is finalized (pending discovery of where Lisa and the child are), the Family Court should have another hearing to “reevaluate Janet’s relationship with IMJ at that time and ensure a transition that comports with the law’s intent to defend and protect IMJ’s best interests.”

At this point, the most interesting legal issue left in the case — Lisa’s contention that despite Vermont’s civil union act, which confers equal parental rights on Janet because the women were civil union partners when IMJ was born, nonetheless Lisa’s constitutional rights as a birth mother would trump any claim Janet might have to custody — was not addressed on the merits by the court, which found that Lisa failed to preserve this legal argument at an early enough stage in the litigation for it to be properly before the court. Throughout the earliest stages of the case, which Lisa filed before deciding she did not want Janet to be in the child’s life, Lisa had conceded without any constitutional objection both the custody of the court and that the Vermont Civil Union Act governed the issues of custody and visitation. On November 8, the Supreme Court of the United States denied Lisa’s petition for certiorari in the Virginia decision denying her claim, sub nom Miller v. Jenkins, No. 10-177.

Judge Skoglund’s concurrence questioned the trial court’s conclusion that Janet “has a good relationship with IMJ” in light of the evidence, summarized by the trial court, that Janet has had virtually no contact with the child for several years, during which time it is likely that Lisa has not done anything to preserve that relationship — indeed, has probably been doing everything possible to extinguish it. On the other hand, she noted the serious problem of parental kidnapping, and concluded that this finding on the quality of Janet’s relationship with the child was not dispositive of the Family Court’s conclusion on the merits that it was in the best interest of the child to be placed in Janet’s custody, inasmuch as a further hearing will be held before a transfer takes place to determine the current state of the relationship and how best to effectuate the transfer.

Gay and Lesbian Advocates & Defenders, New England’s LGBT public interest firm, has been representing Janet in this controversy. A.S.L.

Is This the End of Christian Legal Society’s Challenge to Campus Exclusion?

In Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010), the Supreme Court affirmed a determination by the 9th Circuit Court of Appeals that Hastings College of Law did not violate the Constitution by adopting a non-discrimination requirement for student organizations seeking official recognition and status at the school and applying it to deny recognition to Christian Legal Society on the ground that CLS discriminated on the basis of sexual orientation and religion in certain provisions of its by-laws regarding voting membership and selection of officers. (The CLS by-laws require members to affirm that they do not engage in homosexual conduct and that they believe in a quasi-fundamentalist Protestant Christian creed.) However, a question left open by the Supreme Court’s opinion was whether Hastings might have violated the Constitution by selective application of this policy to CLS and not to other student organizations.

“On remand,” wrote the 9th Circuit panel in an order released on November 17 in Christian Legal Society v. Wu, 2010 WL 4629597, “Christian Legal Society (CLS) asks us to remand with instructions that the district court consider its claim that Hastings College of Law selectively applies its Nondiscrimination Policy against CLS.” CLS contended before the Supreme Court that the circumstances of application of the “new” policy to it suggested pretext, but the Supreme Court refused to address the argument on the merits because, it said, neither the district court nor the 9th Circuit had addressed the issue of pretext — “selective enforcement” — of the policy. The Supreme Court’s remand to the 9th Circuit instructed the court to consider the pretext issue “if, and to the extent, it is preserved.”

In its Nov. 17 order, the panel went to great lengths to show that CLS had failed to preserve the pretext issue by not explicitly placing it before the court in its original appeal of the district court’s order rejecting its claim that the denial of recognition violated its constitutional rights. “CLS presented only one issue for review,” said the court, quoting CLS’s opening appellate brief: “Whether the Constitution permits a public law school to deny a religious student group numerous valuable benefits because the group requires its officers and voting members to agree with its religious viewpoint.”

The panel, “This statement of the issue does not fairly encompass a selective application argument; it in no way suggests that Hastings applied its policy as a pretext for discrimination, or that it applied the policy to certain groups but not to others. This failure alone would warrant our dismissal of its motion for further proceedings on the ground that the pretext issue was not preserved.”

However, the court went on to deconstruct the appellate brief, examining its summary of argument and the entire equal protection section, to assure itself that CLS had not fairly raised the pretext point in its earlier appeal. CLS argued that there were enough passing references to statements that might imply a pretext argument so that it should found to have been preserved for consideration, but the court was not buying the argument, quoting from a 7th Circuit opinion that had colorfully commented: “Judges are not like pigs, hunting for truffles buried in briefs.” Interesting mixed metaphor!

Is this the end of the CLS case? Since the organization is represented by a public interest law firm, Center for Law & Religious Freedom, one suspects that a new certiorari petition may well be filed asking the Supreme Court to consider whether the various references in the organization’s original appellate brief had sufficiently reserved the issue of pretext, but one suspects that at this point the Supreme Court is unlikely to take a second look, so this is probably the end of the case.

The National Center for Lesbian Rights with the assistance of Jenner & Block LLP represents Hastings Outlaw, the LGBT student group at the law school, as intervenor-defendants in the case who participated to defend the school’s anti-discrimination policy in its application to CLS because the CLS by-laws effectively mandate exclusion of gay students from membership. A.S.L.

Government Appeals Witt Ruling

The Justice Department announced that it would appeal the ruling in Witt v. U.S. Department of the Air Force, 2010 WL 3732189 (W.D.Wash. Sept. 24, 2010), to the 9th Circuit Court of Appeals. In Witt, U.S. District Judge Ronald B. Leighton ruled that the Air Force vio-
lated the 5th Amendment Due Process rights of Major Margaret Witt, an Air Force Reserve nurse, by discharging her for being gay. Judge Leighton had ordered her reinstatement, pending a determination that she remained qualified (apart from being gay) for service. This would involve passing a physical exam, among other requirements. Major Witt had indicated in response to the ruling that she would apply for re-enlistment, although she has been out of the Service since being suspended in 2004. In one press report, she indicated her hope to be back in Service by January.

The appeal announcement cause some dismay among LGBT rights advocates, who had hoped that the Obama Administration’s move to get Congress to delete the ban from statutory law, freeing up the Defense Department to change the policy, would militate against an appeal, especially as the Administration had not sought Supreme Court review at an earlier point in the case when the 9th Circuit had remanded the matter for trial after opining that a heightened scrutiny standard should be used in this “as-applied” challenge to the “Don’t Ask, Don’t Tell” policy. Under such a standard, actual application of the policy to an individual with an exemplary service record such as Major Witt is difficult to justify, and the government’s attempts to do so at trial were pathetic.

At the same time, advocates noted with some hope that the Justice Department had not sought a stay of Judge Leighton’s ruling pending appeal, reading this as perhaps a partial concession that in fact the Air Force did not have any serious interest in blocking her re-enlistment. Later clarification from the Air Force deflated the positive reactions to the government’s failure to seek a stay, as the Air Force made clear that if Maj. Witt does apply for re-enlistment, although she has been out of the Service for 10 years that they are ready for oral argument on this second appeal. **With the election of Rich Gordon, Ricardo Lara and Toni Atkins, joining re-elected Assembly Speaker John Perez, Assemblymember Tom Ammiano, and Senators Mark Leno and Christine Kehoe, the California legislature will have the largest contingent of openly-gay members of any state.**

Oregon — The Oregon Court of Appeals reversed a three-judge panel’s decision in the Alameda County Superior Court, thus becoming the first openly-transgender judge to be elected in the United States. A graduate of Louisiana State University Law School, Kolakowski worked as a patent attorney before becoming an administrative law judge. This was her second attempt to be elected. **Openly-gay attorney Michael Nava was unsuccessful in his bid to unseat Richard Ulmer in the San Francisco Superior Court. Ulmer had been appointed last year by Gov. Arnold Schwarzenegger. Had he been elected, Nava would have been the state’s first openly-gay Latino judge. He works as a research attorney in the chambers of California Supreme Court Justice Carlos Moreno, who was reconfirmed by voters in a retention ballot on Nov. 2.**

