

END OF “DON’T ASK, DON’T TELL” MILITARY POLICY IN SIGHT

President Barack Obama signed the “Don’t Ask, Don’t Tell Repeal Act of 2010” into law on December 22, after it had been approved by the Senate on December 18 on a 65-31 vote, the majority comprising all but one of the Democrats, the two Independents, and eight Republicans. (Four members were absent from this unusual Saturday session of the Senate.) The House had previously passed the measure by a decisive vote of 250-175. This action came just over seventeen years after President Bill Clinton had signed the “Don’t Ask, Don’t Tell” mandate (10 U.S.C. sec. 654) into law in the aftermath of a fierce legislative debate that was set off shortly after his election when he reaffirmed his intention to end the existing mandatory ban on military service by gay people.

The passage of the measure marked a startling reversal of fortune on the issue, as the Senate had twice voted against bringing up for floor debate the National Defense Authorization Act to which DADT repeal had been attached. It turned out, however, that upon further investigation, led largely by Senators Joseph Lieberman (I-Conn.) and Susan Collins (R-Maine), there was sufficient support for repealing DADT in the Senate to take the unusual step of detaching the DADT repeal from the larger bill and sending it through both houses of Congress as a stand-alone measure. House passage was overwhelming, and the only question remained whether the necessary 60 votes to overcome the virtual filibuster procedure invoked by Senate Republicans to block any substantive votes on the Administration’s proposals would be there over the opposition of the Senate Republican leadership and the most outspoken opponent of repeal, Senator John McCain (R-Ariz.). The cloture vote was 63-33, and then two Republicans who had voted against cloture switched sides and voted for the bill.

The signing ceremony, held in the large auditorium at the Interior Department rather than at the White House to accommodate the large crowd of invited guests, was a festive occasion. President Obama said, “This law I’m about to sign will strengthen our national security and uphold the ideals that our fighting men and women risk their lives to defend. No longer will our country be denied the service of thousands

of patriotic Americans who are forced to leave the military — regardless of their skills, no matter their bravery or their zeal, no matter their years of exemplary performance — because they happen to be gay. No longer will tens of thousands of Americans in uniform be asked to live a lie, or look over their shoulder in order to serve the country that they love.” The President reiterated his confidence that “this is the right thing to do for our military; that why I believe it is the right thing to do period.”

The new law conditionally removes the statutory mandate underlying the current policy, under which applicants for military service are not asked about their sexual orientation and lesbians, gay men and bisexuals may serve in the military so long as they pretend that they are not gay and avoid having their sexual orientation come to the attention of any service member who might be inclined to report it a commanding officer. The existing policy presumes that people who are gay have a “propensity” to engage in “sodomy,” which is a violation of the Uniform Code of Military Justice, Art. 125, and thus should be separated from the service. Those who are not found to have actually violated the military sodomy law are given normal honorable discharges, while those who have been found to have violated military regulations (other than the DADT regulations) may be subject to criminal penalties under military law and receive dishonorable discharges. The policy had become a major embarrassment to the United States on the world stage as virtually all of our significant military allies have moved over the past two decades to allow openly-gay personnel to serve without any discernible adverse effect.

Prior to the adoption of the DADT policy in 1993, there was no statutory mandate (other than Article 125 of the UCMJ) pertaining to military service by gays, but the Defense Department had its own regulations, dating back to 1980, mandating that gay recruits be screened out and that personnel found to be gay be discharged, usually under less than honorable conditions. Prior to 1980, the policy gave commanders discretion to decide whether to discharge personnel found to be gay, but after the Defense Department was embarrassed by

federal court decisions finding that certain discharges of highly decorated personnel constituted an abuse of discretion, the policy was made non-discretionary. The U.S. military first adopted policies against military service by “homosexuals” shortly before World War II, responding to recommendations by military psychiatrists that homosexuals would not be desirable personnel for psychological reasons.

The new law provides that 10 U.S.C. sec. 654 is repealed after the following conditions are met: First, that the Secretary of Defense has received the report from the special working group he set up last spring to examine the policy implications of allowing openly lesbian, gay and bisexual people to serve in the military and to make recommendations on how to implement this change (this condition was fulfilled prior to the passage of the bill, when the report was submitted and made public at the end of November); Second, that the President transmit to the congressional defense committees “a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff,” stating that these officials have considered the report and its recommendations, that the Defense Department has adopted the necessary policies and regulations to implement it, and that the implementation of these policies and regulations “is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Force;” and Third, that an interval of sixty days must elapse after the certification is transmitted to Congress before the new policies take the place of the existing policy.

The law also provides that it may not be construed to require the military to provide benefits “in violation of section 7 of title 1, United States Code (relating to the definitions of ‘marriage’ and ‘spouse’ and referred to as the Defense of Marriage Act)” and that the law does not provide a private right of action for anybody.

Just before President Obama signed the measure into law, there was a last minute ploy by some Senate Republicans to prolong the period before the policy might be ended, by adding to the still-ending National Defense Authorization Bill an amendment that would add all of the service chiefs to the list of those who must join in the written certification before the old policy would sunset, knowing that at least one and perhaps more than one of the chiefs remain strongly opposed to changing the policy. However, it was reported that Senator Joseph Lieberman, an Independent from Connecticut who was one of the main strategists behind getting the bill passed, had prevailed on

LESBIAN/GAY LAW NOTES

January 2011

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Circulation: Administrator, LEGAL, 799 Broadway, Rm. 340, NYC 10003. 212-353-9118; e-mail: info@le-gal.org. Inquire for rates.

LeGal Homepage: <http://www.le-gal.org>

Law Notes on Internet: <http://www.nyls.edu/jac>

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ISSN 8755-9021

Senate Minority Leader Mitch McConnell to drop the proposed amendment.