New Hampshire — Three members of the Iowa Supreme Court were targeted by anti-gay forces for defeat in their retention elections because of the court’s unanimous decision opening up marriage for same-sex couples. Chief Justice Marsha Ternus, Associate Justice Michael Streit, and Associate Justice David Baker all failed to achieve majority support on November 2 and were turned out of office. Under Iowa procedures, the three vacancies thus created will initially be filled by appointment of the governor, with the appointees eventually having to stand for retention votes. Incumbent Governor Chet Culver, a Democrat who was defeated for re-election, could theoretically appoint the new justices if the merit selection process yields qualified candidates in sufficient time before his handover to Republican Terry Branstad. A Republican tide in the state legislative process put Republicans in control of the House but most likely left Democrats in control of the Senate, under the leadership of Mike Crostal, a firm opponent of any attempt to overrule the marriage decision by placing a constitutional amendment on the ballot. According to a post-election interview with the Des Moines Register, Gronstal intends to stand firm against an amendment, despite calls by Republicans to place one on the ballot. Ironically, despite the defeat of the Supreme Court justices, two trial judges also targeted in the retention balloting — Polk County Judge Robert Hanson, who issued the affirmative ruling on same-sex marriage at the outset of the case, and Polk county Judge Scott Rosenberg, who signed a waiver to allow a same-sex couple to marry without observing a statutory waiting period — both received majority support and will continue to serve. The avowed goal of those who campaigned to oust the Supreme Court justices was to send a message to judges in other states that anybody voting in favor of same-sex marriage in a jurisdiction where judges are elected may expect to be targeted in the future.

Kentucky — A wealthy construction industry executive who also happens to be openly gay, Jim Gray, was elected mayor of Lexington, Kentucky, defeating the incumbent mayor, Jim Newberry. The Lexington Herald Leader (Nov. 3) reported that this was only the second time in the city’s history that an incumbent mayor had been defeated for re-election.

California — Victoria Kolakowski was narrowly elected to the Alameda County Superior Court, thus becoming the first openly-transgender judge to be elected in the United States. A graduate of Louisiana State University Law School, Kolakowski worked as a patent attorney before becoming an administrative law judge. This was her second attempt to be elected. **Openly-gay attorney Michael Nava was unsuccessful in his bid to unseat Richard Ulmer in the San Francisco Superior Court. Ulmer had been appointed last year by Gov. Arnold Schwarzenegger. Had he been elected, Nava would have been the state’s first openly-gay Latino judge. He works as a research attorney in the chambers of California Supreme Court Justice Carlos Moreno, who was reconfirmed by voters in a retention ballot on Nov. 2.**

Carolyn Cox was appointed to an open seat on the U.S. District Court for the Northern District of California, sitting in San Francisco, by President George W. Bush in 2005. Cox is the first openly-gay member of the federal judiciary. Cox has previously served as a trial judge on the U.S. District Court for the Central District of California in Los Angeles. She has also served as a law clerk to Judge William P. Canby, Jr. on the U.S. Court of Appeals for the Ninth Circuit. Cox was born in Oregon in 1950 and received her B.A. from Pomona College in 1972 and her J.D. from the University of California at Berkeley in 1975. She is married to Kymmi Loh and has two children, Kymmy and Drew. She has been a partner in the law firm of Pillsbury Winthrop since 1987, where she specializes in civil litigation and representing clients in complex matters involving data privacy, computer misuse and the Internet. She has also served as an administrator with the National Labor Relations Board. Cox was a member of the 9th Circuit’s En banc Committee and served as the chair of its Appellate Advocacy Council. She is a member of the American Bar Association and member of the Civil Justice at Work Task Force. She is also a member of Lambda Legal Defense and Education Fund, and the American Civil Liberties Union.

**Election Notes**

California — Victoria Kolakowski was narrowly elected to the Alameda County Superior Court, thus becoming the first openly-transgender judge to be elected in the United States. A graduate of Louisiana State University Law School, Kolakowski worked as a patent attorney before becoming an administrative law judge. This was her second attempt to be elected. **Openly-gay attorney Michael Nava was unsuccessful in his bid to unseat Richard Ulmer in the San Francisco Superior Court. Ulmer had been appointed last year by Gov. Arnold Schwarzenegger. Had he been elected, Nava would have been the state’s first openly-gay Latino judge. He works as a research attorney in the chambers of California Supreme Court Justice Carlos Moreno, who was reconfirmed by voters in a retention ballot on Nov. 2.**

Iowa — Three members of the Iowa Supreme Court were targeted by anti-gay forces for defeat in their retention elections because of the court’s unanimous decision opening up marriage for same-sex couples. Chief Justice Marsha Ternus, Associate Justice Michael Streit, and Associate Justice David Baker all failed to achieve majority support on November 2 and were turned out of office. Under Iowa procedures, the three vacancies thus created will initially be filled by appointment of the governor, with the appointees eventually having to stand for retention votes. Incumbent Governor Chet Culver, a Democrat who was defeated for re-election, could theoretically appoint the new justices if the merit selection process yields qualified candidates in sufficient time before his handover to Republican Terry Branstad. A Republican tide in the state legislative process put Republicans in control of the House but most likely left Democrats in control of the Senate, under the leadership of Mike Crostal, a firm opponent of any attempt to overrule the marriage decision by placing a constitutional amendment on the ballot. According to a post-election interview with the Des Moines Register, Gronstal intends to stand firm against an amendment, despite calls by Republicans to place one on the ballot. Ironically, despite the defeat of the Supreme Court justices, two trial judges also targeted in the retention balloting — Polk County Judge Robert Hanson, who issued the affirmative ruling on same-sex marriage at the outset of the case, and Polk county Judge Scott Rosenberg, who signed a waiver to allow a same-sex couple to marry without observing a statutory waiting period — both received majority support and will continue to serve. The avowed goal of those who campaigned to oust the Supreme Court justices was to send a message to judges in other states that anybody voting in favor of same-sex marriage in a jurisdiction where judges are elected may expect to be targeted in the future.

Kentucky — A wealthy construction industry executive who also happens to be openly gay, Jim Gray, was elected mayor of Lexington, Kentucky, defeating the incumbent mayor, Jim Newberry. The Lexington Herald Leader (Nov. 3) reported that this was only the second time in the city’s history that an incumbent mayor had been defeated for re-election.

New Hampshire — Is same-sex marriage in danger in New Hampshire as a result of the decisive take-over of both houses of the state legislature by veto-proof Republican majorities? (Democratic Governor John Lynch, who signed the marriage bill into law, was re-elected by a margin of 8%). Although donations from the anti-gay National Organization for Marriage helped to fuel the Republican victory, and NOM was crowing afterwards about how the results showed that New Hampshire voters oppose same-sex marriage, the new legislative leadership was not immediately reading things that way, according to a November 4 article in the Concord Monitor. Peter Bragdon, described as a Republican leader and candidate for the Senate Presidency, indicated that repealing the marriage law was not on his agenda. “The economy, jobs and taxes. That will be our focus,” he said. “I doubt there will be any marriage legislation introduced into the Senate.” Even some newly empowered House Republicans who have proposed repeal or an anti-marriage amendment in the past seemed to indicate they were unlikely to push such measures as a top priority. Governor Lynch would probably veto either type of measure, but, as noted, the GOP now has a veto-proof majority if they stick together on this issue.

New York — Andrew Cuomo was elected governor on a platform advocating same-sex marriage. Democrats retained their wide margin of control in the Assembly, which approved a marriage equality bill last year. In the Senate,
although an organized campaign led to the defeat of some same-sex marriage opponents in Democratic primaries, and several opponents were replaced by supporters as a result of the elections, control of the Senate was undetermined by the beginning of December, with three seats in various stages of recounting and ballot challenges and control hinging in the balance. It appeared likely, however, that Republicans might win back control of the Senate. In the past, the Assembly had approved a marriage quality bill but the Republican Senate majority refused to bring the question to the floor for a vote. The Republican Senate leader and possible Majority Leader, Dean Skelos, has signaled willingness to let the question come to the floor if a marriage equality bill passes the Assembly next year, with members free to vote their conscience. It is uncertain, however, whether his party conference would back him on that, and whether the votes would be there to pass it, inasmuch as all Republican members of the Senate opposed the bill when it came to a vote late in 2009 and new Republican members are not generally same-sex marriage proponents. During a speech about his experience as governor, David Paterson suggested that the pro-same-sex-marriage lobbyists were at fault for the 2009 defeat, as they had pushed for a floor vote in the Senate without having secured firm commitments from enough members to assure passage. The long-time custom in the Senate has been for the leadership not to bring a measure to a vote without reasonable assurances of majority support, but the lobbying pressure for a vote was so high (and private assurances were claimed to be had from sufficient members) that the leadership bowed to the pressure and allowed the vote. Or so the outgoing governor claims. At the time, Senator Thomas J. Duane, lead sponsor of the bill, claimed to have private assurances of support from sufficient Republicans to make up for the handful of likely Democratic opponents and put the measure of the top, but the private assurances did not stand up to a roll-call vote. Paterson also indicated that after returning to private life he would continue to advocate for same-sex marriage.