As a result, it is now really up to the Defense Department to decide how quickly to move on the ultimate repeal of DADT. President Obama stated his expectation that it would be a matter of months, and reported that Admiral Michael Mullen, the Chairman of the Joint Staffs, was planning to take the implementation recommendations as reading on his holiday vacation. Some news reports relying on sources inside the Pentagon suggested that implementation would take much longer than that, stirring up some consternation among repeal advocates and generating new campaigns to petition for speedy implementation. LGBT rights organizations issued warnings to LGB service members against “coming out” until the final repeal was effected, although it appeared that the Pentagon had put an informal hold on discharges. By the same token, the Defense Department is unlikely to process enlistment applications from openly LGB individuals until the repeal of the existing policy is final.

In the meantime, of course, there is pending litigation to deal with. The Department of Justice obtained a stay of the federal district court’s ruling in *Log Cabin Republicans v. United States*, 2010 WL 2010 WL 3526272 (C.D. CA, Sept. 9, 2010), pending appeal to the 9th Circuit. On December 29, the Justice Department filed a motion asking the 9th Circuit to put the case on hold with the expectation that

the policy will have been replaced by the time that a decision could be rendered in the case, making it moot, as the relief sought in the case is the end of the policy. Two other pending cases present different issues. In *Witt v. U.S. Department of the Air Force*, 2010 WL 3732189 (W.D. Wash, Sept. 24, 2010), the district court ordered the reinstatement of a lesbian Air Force Reserve nurse who had been discharged under the DADT policy, and the Justice Department had indicated its intention to appeal to the 9th Circuit. Presumably, that appeal will be dropped. A new case, *Almy v. U.S. Department of Defense*, was filed in the U.S. District Court in San Francisco on December 13, seeking reinstatement on behalf of three gay men who were dismissed under DADT, Michael D. Almy, Anthony J. Loverde, and Jason D. Knight, on the ground that the policy under which they were discharged violates their constitutional rights. One presumes this case will either be withdrawn or the Justice Department will move to dismiss it as moot. Of course, while the DADT policy remains in effect, these cases are not moot, and it is possible that their pendency will provide some pressure — in addition to political pressures — on the Defense Department to move expeditiously towards the necessary certification to Congress.

In a bit of bizarre fallout from the congressional action, a Virginia state legislator called for the state to adopt a policy of excluding gay people from serving in the Virginia National

Guard, contending that an end to DADT will “weaken recruitment and increase pressure for a draft.” Delegate Robert G. Marshall (Rep. — Prince William County), argued that under the Constitution the state retained authority to establish standards for participation in the National Guard and should not have to adopt policies in line with federal Defense Department policies. A spokesperson for Governor Bob McDonnell, no friend of gay rights, announced that although the governor disagreed with the repeal of DADT, he wanted uniformity in military regulations and would not support Virginia adopting a policy different from that adopted by the Defense Department. *Richmond Times*, Dec. 21. Marshall subsequently pressed his arguments in an op-ed column published in the *Washington Post* on Dec. 31..

Finally, where is the T (from LGBT) in all of this? The answer is that the DADT policy adopted pursuant to statute in 1993 does *not* deal with transsexuality. That is dealt with under Pentagon regulations that classify transsexualism as a medical ground for exclusion from service, which is not affected by the DADT Repeal Act. The debate about repeal of the DADT policy was entirely focused on lesbian, gay and bisexual service members, leaving the issue of transsexuals open for further discussion. And a recent decision by the Australian military forces to cover the cost of gender transition for a transsexual service member suggests that the Defense Department should start thinking about this issue. A.S.L.

LESBIAN/GAY LEGAL NEWS

Court of Appeals of Minnesota Casts Doubt on Second-Parent Adoptions

Ruling on December 14, 2010, in *Adoption of T.A.M. and E.J.M. v. L.A.M.*, 2010 WL 5071361 (Minn.App.), a case involving former same-sex female partners doing battle over the custody and status of children conceived during their relationship, the Court of Appeals of Minnesota affirmed a district court’s determination that a motion brought by the biological mother of twin girls seeking to vacate her former partner’s adoption of the children that took place nearly eight years previously should be dismissed as untimely, while at the same time casting doubt on whether such adoptions are lawful in Minnesota.

In addition to alleging that the twins’ adoptions had resulted from factual error and fraud, the biological mother argued that Minnesota law does not authorize second-parent adoption by same-sex couples or unmarried persons and, accordingly, that the adoptions should be vacated. Though the Court of Appeals insisted that it would not “reach the issue of whether Minnesota law authorizes unmarried second-parent, same-sex adoption,” the court, in the

context of considering sanctions imposed by the district court against the attorney and the biological mother in part for making this legal argument, nonetheless engaged in a significant analysis of the issue going so far as to conclude that the argument is “sufficiently reasonable” as to preclude the imposition of penalties for making it.

The Court of Appeals ultimately affirmed the imposition of sanctions on other grounds cited in the district court decision, however, but its seeming nod at the potential plausibility of such an argument all but invites future litigation on the issue as well as the possibility that its treatment of the issue will be used as a sword by the biological mother in ongoing parenting-time and other disputes between the former couple.

The biological mother had given birth to twin girls in July 2001. The children were conceived with the assistance of a former boyfriend of the biological mother who relinquished all parental rights upon the twins’ birth. At an adoption hearing soon after the twins’ birth, the biological mother expressly supported the adoption by her then-partner and answered affirmatively that she understood that her part-

ner’s legal parental status would continue even if the relationship between the two partners ended.

The relationship ended soon after the adoptions and disputes over custody, parenting time and child support followed. In the intervening years, the biological mother also married a man who is neither the biological father nor a party to the dispute.

In April 2009, nearly *eight years* after the twins’ birth, the biological mother brought a motion seeking to vacate the adoptions by her former partner, arguing that the twins’ adoption had resulted from factual error and fraud, and that Minnesota law did not authorize adoptions by same-sex couples or by unmarried persons regardless of gender.

The district court deemed the legal arguments to be both unfounded and untimely. It not only dismissed the motion but severely sanctioned the biological mother and her attorney by ordering them to pay the defendant’s attorneys fees in light of the tardiness of the motion, the unfounded legal and factual arguments, and because the biological mother brought the motion for improper motives while her attorney was personally “disingenuous” for making the

arguments on her behalf, given that his own law firm had previously advertised its adoption services for unmarried and same-sex couples.

The Court of Appeals affirmed the district court's determination that the motion was untimely and noted that the appeal brought by the biological mother failed to even challenge that basis for the district court's dismissal of her motion. Further, the court easily affirmed the district court's dismissal of the allegations of fraud, which concerned the supposed false representation to the adoption court about the method of the biological mother's insemination (the adoption court had been told the children were conceived through artificial insemination when, according to the recent motion, they were in fact conceived through sexual intercourse). Accordingly, the court agreed that the sanctions imposed for these non-meritorious arguments were justified.

However, in considering the sanctions imposed by the district court, the Court of Appeals asserted that it was required to determine whether the district court relied on improper factors when it sanctioned the mother and her attorney. This stated necessity paved the way for the court's consideration of whether there was any possible merit to the argument that Minnesota law prohibits adoption by the non-biological parent in a same-sex couple. Put another way, the court called the aim of sanctions as limited to penalizing only the filing of non-meritorious claims, not the advancement of losing but arguably merited claims or theories, and considered the argument under this standard.

The Court of Appeals stated that it appeared that the district court concluded that the law indisputably allows adoption by the same-sex partner of a biological parent. The court acknowledged that the Minnesota adoption law permits "any person" who has resided in Minnesota for at least one year to petition to adopt a child provided that the child's legal parents consent to the adoption. With those requirements seemingly met in the present case, it may not have been surprising for the Court of Appeals to simply affirm the district court's determination. The Court of Appeals, however, while acknowledging the "basic logical appeal" of the district court's determination of this issue noted that the interpretation of "any person" may in fact be limited by other provisions in the adoption law. Specifically, the court cited other provisions of the law, which was first enacted in 1876, that used the terms "husband," "wife" and "spouse" in the context of the individual petitions used to adopt a child. From this and similar statutory text the court stated that one might rationally conclude that any adoption creating a two-parent relationship to the adopted child requires that those parents be married at the time of the adoption. As a result, the court held that the sanctions imposed

by the district court could not be based on this argument.

While the court reiterated that it was considering the issue only for the limited purpose of assessing the imposition of sanctions, its interpretation seemed to go further than necessary to achieve that result. The court could have, for example, affirmed the imposition of sanctions on the alternative grounds with which it agreed (e.g., tardiness, frivolous allegations of fraud) while noting that because such grounds were enough to justify sanctions it need not go any further. Instead, the court ostensibly chose a middle ground that considered the merits for the limited purpose of assessing the imposition of sanctions. To be sure, the court, which recognized the "obvious social significance" of the claims involved in the case, could have decided the ultimate issue. Yet, the court's alternative approach seems less like a middle ground than one that will surely provide fodder to those arguing against the adoption of children by same-sex couples in Minnesota while doing little to ensure ultimate clarity among the litigants whose fight, in the end, concerns the presents and futures of two children. <MIBrad Snyder

11th Circuit Affirms Denial of Refuge for Colombian

A panel of the U.S. Court of Appeals for the 11th Circuit, ruling per curiam, denied a petition for review of a Board of Immigration Appeals (BIA) decision denying withholding of removal and protection under the Convention Against Torture to a petitioner from Colombia alleging he would be subjected to persecution and torture based on his political views and states as an HIV+ gay man. *Jaramillo-Mesa v. U.S. Attorney General*, 2010 WL 5158185 (Dec. 20, 2010) (not selected for publication in F3d). The court found that the record supported a determination by the Immigration Judge and the BIA that the petitioner was not credible.

The petitioner claimed that he was part of a group that formed within the Conservative Party to advocate for gay rights, and that as this group became more actively involved in advocacy, it attracted threats from the Revolutionary Armed Forces of Colombia (FARC). He claimed to have been kidnapped by FARC and held captive for thirteen days, during which he was "sodomized with an object" and told he must stop his advocacy and "renounce his rights as a homosexual." He contended that they used an object to sodomize him because they knew he was HIV+ and feared becoming infected. He claimed that after this incident he escaped and went to a clinic for emergency medical treatment, and then fled to the U.S. His petition for asylum was untimely, leaving him to seek withholding of removal or CAT protection.

The IJ found "significant inconsistencies" between the petitioner's testimony and the

documentary evidence in the file. For one thing, he did not mention his HIV+ status in his asylum application, raising it only later in the case, and he failed to document the claimed medical treatment. A letter from the clinic indicated they had no record of his treatment there. The IJ denied relief on credibility grounds, and the BIA affirmed. Among other grounds of appeal, petitioner argued that the IJ and BIA had failed to mention an affidavit he had submitted from a psychoanalyst stating the petitioner had been advised to take an HIV test and had informed the psychoanalyst that he tested positive. The court dismissed this point, observing that it was not necessary for the IJ or the BIA to mention every individual piece of evidence offered in the case, when they indicated that they had reviewed all of the evidence submitted.

The court found that substantial evidence supported the IJ's credibility determination, and nothing in the record compelled the court to substitute its judgment. As to the CAT claim, the court said: "The record indicated that members of the gay community actively employed the legislative and judicial systems to assert their rights and that some police were committed to investigating and prosecuting human rights violations within the gay community. On this record, we cannot say the record compels the conclusion that Petitioner would be tortured with the acquiescence of the government." This finding suggests that applicants for refugee relief from Colombia will have difficulty meeting the standards for relief in the U.S. without specific, credible evidence of past persecution or direct threats of future persecution. A.S.L.