North Carolina — As a result of the Nov. 2 election, the North Carolina House of Representatives will have its first openly gay African-American member, Marcus Brandon.

Ohio — Conflicting messages appeared to be sent by voters in Bowling Green, Ohio, who faced ballot question proposing repeal of two laws prohibiting sexual orientation and gender identity discrimination. According to the count announced on election night, they voted against repealing the law banning such discrimination in housing, but supported repealing the law banning such discrimination in employment, business establishments, educational institutions and city services. Toledo Blade, Nov. 3.

However, after all provisional and absentee ballots were counted, both laws were found to have narrowly survived challenge and will go into effect. Toledo Blade, Nov. 23.

Rhode Island — Openly-gay Providence Mayor David Cicilline, a Democrat, was elected to the House of Representatives, where he will be one of four openly-gay members, an all-time high. The other three, all of whom are Democrats who were handily re-elected, are Barney Frank (Massachusetts), Tammy Baldwin (Wisconsin) and Jared Polis (Colorado). Independent Lincoln Chafee, a retired U.S. Senator with a generally pro-gay-rights voting record, was elected Governor, which may tip the balance towards passage of significant gay rights legislation in Rhode Island.

Tennessee — Voters in Oak Ridge, Tennessee, approved a city charter amendment prohibiting employment discrimination on the basis of sexual orientation, according to a Nov. 4 report in the Knoxville News-Sentinel.

Perry v. Schwarzenegger 9th Circuit Panel Assigned; Arguments to be Broadcast on December 6

Oral argument in Perry v. Schwarzenegger, the case challenging the constitutionality of California Proposition 8, which was enacted in 2008 and then declared unconstitutional earlier this year by U.S. District Judge Vaughn Walker, see 704 F.Supp.2d 921 (N.D.Cal., Aug. 4, 2010), will be held in San Francisco on December 6, beginning at 10 am local (Pacific Coast) time. The three-judge panel announced for the argument consists of Judges Stephen Reinhardt, Michael Daly Hawkins, and N. Randy Smith. The argument will be broadcast live, the panel having granted petitions by the major network affiliates in San Francisco and several cable stations and radio stations for both live broadcast and taping for delayed broadcast. This suggests that the argument will be available for anybody who has internet access as well, and there will be multiple opportunities to view it after the live broadcast.

The panel has announced an unusual structure for the oral argument, due to the threshold question whether any of the Appellants have standing to defend the constitutionality of Proposition 8 at the federal appellate level. Proposition 8 enacted an amendment to the California Constitution providing that the only marriages valid or recognized in California would be those involving the marriage of one man to one woman, thus ending a brief window period during which same-sex marriages could be performed in California pursuant to the California Supreme Court’s decision in In re Marriage Cases, 183 E3d 384 (2008).

After an extended trial in which the nominal state government Defendants provided no active defense and the amendment was defended by private lawyers retained by the proponents of the Proposition as Intervenor-Defendants, Judge Walker found that Proposition 8 as enacted violates the 14th Amendment’s Due Process and Equal Protection Clauses. In the course of wrangling over whether Judge Walker’s Order striking Amendment 8 should be stayed pending appeal, counsel for the Plaintiffs suggested to the court that because the state defendants were not seeking a stay, the proponents of Proposition 8 lacked standing on their own to continue the litigation. Similarly, they argued, a petition by Imperial County to intervene as a Defendant — earlier denied at the trial level but renewed at the appellate level — should be denied as well, since the state was the only government entity with a direct interest in the case, the county performing merely ministerial functions with regard to the state marriage law.

Judge Walker refused to stay his Order, finding that the 9th Circuit’s standards for staying an Order pending appeal were not met in this case, and noting that the Plaintiffs’ argument that Intervenor-Defendants lacked standing to continue the litigation on their own seemed plausible. His ruling denying the motion for stay can be found at 702 F.Supp.2d 1132 (N.D.Cal. Aug. 12, 2010). The Intervenor-Defendants promptly appealed to the motions panel of the 9th Circuit, which unanimously granted a stay pending appeal. The motion panel’s ruling can be found at 2010 WL 3212766 (9th Cir.(Cal.) Aug 16, 2010). Without intimating any view on the merits of the standing issue, the motions panel instructed that the parties address the issue of standing as part of the argument on appeal.

In light of the continued dispute about the standing of the appellants as Intervenor-Defendants to carry the defense of Proposition 8 forward in the appellate courts, the merits panel has scheduled a bifurcated argument, the first hour devoted to the standing issue, a second hour devoted to the merits of Proposition 8’s constitutionality. The panel also proposed a division of argument time among the various represented parties.

The panel designated to hear the case differs from the three-judge panel that granted a stay of Judge Walker’s order.

Judge Hawkins, an appointee of President Bill Clinton who is seen as a moderate in the ideological line-up of the 9th Circuit, was a member of the stay panel.

Judge Reinhardt, an appointee of President Jimmy Carter, is generally characterized as one of the most liberal members of the Circuit, and was part of the 3-judge panel that considered the landmark case of Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988)(vacated for en banc rehearing and decided on other grounds). In Watkins, the panel majority decided that sexual orientation was either a suspect or quasi-
murder conviction where there was a special
campaign. In late the 1st Amendment rights of right-wing
rules against standing; if it were to be remanded
in another panel ruling, Rangel-Fletes v. Holder, 339 Fed.Appx. 826 (2009), the panel agreed with the BIA that the gay petitioner from Mexico failed to show past persecution or clear probability of future persecution. (Gay asylum claims from Mexico are becoming much more difficult to win in light of the advances made by the gay rights movement there in the past few years. )
In Cooper v. Federal Aviation Administration, 622 F.3d 1016 (2010), he was part of a panel that upheld a damages award under the Privacy Act for a gay, HIV+ pilot whose license status was harmed by an unauthorized breach of confidentiality concerning his Social Security records, and in Smith v. J.S. Woodford, 2010 WL 3937326 (2010), he was part of a panel that revived a state prisoners federal civil rights lawsuit alleging sexual orientation discrimination by prison officials. In 1998, he joined a dissent from the circuit’s refusal to grant en banc review in Holmes v. California Army National Guard, 155 F.3d 1039, a case challenging the military “don’t ask, don’t tell” policy, which had been upheld by a three-judge panel. Hawkins joined Judge Pregerson’s argument that the policy raised serious 1st Amendment concerns by attaching adverse consequences to speech. Based on this record, it would appear that the Plaintiffs-Appellees stand a fair chance with Judge Hawkins.

If the court decides that the Appellants lack standing, there remains the question whether their lack of standing to appeal undermines the validity of Judge Walker’s decision and Order, since the state government Defendants did not actively participate at the trial. Intervenor-Defendants have argued that if nobody with standing was defending Proposition 8, there was no genuine case or controversy pending before Judge Walker, so he should have granted a default judgement against the state rather than issuing a ruling on the merits. Perhaps the 9th Circuit panel would address this question if it rules against standing; if it were to be remanded to the District Court for consideration of an appropriate Order in that case, it would go to a different judge, because Judge Walker announced that he will retire from the bench at the end of December.

After the names of the panel members were announced, the Proponents for Proposition 8 filed a motion requesting that Judge Reinhardt recuse himself from the case, because his wife, Ramona Ripston, was executive director of the ACLU of Southern California (recently retired) and is a public opponent of Proposition 8. ACLU of Southern California participated in the underlying California same-sex marriage litigation, and has filed amicus briefs in this case. They also alleged that counsel for the appellants had consulted Ripston before filing the lawsuit. San Francisco Chronicle, Dec. 2. On December 2, Judge Reinhardt issued a brief order refusing to recuse himself, stating that he would file a memorandum in due course setting out his reasoning. He asserted that he would be able to rule impartially in this case and would do so.