North Carolina Supreme Court Approves Joint Custody But Disallows Second-Parent Adoption

The North Carolina Supreme Court has ruled that a second-parent adoption that a trial court approved several years ago was void for lack of jurisdiction, but that a different trial court's more recent decision to grant the adoptive parent's petition for joint custody should be affirmed. *Boseman v. Jarrell*, 2010 WL 5246132 (Dec. 20, 2010). Over dissents arguing that the court's ruling on the adoption should have been barred on grounds of finality and timeliness, the majority, in a decision by Justice Newby, refused to construe the state's adoption law to authorize courts to grant such adoptions.

The decision came in a very high profile case, involving openly lesbian state legislator Julia Boseman, who was seeking joint custody over the child she had been raising with Melissa Jarrell, the child's birth mother, when the women broke up in 2006. Boseman and Jarrell met and began their relationship in 1998, moving to North Carolina together in 1999. In 2000, they began the process of hav-

ing the child. They decided that Jarrell would bear the child, conceived with sperm from an anonymous donor, and after the child was born, the women played equal parental roles. In 2004, having heard that a trial judge in Durham County had granted a second-parent adoption, they agreed that they would apply to have Boseman adopt the child while preserving Jarrell's parental status.

The trial judge in Durham County was amenable to this, allowing them to "waive" the statutory provision under which an adoption terminates existing parental rights. Under the August 10, 2005, adoption order, the court determined that Jarrell's "limited consent" to the adoption, under which she would continue to have parental rights, was sufficient, and the court conferred full parental rights on Boseman without affecting the continuing parental rights of Jarrell. Unfortunately, less than a year later the women ended their relationship and soon Jarrell began limiting Boseman's access to the child. As a legal adoptive parent, Boseman went to court, this time in Hanover County, seeking custody of the child. In a custody dispute between legal parents, the court is supposed to decide solely on the basis of the best interest of the child. Having found that both women were fit mothers who had good relationships with the child, the court ordered joint custody, while declining to entertain an attack on the adoption that had been approved by the Durham County court.

Jarrell had opposed Boseman's custody petition, claiming that the adoption was void and that as the child's only legal parent, she should retain sole custody and have a right to determine who would have access to the child. The trial judge said it was not appropriate to question an adoption decree entered by a different court and, in any event, that Jarrell's conduct had been "inconsistent with her paramount parental rights and responsibilities" in encouraging Boseman and the child to form a parental relationship. Thus joint custody would be appropriate, consistent with other North Carolina decisions allowing custody to same-sex partners who had formed parental relationships with children under similar circumstances but in the absence of adoption decrees. On Jarrell's, the court of appeals concluded on the merits that the adoption decree was valid and that Boseman was entitled to joint custody.

In the Supreme Court, however, five justices concluded that the Durham County trial judge who granted the adoption never had proper jurisdiction to do so. They reached this conclusion by reading into the adoption statute a jurisdictional requirement that the party petitioning for adoption seek one out of the three types of adoption specifically described in the statute: either birth parents surrendering their parental rights directly to adoptive parents, birth parents surrendering their adoption rights to an agency

which would then place the child with adoptive parents, or a step-parent adoption, in which a birth or legal parent consents to adoption by their legal spouse. The court found that this case did not fit into any of those categories, rejecting any attempt to analogize to a stepparent adoption, and thus the trial court lacked jurisdiction to grant the adoption.

Insisting that in North Carolina adoption is entirely a creation of statute, Justice Paul M. Newby cited excerpts from the statutory language to suggest a literalistic interpretation in support of the court's conclusion, but this approach was sharply criticized by Justice Robin E. Hudson, who pointed out in her dissenting opinion that the legislature had also provided, in no uncertain times, that once an adoption order is issued by a court, there is a strict time limit for challenging it, which had long since passed when Jarrell raised her objection defensively in this case.

Justice Hudson also pointed out that the legislature had included a section on "jurisdiction" in the adoption statute, which spoke only to the residence of the adoptee and the petitioner and placed no other limitation on the jurisdiction of the court. Significantly, she noted, the statute said nothing one way or the other about whether a birth parent and adoptive parent could agree to waive the provision about termination of parental rights, while the statute expressly called for "liberal interpretation" to protect the best interest of children in need of adoption. Thus, she argued, the Supreme Court was violating the clear language of the statute by allowing this challenge to the adoption so long after the fact. Justice Patricia Timmons-Goodson separately dissented in a brief opinion focused solely on the statutory time limit for challenging an adoption decree, which is six months.

While a majority of the court voted to hold the adoption void *ab initio*, nonetheless the court was unanimous in upholding the lower court's award of joint custody to Boseman and Jarrell, based on earlier North Carolina rulings upholding the award of joint custody in the best interest of the child when a legal parent had acted in a manner inconsistent with her "paramount" parental rights by allowing an unrelated adult to assume a full parental role toward her child. The upshot is that Boseman will have joint custody of the child but will not be considered its legal parent, a rather strange concatenation of events and questionable from the standpoint of the best interest of the child. The majority opinion also blithely casts into doubt the effectiveness of all second-parent adoptions that have been approved over the past decade in any of the state's trial courts, in blatant disregard of the best interests of children in those adoptive families, but of course in the best traditions of judicial activism. A.S.L.

Ohio Appeals Court Rules Sperm Donor Who Sought Paternity Declaration Must Pay Child Support to Lesbian Mom

The Ohio Court of Appeals has ruled that a gay man who donated sperm to a lesbian couple so they could conceive a child, and who subsequently obtained a declaration of paternity, was obligated to pay for support of the child. *Curtis v. Prince*, 2010-Ohio-5999, 2010 Westlaw 5071195 (9th Dist., Dec. 8, 2010). The court invoked the doctrine of *res judicata* (collateral estoppel), holding that the appellant's failure to appeal the original paternity determination barred his attempt six years later to resist a child support order.