On an interesting side note, the elections of Attorney General Jerry Brown as Governor of California and of San Francisco County District Attorney Kamala Devi Harris as Attorney General guarantee that the state’s position of refusing to defend Proposition 8’s constitutionality will continue. The Republican candidates for both positions had announced that if elected they would seek to defend Proposition 8 in the appeal, most likely in an amicus capacity because of the time for the state to appeal Judge Walker’s decision expired prior to the election.

Federal Civil Litigation Notes

9th Circuit — A unanimous 9th Circuit panel upheld the Board of Immigration Appeals’ decision to deny asylum, withholding of removal or protection under the Convention Against Torture to a lesbian from Colombia, who alleged that she had been raped by military officers because of her sexual orientation. Sierra-Cordona v. Holder, 2010 WL 4629028 (Nov. 16, 2010) (unpublished disposition). After noting her allegation, the panel wrote: “The IJ determined that she was not credible. Although Sierra-Cordona testified that she was raped by military men because she is a lesbian, she neglected to mention this incident in her initial interview with an asylum officer and in her application. She only raised this claim a day before her hearing. It is not clear from the record that her lawyer was responsible for omitting this rape incident. While it is true that in some circumstances failure to disclose an instance of rape prior to an asylum hearing cannot alone support an adverse credibility finding, the BIA found the record as a whole undermines Sierra-Cordona’s credibility. The BIA noted the IJ identified and properly evaluated a number of inconsistencies and omissions in the record. The evidence does not compel a contrary conclusion.” The court also noted that there was some confusion about which of two attorneys were representing plaintiff during this process, but that this was sorted out well before the hear-
ing, and found that BIA did not abuse its discretion by denying her motion to reopen the case for more evidence. Is this a case of somebody traumatized and ashamed by rape who could not bring herself to talk about it openly with government officials until confronted with the moment of truth at a hearing on her asylum petition? If so, this case may reflect an awful miscarriage of justice. On the other hand, the IJ may have correctly perceived that the story does not hold up. It is hard to tell based on the minimalist unpublished order issued by the court of appeals.

Louisiana — U.S. Magistrate Christine Noland granted a motion to dismiss a Title VII sex discrimination claim brought pro se by a Waffle House employee who claims he was discharged based on accusations that he had a sexual relationship with his male supervisor. Williams v. Waffle House, 2010 WL 4512819 (M.D.La., Nov. 2, 2010). Magistrate Noland found that in fact Williams was trying to assert a sexual orientation discrimination claim under Title VII, and that such claims are not cognizable. She noted that there were cases upholding sexual harassment claims by gay employees on grounds that they were harassed due to failure to comply with gender stereotypes, but that such sex discrimination claims are distinct from sexual orientation discrimination claims. Louisiana does not bar sexual orientation discrimination, and the Louisiana Commission on Human Rights had dismissed his sex discrimination claim. Since he did not also indicate race discrimination and retaliation in his charge to the Commission, Magistrate Noland also found that he could not include those grounds in his federal complaint, for failure to exhaust administrative remedies; such claims were also found to be time-barred.

New York — The intricacies of federal civil rights pleading tripped up Felice Rubino, a gay bar owner in Babylon, N.Y., who sought in federal court to hold the town liable for unprovoked police raids on his bar. Rubino v. Town of Babylon & Suffolk County Police Department, 2010 WL 4683511 (E.D.N.Y., Nov. 12, 2010). Magistrate Noland found that the complaint was deficient for not specifically identifying a town policy or practice that could be made the basis of a 42 USC 1983 constitutional tort claim. The complaint generally asserted claims under the 4th, 5th, 6th, and 14th Amendments, without the degree of specificity required under the Supreme Court’s ruling in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). Justice Hurley observed that although Rubino asserted in his papers responding to the Town’s motion that the town had a discriminatory policy against gays and lesbian, “there is no mention of any such policy in the Complaint. Nor is there any reference to a widespread consistent practice in the Town of discriminating against gays.” Although Justice Hurley dismissed the complaint, he granted leave to replead by December 1 if the Town could marshal factual allegations sufficient to ground this action.

Pennsylvania — The Philadelphia Inquirer reported that a settlement may be brewing in the litigation over the City of Philadelphia’s attempt to evict the Cradle of Liberty Council of the Boy Scouts of America from a city-owned building, because of the BSA’s anti-gay membership policies. Although the City is excluded from going after the Scouts directly under their discriminatory policy, because of the U.S. Supreme Court’s ruling finding the policy protections of the 1st Amendment in the Dale case in 2000, the City nonetheless maintained that it could terminate a sweetheart deal with the Scouts by demanding market rent for the building, which the Scouts could not afford to pay. The Scouts filed suit in federal court, charging that the City’s position was improperly burdening the organization’s exercise of its 1st Amendment rights, and a federal jury agreed with the Scouts in July. Settlement talks have proceeded since the jury verdict, with the latest proposal on the table being a sale of the building to the Scouts at a price below market — reportedly $500,000. But a sale is expected to encounter resistance from the City Council, which would have to approve any sale of city property.

Board of Immigration Appeals — The University of Houston Law School Immigration Law Clinic won a victory from the Board of Immigration Appeals on behalf of a transgender woman from El Salvador. Rejecting an appeal by the Department of Homeland Security from the Immigration Judge’s award of withholding of removal, the BIA found in its Nov. 16 ruling that the IJ had appropriately credited expert testimony and a State Department Country Report on El Salvador showing significant persecution of effeminate men and transsexuals in that country. The UH Clinic preserved the confidentiality of their client’s name in circulating the opinion to immigration law professors, so we do not have a case name to report on line. Those interested could contact Janet Beck at the Immigration Law Clinic at the University of Houston, A.S.L.

State Civil Litigation Notes

California — Gay former Los Angeles City Police Officer Mitchell Grobeson will have another chance to persuade a jury of his sexual orientation discrimination and retaliation claims against the city, pursuant to a ruling on December 2 by the California 2nd District Court of Appeal, which affirmed L.A. Superior Court Judge James R. Dunn’s post-trial order setting aside a verdict for the city on the ground of juror misbehavior. Grobeson v. City of Los Angeles, 2010 WL 4888251. After the verdict in favor of the city was rendered, a member of the jury filed a declaration stating that another juror told her early in the trial that she had already made up her mind against the plaintiff, and “I’m not going to listen to the rest of the stupid arguments.” When some investigation showed that this allegation was credible, Grobeson’s lawyers sought a new trial, and Judge Dunn ordered it. The court of appeal approved the finding that there was evidence of juror bias, justifying an order for a new trial.

Connecticut — Finding that a Commission on Human Rights and Opportunities hearing officer had erred in several respects in ruling on a discrimination claim by a transgender police officer, Superior Court Judge Henry S. Cohn remanded the case back to the CHRO for reconsideration of her case on the existing record. Commission on Human Rights and Opportunities v. City of Hartford, No. CV 09401948 S (Superior Ct., New Britain, Oct. 27, 2010). Officer Dana Peterson, born male but who subsequently transitioned to female gender, had applied for transfer to the position of patrol canine handler. It seems that training for that position is handled by the state police, and the Hartford Police Department had been embarrassed when the first set of candidates it sent up for training failed to pass the physical agility test used by the state police. As a result, the HPD set up its own pre-testing process to assure that the candidates it sent for state training would be accepted. Peterson failed to pass on some aspects of the test on her first try and was not selected. Although she passed on a subsequent try, she was still not selected. The CHRO Hearing Officer asserted that Peterson could not assert a discrimination claim under the Connecticut Human Rights law, which bans sex, sexual orientation and disability discrimination, relying on an old ruling to that effect, and that in any event the HPD had legitimate non-discriminatory reasons for not selecting her for the training. The Hearing Officer also rejected her retaliation claim, and excluded evidence of various forms of harassment that Peterson had endured from co-workers in the HPD. Judge Cohn found the Hearing Officer erred as to
these points, pointedly noting that the old case relied upon had been long superseded, so that a sex and disability discrimination was viable under state law, that the Hearing Officer’s evaluation of pretext evidence was flawed, exclusion of evidence of discrimination that was relevant on the retaliation point was improper, and that a complete review of the case based on the existing hearing record was needed.

Florida — The Miami Herald reported that Mike Verdugo was unsuccessful in his discrimination suit against the Hollywood, Florida, police department, which discharged him after learning that he had performed in gay porn films earlier in his life.

New Jersey — The N.J. Division on Civil Rights has found probable cause that Emerson Board of Education has failed to comply with its obligations under the state’s anti-discrimination law by failing to deal with allegations of sexual orientation harassment brought by a male student in the school district. The male student, identified as J.C.Jr. in the Division’s case file, was allegedly assaulted four times, once by other students at a school function, was threatened with physical assault if he reported the action, was depicted on MySpace as a girl, and suffered the circulation of embarrassing pictures at the school. The Division’s investigation determined that he was “the target of consistent harassment for a period of years and that despite the existence of a written zero tolerance policy regarding such conduct, his fellow students routinely subjected him to the kind of torment no one should have to endure.” The Board’s attorney told the Bergen Record, Nov. 24, that the Board disagreed with many of the Division’s conclusions.

New York — In County of Onondaga v. Mayock & N.Y. State Dis. Of Human Rights, 2010 WL 4542948, a unanimous panel of the N.Y. Appellate Division, 4th Department, ruled on Nov. 12 that there was substantial evidence in the record to support a ruling by the State Division of Human Rights that the Onondaga County Probation Department had discriminated against an openly gay probation officer by re-assigning him to a non-supervisory job in the investigations unit with a restriction that he not be assigned to investigate any cases involving young gay male probationers. In 1991 the officer had sustained a minor penalty for inappropriate involvement with a male probationer, but his record had been essentially clean and he had served successfully as a supervising probation officer from 1993 until 2002, when he was reassigned after co-workers reported seeing a young male probationer exiting the officer’s truck. The officer and the probationer denied any inappropriate relationship, and there was no evidence he had violated department rules, nonetheless he was reassigned to a position that effectively reduced his pay by eliminating his overtime compensation, reduced his status, and caused him emotional distress. An ALJ for the agency found the Department’s explanation of this move to be a pretext for sexual orientation discrimination, ordering reinstatement, backpay for the lost overtime, and compensation for mental anguish. The commission affirmed the ALJ’s decision. DHR attorney Michael Swirsky, a long-time LeGaL member, successfully defended the agency’s decision before the court. A.S.L.

Criminal Litigation Notes

New York — New York City Criminal Court Judge Matthew A. Sciarrino, Jr., has dismissed as facially insufficient a charge of sexual misconduct involving oral sex between the male defendant and another man in People v. Chan, 2010 NY 040205, NYLJ 12042475140050 (Nov. 17, 2010). The accusatory instrument alleged a violation of Penal Law 130.20(2), which applies when a person “engages in oral sexual conduct...with another person without such person’s consent.” “The defendant’s alleged acts of touching and placing his mouth around the victim’s penis establish the occurrence of oral sexual conduct...,” wrote Judge Sciarrino. “However, the element of lack of consent has not been sufficiently pled.” He noted that the phrase “lack of consent” has a specific definition under the Penal Law: it results from (a) forcible compulsion, or (b) incapacity to consent, neither of which had been explicitly pled. However, Judge Sciarrino refused to dismiss charges of “forcible touching” (Section 130.52) and “sexual abuse in the third degree” (Sec. 130.55), finding that lack of consent to these acts could be inferred from the circumstances. “The failure of the victim to yield to the defendant’s sexual contact demonstrates that the victim did not consent. Moreover, the accusatory instrument signed by the victim in the within case clearly indicates that the alleged acts of the defendant were done without consent,” so the factual allegations were sufficient to support the charge.

New York — The Associated Press reported that Daniel Rodriguez and Daniel Aleman have pled guilty to a hate crime assault against Jack Price, a Queens, New York, man whom they attacked as he left a store near his home in College Point in October 2009. The defendants had yelled anti-gay slurs as they attacked Price, who suffered a fractured jaw and ribs, two collapsed lungs, and a lacerated spleen. A.S.L.

Legislative & Administrative Notes

Federal — Senator Frank Lautenberg (D-NJ) and Rep. Rush Holt (D-NJ) introduced the “Jyller Clementi Higher Education Anti-Harassment Act” on November 18, House co-sponsors include New Jersey Representatives Robert Andrews, Frank Pallone, Bill Pascrell, Steve Rothman, and Albio Sires, and California Representative Linda Sanchez. Senate co-sponsors include New Jersey’s other senator, Robert Menendez, and Oregon Senator Ron Wyden. The bill is named for the Rutgers University student who killed himself by jumping off the George Washington Bridge after discovering that his dormmate and another student had filmed him engaging in sexual activity with another man. The Senate bill has been assigned the number S. 3960, and is available online at: http://lautenberg.senate.gov/assets/anti-bully.pdf. The introduction Nov. 18 is largely symbolic, as actual Senate consideration will require re-introduction in the newly-elected Congress that begins in January. The measure would require colleges and universities that receive federal financial assistance to have anti-harassment policies in place that would cover, inter alia, sexual orientation and gender identity as well as the usual anti-discrimination categories under federal law. The bill resembles in some respects a measure that was approved by the New Jersey legislature later in the month (see below).

Federal Hospital Visitation Rules — On November 17, the U.S. Department of Health and Human Services announced its final rule, scheduled to go into effect early in 2011, under which all health care institutions that receive any federal money (i.e., all health care institutions) will have to have written visitation policies that include same-sex partners and don’t discriminate based on sexual orientation or gender identity. The rules also require health care institutions to notify patients upon admission of their right to designate anybody they want as authorized visitors, regardless of family status or other relationship.

Federal Partner Benefits Extended — The General Services Administration published an interim rule in the Federal Register on November 5, adopting the Office of Personnel Management’s definitions of “domestic partner,” “domestic partnership,” and “immediate family” for use in interpreting federal employees’ official business travel and relocation rules. However, due to the limitations imposed by the Defense of Marriage Act, these definitions will not apply to house-hunting trip expense reimbursements, relocation income tax allowance, income tax reimbursement allowance, or non-federal source travel — unless, of course, somebody affected by these exclusions should happen to file suit successfully seeking a declaration of unconstitutional as a violation of the Equal Protection Clause. The interim rule takes effect 120 days after publication, early in February 2011. BNA Daily Labor Report, 211 DLR A-8 (Nov. 2, 2010).

Florida — On November 23, Orange County (Orlando) Commissioners passed a Human Rights Ordinance prohibiting discrimination on the basis of sexual orientation and gender
identity, in addition to the grounds specified in state law (which do not include these categories). The effect of this is to extend protections that exist in the city limits of Orlando to the surrounding suburban areas of the county, more than a million residents who live outside the city limits. Florida Together Press Release, Nov. 23.

New Jersey The legislature passed what some called the nation’s toughest state anti-bullying law, sparked by the suicide of Tyler Clementi several weeks before the vote. The measure builds on a 2002 anti-bullying measure, by moving from exhortation to mandatory action by school districts and public colleges and universities. The Anti-Bullying Bill of Rights broadly defines bullying and protects all students from bullying for any reason — going beyond the 2002 measure that enumerated grounds that included sexual orientation and gender identity or expression. (One criticism of the enumeration approach is that it fails to reach bullying on grounds not mentioned.) The measure sets deadlines for reporting, investigating and resolving bullying complaints, requires establishment of anti-bullying teams at the school level, and grades schools on their anti-bullying efforts. The bill passed both houses of the legislature by veto-proof majorities and was pending before Gov. Chris Christie at month’s end.

Tennessee — A measure intended to forbid sexual orientation discrimination in employment by the city of Memphis fell short of the necessary votes for enactment under the consent agenda process in the City Council on November 23. Under the Council’s rules, the measure can’t be brought up for debate and regular vote for at least 6 months. A study of discrimination in city government, including sexual orientation, will continue, and is expected to provide the basis for further consideration of the bill next spring. Memphis Commercial Appeal, Nov. 25.

Texas — The Dallas Independent School District board passed an anti-bullying policy on Nov. 18 that includes explicit protection for lesbian and gay students, according to a Nov. 19 report published by the Dallas Morning News online. The board voted unanimously for the new policy after hearing testimony from, among others, students enrolled in the district’s schools. Bullying on grounds of national origin, family background, political beliefs, and the usual civil rights categories as well as sexual orientation are covered, as well as cyberstalking and cyberbullying. Teachers are charged with fostering an environment of tolerance and respect in the schools, and all district employees will be required to go through training on how to notice, report and investigate bullying annually before the start of school.