According to Judge Carla Moore's opinion for the court, domestic partners Laura Prince and Vicki Griffin asked their friend Robert Curtis, a gay man, to donate sperm so they could conceive a child. Curtis initially resisted, but ultimately agreed and a child conceived with his sperm, M.P., was born to Prince in July 2002. Curtis, Prince and Griffin had signed a written agreement providing that Curtis's name would not appear on the birth certificate and he would not be designated as the father, but that he could babysit the child from time to time.

However, shortly after M.P. was born, Curtis instituted an administrative proceeding before the Summit County Child Support Enforcement Agency to determine his paternity, and the agency made an administrative paternity determination that Curtis was the father of M.P. on November 27, 2002. Several months later, the agency ordered Curtis to provide child support of \$282.56 per month, but Curtis appealed this determination to the trial court, which found that Prince had waived child support. The trial court record shows that Curtis had also sought an order for parenting time with M.P., but the court noted that he would have to file a separate motion for determination of that issue, and he never did so.

Curtis subsequently moved from Ohio to Florida, where he currently resides. Evidently Prince changed her mind about needing child support for M.P., as the agency file an administrative action seeking child support on her behalf in December 2008, and a magistrate heard the case on April 2, 2009. Curtis and Prince both appeared pro se. Curtis argued that as a sperm donor for alternative insemination, he should not be held liable for child support. The magistrate rejected this argument, ordering that he pay \$533.22 a month. Curtis retained counsel and filed an objection, which the trial court sustained, finding that since Curtis was a sperm donor, there was "no legal basis for imposing upon him a child support order." The agency appealed.

The court of appeals agreed with the agency's argument that the trial court abused its discretion by finding that the parties had partici-

pated in “artificial insemination” in light of the prior, unappealed determination of Curtis’s paternity. Judge Moore pointed out that an administrative determination that is not appealed stands as a final judgment on the merits. Curtis did not appeal the paternity determination (no surprise, since he had initiated the paternity proceeding), but he had appealed the initial order that he pay child support. When Prince waived any claim to child support at that time, the case was closed, the appeal not judicially decided. “Any challenge regarding artificial insemination should have been raised at that time,” wrote Judge Moore. “Therefore, collateral estoppel barred him from raising artificial insemination as a defense to the child support action brought several years later.” “In light of the personal relationships in place at the time of the child’s conception, the trial court’s attempt to create an equitable result is understandable,” Judge Moore continued. “However, Curtis’s failure to challenge the paternity determination at the appropriate time precludes him from doing so at this time.” Thus, the trial court’s decision was reversed, with the court of appeals ordering that a special mandate issue directing the Court of Common Pleas to “carry this judgment into execution,” requiring Curtis to begin paying child support. Under principles of full faith and credit, the court’s order will be enforceable in Florida courts if Curtis resists payment.

The court also mentioned a second assignment of error brought by Prince, on which it declined to rule. Prince argued that because the parties had not complied with statutory requirements to establish artificial insemination, Curtis was not entitled to the protection against financial liability that would ordinarily be provided to a sperm donor. But the court found this issue moot in light of its collateral estoppel ruling.

Summit County prosecuting attorneys Sherri Bevan Walsh and Lisa M. Vitale represented the Agency and Prince, while private attorney Sarah Cabinet represented Curtis on the appeal. A.S.L.

New Jersey Appellate Division Affirms Demotion for Homophobic Corrections Officer

In *Matter of Pedro Delgado*, 2010 WL 4977101 (N.J. App. Div., Dec. 9, 2010), the Appellate Division of the New Jersey Superior Court affirmed an administrative determination by the state’s Civil Service Commission demoting a corrections officer from the rank of lieutenant to sergeant on account of repeated offensive remarks he made to a lesbian subordinate that were related to her sexual orientation. The Commission’s determination was based on findings of fact by an administrative law judge after a three day hearing involving fourteen witnesses.

Delgado had been a corrections officer in the Middlesex County Corrections System since 1987. The ALJ found that he had received copies of the County’s sexual harassment policy over the years. W.P., the complainant, began working for the system as a “civilian employee” in 2001. She became friendly with Delgado, and became a corrections officer in 2004.

The record indicates that W.P. began having problems with Delgado in 2007, after he was promoted to lieutenant and became a shift commander. The remarks that W.P. found objectionable included, “Tell him I’m the only guy you ever f__ked,” “You are my favorite boy” (both said to W.P. in the presence of others, including other officers), “She’s more man than you’ll ever be” (said about W.P. in the presence of others), and “What are they, your testosterone pills?” (said when she was taking headache medication, in the presence of other officers). In some cases W.P. just walked away, but on another occasion, she filed an informal complaint. The record indicated that Delgado was admonished by another lieutenant that his comments were inappropriate, that, as a supervisor, he was held to a “higher standard” than rank-and-file corrections officers.

W.P. filed a formal complaint in January 2008, which was investigated by the County’s affirmative action officer. At trial, Delgado initially denied that he made any of the comments, but then claimed that when he said that she was “more of a man,” he intended it as a compliment. The ALJ and the Commission rejected his defensive arguments, finding that Delgado’s statements had been made and were inappropriate, that they constituted conduct unbecoming a public employee, discrimination and sexual harassment. The Commission reviewed the ALJ’s suggested penalty of demotion “independently,” and found that the suggested penalty did not violate the principles of progressive discipline because the conduct was “egregious” considering “his utterly offensive and derogatory comments based on the subordinate’s sexual orientation.” Delgado also argued that the ALJ failed to make a determination that the comments complained of were “unwelcome” by W.P. or that they constituted unlawful conduct. The ALJ, the Commission and the Appellate Division all rejected this claim. The ALJ found W.P. credible, and Delgado evasive and unconvincing in his claims that the comments were not “unwelcome,” and thus in violation of the law. The Appellate Division quoted with approval Commission’s conclusion that Delgado’s “contention that the policy only covers ‘unwelcome conduct’ is unconvincing as the comments, whether welcome or not, were offensive and inappropriate on their face.” Delgado’s other claims, relating to alleged bias by the investigating officer, denial of due process rights, error as to evidentiary determinations, and error

as to severity of punishment, were likewise rejected. *Steven Kolodny*

Texas Appeals Court Affirms Application of Dating Relationship Anti-Violence Statute to Same-Sex Relationships

In *Ochoa v. Texas*, 2010 WL 4910900 (Tx. App. Ct., Dec. 2, 2010), Judge Elsa Alcalá wrote for the Texas Court of Appeals affirming a judgment by the Harris County District Court convicting Alfred Ochoa of felony assault involving dating violence in the context of a same-sex relationship. The dating enhancement elevates misdemeanor assault to a third-degree felony. Ochoa’s argument turned “solely on a question of law: whether the statutory term ‘dating relationship,’ properly construed, unambiguously encompasses same-sex relationships.” The court held that it does.