Utah — The city councils in Moab and Murray have passed ordinances banning discrimination on the basis of sexual orientation and gender identity, according to a Nov. 10 report by Advocate.com. The measures address housing and employment discrimination, and bring the total of Utah cities and counties banning such discrimination to nine, including Salt Lake City. Nonetheless, the state legislature has been resistant to proposals to ban such discrimination statewide. A.S.L.

Law & Society Notes

Smithsonian Censorship — Just in time for World AIDS Day on Dec. 1, the National Portrait Gallery, a museum operated as part of the Smithsonian Institution, responded to complaints from some Republican members of Congress and some Christian organizations and removed a 4-minute video clip by the late David Wojnarowicz from a show titled “Hide/Seek: Difference and Desire in American Portraiture.” Wojnarowicz, an out gay artist who died from AIDS, had included a quick scene of ants swarming over a wooden cross lying on the ground, which was deemed offensive to Christians by some of the protesters. Rather than standing up for the free speech rights of the artist, Smithsonian officials promptly caved to the pressure, and there were fears that the entire exhibit might be in danger. Protests were planned, Washington Post, Dec. 1.

Danger to Same-Sex Marriage in Iowa — After the Iowa Supreme Court ruled unanimously in favor of a same-sex marriage claim, opponents of same-sex marriage attempted to overturn the decision by placing a constitutional amendment on the ballot. Democrats in the legislature managed to block this move. Frustrated, anti-gay advocates may try again now that the Republicans have gained control of one chamber and the governorship, and three Supreme Court justices who joined in the opinion have been ousted in a retention vote after a campaign fueled by out-of-state money. However, Senate Majority Leader Michael Gronstal, who retains control of the leadership in that house by a slim majority, vowed to block any attempt to put an anti-gay marriage constitutional amendment on the ballot. Chicago Tribune, Nov. 12.

Equalizing Benefits — Barclays PLC, a British based international banking corporation, has announced that it will reimburse its U.S. employees for federal taxes they have to pay on the value of health benefits provided for their same-sex partners. A handful of major U.S. employers have previously taken this step in order to provide equal benefits to all their employees whose non-marital partners are covered by company benefit plans. Because the federal government refuses to recognize same-sex partners as spouses under the Defense of Marriage Act, provision of benefits to such partners falls outside the tax-favored treatment provided under the U.S. Internal Revenue Code for benefits for an employee’s family members.

Transsexual Golfers — Members of the Ladies Professional Golfing Association (LPGA) voted Nov. 28 to change the organization’s constitution to remove the membership requirement of “female at birth,” which had been adopted specifically to exclude from membership transsexuals who were born with male genitalia. As a result of this change, female transsexuals (born male who transitioned to female identity) will be allowed to join and compete in LPGA-sanctioned tournaments as women. A.S.L.

International Notes

United Nations — Outrageously, the United Nations General Assembly voted on Nov. 16 to remove explicit mention of sexual orientation from a resolution condemning extra-judicial summary executions. The U.N. resolution is intended to put the world body on record in support of fundamental principles of due process of law that must be followed before a member state can take somebody’s life. The African nation of Benin sponsored a resolution to remove mention of sexual orientation, which passed by a vote of 79-70, from the existing resolution, which has been the official statement of the organization’s policy for the past decade. The usual anti-gay suspects either supported the removal or abstained on the vote, while the western democracies and some of their former colonies voted in opposition.

Australia — The Army announced that it would pay for a gender reassignment procedure for Captain Matthew Clinch. Clinch, who has twice served in East Timor, hoped to return to his same Army position after transition to Bridget Clinic. Clinch asserted that the transition would not affect her ability to be an Army officer, and the head of Defence People Capability, Major General Craig Orme, agreed, stating that being transgender was no barrier to serving in the Australia Defence Force. General Orme did admit that the case, the first of its kind, had forced a steep learning curve about transsexuality on military officers. The head of the Force, Angus Houston, has ordered troops to “manage ADF transgender personnel with fairness, respect and dignity. . . and ensure all personnel are not subject to unacceptable behaviour.” Advertiser (Australia), Nov. 8. As we report this, we marvel at how much more sophisticated Australian military officials are compared to their U.S. counterparts, as we struggle to deal with the continuing ban on military service by openly gay people — a debate during which the medical exclusion of transsexuals from military service has not yet even been raised. (The U.S. medical exclusion is not part of the “don’t ask, don’t tell” policy, which only applies to issues of sexual orientation.
While there is no statutory ban on service by transsexuals in the U.S., military regulations provide that transsexuals are disqualified from service and will be discharged once identified.

**Australias** — The Tasmanian Green Party announced that it will introduce a bill in the Parliament of Tasmania to legalize same-sex marriages. **Wockner International News** #864, Nov. 15.

**Brazil** — Two Army sergeants were arrested in connection with the shooting of Douglas Igor Marques Luiz, a gay man who was participating in the Rio de Janeiro Gay Pride Parade, according to a Nov. 18 report in the **New York Times**.

**Canada** — Vancouver Procuratorial Court Judge Jocelyn Palmer concluded that Shawn Woodward, charged with aggravated assault again a gay bar patron, was guilty of a hate crime, and imposed an enhanced prison sentence of six years. “I see no possibility for Mr. Woodward’s abhorrent behavior,” said the judge, “other than virulent homophobia.” Woodward, 37, was in the Fountainhead Pub, an establishment in Vancouver’s West End predominantly-gay neighborhood. Also present was Ritch Dowrey, 62, who was celebrating his retirement with friends. According to trial testimony, Dowrey had placed his hand on Woodward’s shoulder and offered him a drink. Woodward responded by punching Dowrey in the face and, after Dowrey fell to the ground, stepping on him, and leaving the pub, telling those around him that he was not a “faggot” and referring to Dowrey as a “fag.” He was apprehended by pub patrons and held until the police arrived. Dowrey suffered serious brain damage and will need special care for the rest of his life. The judge referred to Woodward as “a man of flawed character, who has yet to express any remorse for or acknowledge the catastrophic harm done to Mr. Dowrey and his family,” and that there was no provocation to justify his conduct. **Globe & Mail**, Nov. 9.

**Colombia** — The Constitutional Court voted 5-4 in a ruling announced November 11 that it would not decide a pending case seeking the right of same-sex couples to marry, on the ground that the plaintiffs had not “sufficiently argued” in support of their legal claims. This refusal to rule on the merits was seen as inexplicable, given the arguments mounted by plaintiffs and in amicus briefs. The court noted two potentially relevant constitutional provisions, one banning discrimination in civil rights and liberties, the other guaranteeing the right of men and women to marry. In the course of their opinion, the court apparently misconstrued a recent decision by a chamber of the European Court of Human Rights rejecting a claim for same-sex marriage filed against Austria, in which that court had considered the provision of the European Convention guaranteeing the right of men and women to marry as not precluding a gender-neutral construction of the marriage right, but rather premised its decision denying the claim in that case on the lack of a European consensus on the question. (Thanks to Rob Wintemute of King’s College, London, Faculty of Law, who participated in an amicus brief on the point and posted an explanation.) One can only conclude that this was an entirely political decision promulgated by a timid court. Activist expressed the hope that they could get the legislature to pass a measure similar to that passed recently in Argentina, making the court’s timidity irrelevant. **CNN.com**, Nov. 12.

**European Union** — In a move that seems contrary to the free speech protection in the European Convention on Human Rights, the European Union has issued a new directive obliging all member states to criminalize a wide range of erotic depictions in the name of protecting children from sexual exploitation and harm. According to a summary provided by Helmut Graupner, the Austrian gay rights attorney who closely monitors EU activity on the subject, the new directive, KOM (2010) 94, repeals exceptions to an earlier directive aimed at combating child pornography, resulting in a situation where depictions of young adults may come within the ban, even where the models or actors are of adult age, if it could be claimed that they appeared underage. If a majority of judges in a particular case judged the images to depict what appear to be minors, criminal penalties could be imposed. Member states are expected to alter their laws accordingly, and a test of these measure in the Court of Human Rights would not be available until prosecutions take place under the new laws.