According to Judge Alcalá’s opinion, after three years of platonic friendship, Ochoa and the victim — William Crump — began a sexual relationship. For nine days, appellant resided at Crump’s house, and the two slept together in Crump’s bed. Crump regarded appellant as his boyfriend, and they had sex on multiple occasions. Crump testified that he considered their relationship to have been of a “sexual” nature as opposed to of a “romantic” nature. However, when they went out, their friends treated them as a couple.

Ochoa attacked Crump after Crump broke up with him and refused to pay back a twenty-dollar loan. Ochoa hit and kicked Crump, and he fell into a ditch as Ochoa continued the attack. When the police arrived, Crump was bleeding from his nose and mouth, and his eyes were swollen. The next day, Ochoa came to Crump’s house to apologize. Crump’s roommate called the police, and an officer arrested him.

Ochoa argued on appeal that his conviction should be thrown out because, among other things, the dating violence statute did not cover same-sex relationships. Even if it did, he argued, it was unconstitutionally vague and failed to give notice that it applied.

For purposes of the dating violence law, the existence of a dating relationship is determined by considering: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship. It excludes “a casual acquaintanceship or ordinary fraternization in a business or social context.”

Ochoa argued that the law could not encompass intimate, same-sex relationships because, at the time of enactment, Texas had a criminal sodomy law. Thus, interpreting the term “dating relationship” to encompass same-sex relationships would have led to an “absurd result,” because it would have meant that the Legislature provided special protection for partners in

same-sex relationships at the same time that same-sex intercourse was illegal.

The court rejected this argument and held that the statutory term “dating relationship” plainly and unambiguously applies to both same- and opposite-sex relationships. The court reasoned that the “Legislature could have reasonably determined that people in these relationships, whether legal at the time or not, needed special protection from an abuser. Furthermore, as acknowledged by appellant’s counsel at oral argument, a dating relationship between individuals of a romantic or intimate nature need not include sexual intercourse. The Texas Penal Code has never prohibited a dating relationship between people of the same sex; rather, it disallowed deviate sexual intercourse.”

Ochoa also argued that the statute was void for vagueness under the Due Process Clause of the Fourteenth Amendment. He gave two reasons: 1) because it failed to give notice that a same-sex dating relationship was included under its definition and 2) the law was unclear as to what constitutes a “dating relationship,” regardless of the sex of the participants.

The court rejected the first argument by pointing to its holding that same-sex dating relationships were clearly covered by the framers’ intentions for the law. It rejected the second argument on the basis that appellant’s relationship with Crump was clearly covered by the statute, as they had “cohabitated for the length of their relationship, they shared the same bed, they frequently had sex, and they were known by others to be a couple.” The court also reasoned that the criminal prohibition assault was the conduct of which a defendant needed notice for purposes of due process, not the status of the actor’s relationship to the victim.

Defendant-appellant was represented by Winston E. Cochran Jr. and the state was represented by Michelle Ruth Townsend, Assistant District Attorney, and Patricia R. Lykos, Harris County District Attorney, Houston, TX. *Daniel Redman*

Washington State Appellate Court Applies Community Property Law to Same-Sex Couple’s Breakup

Courts in states without same-sex marriage are adapting existing family law and equitable principles to the dissolutions of domestic partnerships. An appellate court in Washington State thus upheld a trial court’s dissolution of a domestic partnership using the Washington legal concept of an “equity relationship” requiring equitable distribution of a couple’s property. *In re the Meretricious Relationship of Long and Fregeau*, 2010 WL 5071860 (Wash. App. Div. 3, Dec. 14, 2010). The term “meretricious relationship” in the title of the case is a Wash-

ington State legal term of art, with essentially the same meaning as “equity relationship” or “committed intimate relationship.” The court briefly notes the derogatory connotation of “meretricious,” and declines to use the term for the remainder of the decision.

Jeremy Long and David Fregeau were in a “committed intimate relationship” from 1999 to 2008. Fregeau was married to a woman, although separated, during most of that time, and received a divorce in 2007. During their time together, the men lived with each other, purchased homes and investment property together, and were in a “marriage-like relationship.” Each of them had sexual relations outside their partnership, although it appears that Long’s infidelity was of greater duration and more frequent than Fregeau’s.

When Long and Fregeau broke up in 2009, division of their property became an issue. One of the complications was that title to one of their properties was in the name of Fregeau’s daughter, Kirsten, even though both men paid for the property and for its upkeep. Another issue was that Fregeau claimed a retirement account that was entirely his, and not a part of their mutual property.

In March 2008, Long sued for an equitable property division. Under Washington law, for such a division to be available, the court must find that the couple had an “equity relationship,” which is a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” Fregeau claimed that it could not be an equity relationship because he was married to a woman at the time. However, the court cited precedent stating that “equitable claims are not dependent on the legality of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties.” Thus, equitable distribution is available to gay couples, even if one remains legally married to a different-sex partner.

A court must analyze five factors in a relationship to determine whether it is an equity relationship. The partnership of Fregeau and Long met the requirement under each of the factors. The factors are: 1. Continuous cohabitation. 2. Duration of relationship. 3. Shared purpose, such as mutual love, care, support, sex, intent to retire together. (The court found that the infidelity of the parties did not take away from their shared purpose in the relationship.) 4. Pooling of resources. 5. Intent to be in a marriage-like relationship. Reviewing these factors in regard to the Long-Fregeau relationship the court found that an equitable property distribution was appropriate.

An issue arose as to whether Fregeau’s retirement accounts should be equitably distributed. The court said no. Property acquired through the joint efforts of the parties, or contributed to by both parties, is subject to distribution. The

accounts at issue here were established prior to the relationship. Long was not able to produce evidence to show that he had contributed to the accounts during the relationship. Therefore, the accounts belonged solely to Fregeau, and were not distributable. (The trial court had considered the accounts in making its distribution; that portion of its decision was overturned by the appellate court.)

Fregeau’s daughter Kirsten intervened, contending that her status as a record owner of one of the properties makes her a necessary party to the action. The court ruled that the title owner of the property is not a necessary party in a distribution, because her omission did not prevent the trial court from giving complete relief. The distribution did not impair her interest in the property or subject her to conflicting liability, since the house was placed in her name solely as a “divorce accommodation” to Fregeau. Thus, for the most part, the appeals court approved of the equitable distribution ordered by the trial court. *Alan J. Jacobs*

Federal Civil Litigation Notes

Arizona — The Equal Employment Opportunity Commission (EEOC) has settled a case against the owners of Flemington’s Prime Steakhouse and Wine Bar in which it was charged that Flemington’s failed adequately to address claims by three male employees that they had been subjected to sexual harassment by the male head chef of the restaurant, who was never disciplined and was allowed to resign after complaints against him had accumulated over the course of a year and a half. Under the terms of a consent decree approved the U.S. District Court on November 23 and made public on December 8, the defendant agreed to an injunction and monetary relief, including individual payments to the three employees and a payment of \$248,750 to the EEOC. Of course, in the consent decree the defendant does not admit to any violations of Title VII, but indicates it is settling to avoid the burdens of litigation. *EEOC v. OSI Restaurant Partners, Inc.*, No CV-07-683-PHX-SMM (D. Ariz., consent decree filed 11/23/2010).

Georgia — Lambda Legal announced a settlement in *Calhoun v. Pennington*, a federal civil rights suit arising from a notorious bar raid by Atlanta Police. According to the Lambda Press Release (Dec. 8), the federal court order ending the case includes a finding that each of the 26 plaintiffs was unlawfully searched, detained, and/or arrested during the raid and that none was personally suspected of criminal activity — thus there was no probable cause for the actions of the police toward them. The settlement requires policy changes and training, and a payment by the City of Atlanta to the victims totaling \$1,025,000. The plaintiffs were represented by Atlanta attorney Daniel J.

Grossman with lawyers from Lambda Legal, the Southern Center for Human Rights, and the law firm of Robins, Kaplan, Miller & Ciresi LLP.

New York — The *Advocate* (Dec. 11) reported that a federal jury had awarded \$480,000 to Melissa Stampf, a lesbian who was a locomotive engineer on the Long Island Railroad, after deciding she was wrongly accused of and arrested for fondling a co-worker's breast. Stampf sued the railroad and the person who falsely accused her in the U.S. District Court for the Eastern District of New York, claiming discrimination based on her race, gender and sexual orientation. The *Advocate* based its story on an article in the *New York Daily News*. A.S.L.

State Civil Litigation Notes

Massachusetts — The Supreme Judicial Court has vacated and remanded for new trial a sexual orientation discrimination verdict involving a former employee of the Somerset Town Highway Department, finding that the trial court erred in allowing testimony that went beyond the scope of the Mass Commission Against Discrimination's investigation based on the original discrimination charges filed in the case. *Pelletier v. Town of Somerset*, 2010 WL 4984810 (Dec. 10, 2010). The jury had found a statutory violation and awarded substantial damages, which the trial judge reduced in response to a post-trial motion by the Town, which argued concerning the scope of evidence introduced at trial. Plaintiff accepted a remittitur that still resulted in substantial damages, and both parties appealed. The SJC found that the complaint in the case concerned conduct towards the plaintiff by a particular supervisor, and that it was inappropriate to allow evidence about conduct that predated this supervisor's tenure. Such evidence tainted the trial, requiring a remand for a new trial on the merits. A.S.L.

Criminal Litigation Notes

New York — The *Advocate* reported on Dec. 14 that Daniel Aleman had been sentenced to eight years in prison for participating in an anti-gay attack on Jack Price of Queens, N.Y., that required three weeks of hospital treatment. Aleman sought to excuse his conduct by claiming intoxication. The other man who participated in the attack, Daniel Rodriguez, pleaded guilty to a hate crime and was yet to be sentenced. A.S.L. @H2 = Legislative Notes
Federal — In a symbolic move undertaken during the lame duck session of the 111th Congress, several outgoing House committee chairs introduced the Housing Opportunities Made Equal Act ("HOME Act") to expand the coverage of the federal Fair Housing Act to ban discrimination based on sexual orientation, gender identity, marital status, or source of income.

The co-sponsors are Jerrold Nadler (D-NY), John Conyers (D-MI), and Edolphus Towns (D-NY). It is highly unlikely that the incoming Republican committee chairs of their respective committees will take any interest in advancing this legislation, which would have to be re-introduced in the 112th Congress before it would receive any committee attention.

Indiana — Monroe County has enacted a human rights ordinance that includes sexual orientation and gender identity among the grounds of prohibited discrimination. The County Commissioners have established a seven-member body charged with preventing discrimination in the county. The commission's duties will include consulting with county attorneys to determine whether discrimination charges are valid, scheduling public hearings on complaints, attempting to mediate disputes, and seeking court enforcement of agreements achieved through mediation. The *Herald Times* (Dec. 31) article reporting on the legislation did not indicate that aggrieved individuals could bring their complaints to court.