**European Parliament** — The European Parliament adopted a statement providing that birth and death certificates, marriage certificates, and similar official state papers signifying family status relationships, must be recognized as having the same legal effect in every European Union nation. At present, many nations in the Union provide some form of legal recognition for same-sex partners and, in some nations, unmarried different-sex partners. The forms vary widely. Within the Union, same-sex marriage is available in Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden. Other countries have various forms of civil partnerships, civil unions, and registered partnerships, in some cases equating marriage in status, in others carrying a more limited list of rights and protections. This situation could lend itself to serious confusion, given the freedom with which citizens of Union nations can move across state lines to live and work. The Parliament’s action sought to take a step towards clarification. Ulrike Lunacek, co-president of the European Parliament Intergroup on LGBT Rights, called the Parliament’s action “a great development for the many couples and families who see their fundamental rights diminished every day when crossing a border inside the EU.” **Wockner International News**, #866 (Nov. 29, 2010).

**Kenya** — Prime Minister Raila Odinga stirred up consternation on November 26 when he reportedly told a political rally that homosexuals should be arrested and brought before relevant authorities. The comment came just months after Special Programmes Minister Esther Murugi had called for recognition and acceptance of gays. These comments are being made in the context of heated debate over the adoption of a new constitution. Reacting to the media uproar over his remarks, PM. Odinga then back-tracked, stating that he was not calling for a mass arrest of gay Kenyans, and that “I understand that there are gay rights.”

**Mexico** — Mexico’s House of Representatives voted 232-58 on November 9 to amend social security rules to extend medical and social benefits to same-sex couples. The measure goes to the Senate for further consideration. At present, Mexico City is the only jurisdiction within the country that allows same-sex couples to marry. **SFGate**, Nov. 9.

**Netherlands** — Bowing to pressure from the Equal Opportunities Commission, the University of Amsterdam has agreed to issue a replacement diploma to Justus Eisfeld, a transsexual alumnus of the University who was identified as a woman when he graduated in 2001 but has since transitioned to male gender identity. Eisfeld sought a new diploma and was turned down by the University, which relied on a law that bars universities from issuing replacement diplomas. A University spokesperson said that once the legal issues were sorted out, the University was happy to issue the replacement diploma. The Commission’s Chair, Laurien Koster, said that the University “should have recognized that a gender change is a reason to replace a diploma.” Eisfeld now lives in New York City. **Huffington Post**, Nov. 30.

**Russia** — Having been scolded by the European Court of Human Rights, now the Russian government is willing to allow gay-rights demonstrations, and a small one — the first to be legally sanctioned — took place in St. Petersburg on November 20. In the event, the police claim not to have anticipated the opposition that would emerge on the street, and security forces were outnumbered by anti-gay demonstrators, whose offensive behavior cut the demo short, according to a report in **Gay City News** by Doug Ireland.

**Saudi Arabia** — Bloomberg News reported on-line on Nov. 10 that a 27-year-old man arrested by Saudi police for sodomy and cross-dressing. He was fined the equivalent of $13,300 (50,000 riyals) and sentenced to five years in prison and 500 lashes. The story was attributed to a Jeddah-based publication, **Okaz**. In common with other Islamic republics, Saudi Arabia imposes severe penalties for homosex-
ual conduct and makes no pretense of respecting the human rights of LGBT people.

Uganda — A publication called “Rolling Stone” (not related to the U.S. publication of the same name) published a list during October of what it claimed to be 100 leading gay and lesbian Ugandans, with a yellow banner declaring “Hang Them.” Several of those named suffered harassment of various kinds, and there was outrage expressed in the international press. When “Rolling Stone” published another such list at the beginning of November, the gay rights group Sexual Minorities Uganda filed an invasion of privacy suit on behalf of those names and applied for a temporary injunction against further such publications, which was granted by the court pending a hearing on the merits of the case. Religion Clause, 2010 WLNR 21899313 (Nov. 2, 2010).

United Kingdom — A campaign seeking same-sex marriage rights has been launched. On November 2, Rev. Sharon Ferguson and her partner, Franka Streitzel, announced that having been denied a marriage license they will file a lawsuit challenging the denial on legal grounds. The U.K. offers same-sex partners civil partnerships that carry the legal rights of marriage, but deny them admission to the same legal status available for different-sex couples. Several other same-sex couples are expected to file suit, in a campaign being coordinated by U.K. activist Peter Tatchell. Daily Telegraph, Nov. 3. In addition, some heterosexual couples are complaining about being excluded from civil partnerships. According to The Guardian (Nov. 9), Tom Freeman and Katherine Doyle were planning to ask for a civil partnership at the Islington Register Office, and to sue when they were turned down. Freeman told the newspaper that they sought to obtain a legal status for their relationship equal in legal rights to marriage with “free of the negative, sexist connotations of marriage.” The overall campaign seeks complete relationship equality by opening marriage to same-sex couples and civil partnerships to different-sex couples.

United Kingdom — The Court of Appeals (Civil Division) issued a ruling on December 1 in a hotly contested custody dispute between a lesbian couple and a gay man over their two children. T v. F. [2010] EWCA Civ 1366, Case No. B4/2010/1732. The father, F, had placed an advertisement indicating an interest in becoming a parent, to which a lesbian couple, identified as M and L in the opinion by Lady Justice Black, responded. M bore the two children, who are now 10 and 7. The understanding was that the children would primarily live with M and L, but that F would have the role of a father in their life. Over time various misunderstandings about custody and living arrangements arose. M and L, who are civil partners, were unhappy about L having a lesser legal status towards the children than F, and were appealing the trial court’s determination that F and M have shared residential custody, with the children living for a substantial part of the year (cumulating to some 110 days) with F. They were also concerned that should anything happen to M, F could claim sole custody of the children, depriving L of a continued parental role. F had conceded his willingness to have the residential custody status broadened to include all three adults (but not his own same-sex partner, evidently, who is mentioned briefly at the outset of the opinion). The court said it would have upheld the lower court’s order in the case without modification were it not for F’s willingness to agree to a residence order that included both M and L. The court noted that each determination of a case like this is heavily dependent on the facts and relationships between the parties. A.S.L.

Professional Notes

California — U.S. District Judge Vaughn Walker, author of the decision in Perry v. Schwarzenegger holding unconstitutional California’s anti-same-sex-marriage Proposition 8, who announced that he would be retiring at the end of 2010, will be teaching at the University of California, Berkeley School of Law, beginning in the spring 2011 semester. He will co-teach a course on strategic decision-making in aggregate and complex litigation, according to a Nov. 11 report by National Law Journal online.

Texas — Transgender rights activist attorney Phyllis Randolph Frye has been sworn in as an Associate Judge in the City of Houston Municipal Courts, having been appointed by Mayor Annise Parker and confirmed by a vote of the City Council. This is a part-time position, and Judge Frye will continue in the private practice of law in addition to her judicial work. Her appointment brought the usual hysterical outcry from the predictable anti-LGBT sources.

District of Columbia — LGBT rights activist Dr. Frank Kameny, a pioneering advocate who was the first to attempt to bring the gay rights issue before the U.S. Supreme Court half a century ago, will be honored at the Annual Human Rights Luncheon held in Washington on December 10 by the United Nations Committee for the District of Columbia, the District of Columbia Office of Human Rights and the city’s Human Rights Commission. Dr. Kameny will receive the 2010 Cornelius R. “Neil” Alexander Humanitarian Award. A.S.L.

AIDS & RELATED LEGAL NOTES

AIDS Litigation Notes

California — The 3rd District Court of appeal upheld an order by Tulare County Superior Court Judge James W. Hollar that defendant Paul Chacon, who pled no contest to charges of felony sexual battery of a person who is seriously disabled or mentally incapacitated and misdemeanor child molestation, submit a blood sample for HIV testing. People v. Chacon, 2010 WL 4261920 (10/29/2010)(not officially published). It is unfortunate that the court designated this opinion as “nonpublished/noncitable,” since it provides a more extensive analysis of the questions presented by the California statutes on HIV testing in the context of sex crimes than we have seen in most cases. The technical difficulty was that neither of the charges to which Chacon pled no contest are on the list enumerated in the statute for HIV testing and, additionally, Judge Hollar made no explicit findings on the record relative to the need for HIV testing, the probation department report did not recommend HIV testing, and the only record indication that it was ordered being a box checked on the minute order. This gave the court of appeal some pause, but ultimately it decided to uphold the order, finding that it was within the scope of the trial court’s authority in this case where the allegation by the slightly-retarded 18-year-old female victim was that Chacon had placed his penis in her anus. The court discussed prior appellate authority supporting upholding HIV testing orders where the defendant’s conduct could come within the scope of offenses listed in the statute, even though his guilty plea was to offenses not listed, and the conduct to which he pled no contest posed the possibility of HIV transmission. A.S.L.
Social Security Disability Cases

Texas — In Scott v. Astrue, 2010 WL 4628725 (N.D.Tex., Nov. 16, 2010), U.S. Magistrate Jeff Kaplan issued an order denying a decision by the Commissioner of Social Security to deny disability benefits to the plaintiff, an HIV+ woman who has not held gainful employment since 2002. When plaintiff appealed the denial of disability benefits, an ALJ determined after hearing that despite her HIV infection and other medical complications, she had the residual capacity to hold sedentary employment. Magistrate Kaplan found no basis for overturning that conclusion. A.S.L.

International AIDS Notes

UNAIDS — In a report released late in November in anticipation of World AIDS Day, normally observed on December 1, UNAIDS asserted that the number of new HIV infections worldwide has declined slightly, and that the number of HIV+ people receiving treatment has increased, but that funding worldwide for HIV-related treatment has failed to keep up with the need. The bottom line is that the level of the epidemic has stabilized but much more work needs to be done on prevention and treatment, especially as more widespread access to HIV antibody testing confirms that there are huge numbers of infected people who are still not receiving treatment. The brightest spot in the overall picture is the sharp decline in HIV transmission at birth, as more HIV+ pregnant women are obtaining access to prophylactic treatment.

United Nations — The UN has released a set of international guidelines, drafted jointly by the International Labor Organization, the World Health Organization, and the Joint UN Program on HIV/AIDS, to help doctors, nurses and midwives, pharmacists and laboratory technicians, health managers, cleaners, security guards and other support workers in health care institutions protect themselves from occupationally acquired HIV infection. The guidelines suggest national policies, workplace actions, and budget, monitoring and evaluation recommendations. They are stated at a very general level, but the sponsoring organizations hoped that they could prove a framework for countries to upgrade their efforts to protect health care workers in the continuing HIV epidemic. BNA Daily Labor Report, Nov. 29.

Roman Catholic Church — A surprising contribution to the battle against the spread of HIV may have come from a new, formerly obstructive source, the Roman Catholic Church, as Pope Benedict XVI stated in an extended interview published in book form during November that there were some circumstances where condom use was morally acceptable for the purpose of halting the spread of sexually-transmitted diseases. Although the example he used was inelegant — a male prostitute who was infected with HIV — and rather odd in context, clarifying statements issued after the story surfaced indicated that the Pope was apparently signaling that anybody who knows they are infected with a sexually-transmitted disease has a moral obligation to take steps to prevent the spread of infection, and condom use for that purpose might be morally justified. (We had not interpreted the Pope’s earlier remarks to be expressing moral approval for prostitution by HIV+ males who use condoms, but rather more along the line of musing about hypothetical situational ethics...) While this was not a general reversal of the Vatican’s opposition to barrier contraception, it was a first recognition by a head of the Church, more than two decades into the HIV epidemic, that exhorting abstinence for infected people is not sufficient as a prevention strategy, and that exerting moral influence against the use of condoms is a losing strategy for the Church, especially in Africa, the continent of its greatest potential growth, where local Catholic clerics had been calling for a more realistic approach from the Church.

China — What good does it do for a nation to ban HIV-related discrimination, if its own courts will not enforce the law? The New York Times reported on November 13 that a Chinese court had ruled the previous day that education bureau regulations barring HIV+ individuals from being school teachers took priority over a measure passed by the State Council, described as the government’s “chief administrative body,” that provides that “no institution or individual shall discriminate against people living with H.I.V., AIDS patients and their relatives.” The article noted that although access to treatment for HIV+ people has been expanding in China, and the national government has stopped trying to cover up the issue of HIV in that country, it remains difficult for HIV+ people to avoid discrimination in their daily lives. The Times reports: “The man who filed the lawsuit, a 22-year-old college graduate, had passed a battery of written tests and an interview when a mandatory blood test revealed his H.I.V. status, prompting the local education bureau in the eastern city of Anqing to reject his application.” The case was said to be the first HIV-discrimination claim to come to trial under the new law, and marked a major set-back. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Major Gift to NCLR Will Fund New Clerkship

The estate of Professor C. Edwin Baker of the University of Pennsylvania Law School has provided a gift of $150,000 to National Center for Lesbian Rights to establish the C. Edwin Baker Clerkship, providing stipends for student law clerks and fellows. Prof. Baker, a heterosexual man, was a longtime supporter of LGBT rights, inspired by his lesbian sister. Among other things, he wrote op-ed pieces in support of gay things, he wrote op-ed pieces in support of gay

LESBIAN & GAY RELATED LEGAL ISSUES:


Berall, Frank S., Update on Evolving Legal Status of Same-Sex Marriages, 37 Est. Plan. 21 (December, 2010).


Duncan, William C., Problems of Classification, 4 Liberty U. L. Rev. 465 (Spring 2010) (rearguing the Massachusetts same-sex marriage case by the sore losers).

Gilreath, Shannon (see under Tebbe, Nelson, below).


Ireland, Honorable Roderick L.. *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. Rev. 1417 (Nov. 2010) (Brennan Lecture; Note: Justice Ireland, of the Massachusetts Supreme Judicial Court, was part of the majority in *Goodridge* and has recently been nominated by Governor Patrick to be the next Chief Justice of Massachusetts).


Joslin, Courtney G., *Protecting Children(?)*: Marriage, Gender, and Assisted Reproductive Technology, 83 S. Cal. L. Rev. 1177 (September 2010).

Knight, Robert H., *How the Concept of “Sexual Orientation” Threatens Religious Liberty*, 4 Liberty U. L. Rev. 503 (Spring 2010) (By making discrimination against gay people seem immoral, that’s how…).


Lambrose, Katherine Fancys, *Getting Back to Sex: The Need to Refine Current Anti-Discrimination Statutes to Include All Sexual Minorities*, 39 Stetson L. Rev. 925 (Spring 2010).


Pedrioli, Carlo A., *The Rhetoric of Catharsis and Change: Law School Autobiography As A Nonfiction Law and Literature Subgenre*, 41 McGeorge L. Rev. 843 (2010) (An examination of law review articles and books relating the authors’ experience of law school includes discussion of the writing of two openly gay lawyers: Brad Sears and Kevin Reuther, both of whom attended Harvard Law School and expressed dissatisfaction about the way gay legal issues were presented — or omitted — from the curriculum).

Phillhower, Samuel J., A Moral and Political Roadblock to Viable Sex Education: How Abstinence Education Has Established Itself at the Center of Public Policy, 31 Women’s Rights L. Rep. 147 (Fall 2009).


Tebbe, Nelson, and Deborah A. Widiss; Shannon Gilreath, *Debate, The Argument for Same-Sex Marriage: Debate*, 159 U. Pa. L. Rev. PENNumbra 21 (2010) (Profs. Nelson and Widiss elaborate on their arguments in support of an “equal access” strategy as opposed to a due process/equal protection strategy for making marriage available to same-sex couples; Prof. Gilreath explains the change in his views previously expressed about the value of seeking marriage rights for same-sex couples, arguing that different strategies should be pursued for equal legal rights without embracing the heterosexual institution of marriage).


Specially Noted:

Vol. 32, No. 1 (Fall 2010) of the Comparative Labor Law & Policy Journal presents a symposium title “The Law of Workplace Bullying, with articles considering how the issue of workplace bullying is dealt with under the laws of Australia, Canada, Chile, France, Germany, Spain, Sweden, and the United States.

**AIDS & RELATED LEGAL ISSUES:**

*Does Greater Use of Criminal Law Prevent the Spread of HIV?*, 13 Int’l’l Rev. (NYLS) No. 1, p. 3 (Fall 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 Legal Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.