Maryland — LGBT rights advocates in Maryland were predicting at year's end that the election of more same-sex marriage supporters to the legislature in November had substantially increased the chances that Maryland will enact a law authorizing same-sex marriage in 2011. Same-sex marriages are now performed in the neighboring District of Columbia, and the Maryland attorney general has opined that such marriages would be recognized under Maryland law, so there is a strong incentive for Maryland to amend its marriage law and keep the marriage business from its LGBT community in-state. However, LGBT rights proponents in the state were less sanguine about the likelihood that the legislature would amend the human rights law to add protection on the basis of gender identity. *Washington Blade*, Dec. 16.

Michigan — City Commissioners in Traverse City approved an ordinance banning sexual orientation discrimination in employment and housing in October, but opponents of the measure vowed to force a repeal referendum on to the ballot in 2011. The chief opponent, Paul Nepote, claimed that he and others had quickly obtained 100 more signatures than are required by local law to put the measure on the ballot. *Traverse City Record-Eagle*, Dec. 9.

Pennsylvania — Pennsylvania remains among the states that have not added sexual orientation or gender identity to their human rights laws, but many Pennsylvania municipalities have moved to the fill the gap by including these characteristics in local ordinances. Hatboro Mayor Norm Hawkes, while professing to be opposed to discrimination, vetoed a measure that was passed by the municipal governing board on a 4-3 vote, stating he thought this was an issue that should be addressed on the state level. Although a state measure has been pro-

posed in the legislature during the past five sessions, it has never gotten to a floor vote, and the ascendant Republican majorities in both houses after this November's elections make it unlikely that a state measure will advance in the next two years. Shortly after Hawkes' exercised his veto, another township, Lower Merion, joined the growing number of local governments that have moved to ban such discrimination, as the township board voted 12-0 in favor of the nondiscrimination proposal.

Tennessee — The resignation of a lesbian soccer coach at Belmont University after she revealed that her same-sex partner was pregnant led to an extended discussion in Nashville about the issue of sexual orientation discrimination. Although Belmont, a self-described Christian school, denied dismissing the coach, Lisa Howe, it was generally understood that she had been asked to leave, to the consternation of members of the women's soccer team and many other students and faculty. The ensuing discussions resulted in Mayor Karl Dean calling on the city's boards and commissions to adopt non-discrimination policies including sexual orientation and gender identity, in line with action the city had taken last year regarding its own employment policies. *The Tennessean*, Dec. 15.

Texas — *Fort Worth* — In the aftermath of the Rainbow Lounge police raid controversy from 2009, Fort Worth's city manager established a Diversity Task Force, which made twenty different policy recommendations to promote equal rights for the LGBT community in Fort Worth, most of which have been implemented. Going into effect on January 1, 2011, according to a Dec. 26 report in the *Fort Worth Star-Telegram*, is expansion of the city's health plan to cover domestic partners of employees, extension of the family leave policy to cover domestic partners, and a new right for employees to designate a domestic partner to receive monthly survivor's pension benefits if the retired employee dies.

Utah — Utah is yet another state that refuses to ban sexual orientation or gender identity discrimination, contrary to the trend among local governments in the state. Grand County recently became the tenth local jurisdiction to adopt a non-discrimination policy banning sexual orientation and gender identity discrimination. The *Salt Lake Tribune* reported on Dec. 22 that a quarter of the state's population now resides in communities where such discrimination is prohibited. A.S.L.

Law & Society Notes

Taxes — On December 10, the *New York Law Journal* reported on a trend in large law firms to provide additional compensation to employees whose domestic partners are enrolled in the firms' employee benefits programs, to make up

for the additional taxation to which those employees are subject because federal and state tax authorities treat the value of partner coverage as taxable income to the employee. Under tax law, the value of benefits provided to a legal spouse or minor children of the marriage is not counted as income to the employee, coming under the same exemption from taxation that the employee enjoys for the value of his or her own employee benefits coverage. Among the firms noted in the article were McDermott Will & Emery, Morrison & Foerster, Cadwalader Wickersham & Taft, and Linklaters. The article noted that a handful of other large employers have taken the same step, among them Barclays PLC and Google, Inc. N. Raymond, *Firms Roll Out Perk to Employees in Same-Sex Domestic Partnerships*, NYLJ, 12/10/2010, p. 1.

Transgender Golfers — The *New York Times* reported on Dec. 28 that the Long Drivers of America, who have sponsored the women's world long-drive title, have indicated that they will follow the lead of the LPGA, which has voted to allow transgender golfers to compete consistent with their gender identity. The one catch is that the organization also announced that it had no plans to conduct any women's-only long-drive events in the future, but would allow women to compete in open or senior men's events. Both LDA and LPGA had been sued by Lana Lawless, a transgender woman, about her exclusion from women's competition. Lawless had won the LDA's women's long-drive title in 2008, but was subsequently disqualified on grounds of her birth.

Censorship of Art — A controversy blew up in December about a decision by officials of the Smithsonian to remove a short video by the late David Wojnarowicz from an exhibit at the National Portrait Gallery about gay images in art after a spokesperson for a Catholic group and several Republican members of Congress criticized the video as being defamatory of Catholicism. The exhibition was mounted with private donations, not taxpayer dollars, although of course the National Portrait Gallery itself is a public institution as part of the Smithsonian. In what seems a clear case of content-based discrimination as well as a potential establishment clause violation, Smithsonian officials seem to have taken the position that removing art that religious groups find objectionable is justifiable if refusing to do so would offend members of Congress who have control over funding decisions for the Institution. Sounds like censorship to us. Even the curators of the exhibition were publicly critical of the decision at a program held at the New York Public Library on Dec. 15.

Yale Study — A study carried out by researchers from Yale University and published in the journal *Pediatrics* concluded the LGBT teens are more likely to be punished for conduct that does not draw censure when commit-

ted by non-gay youth. The study concluded that gay and lesbian teens in the U.S. are 40% more likely than straight youth to suffer punishment by schools, police and the courts for equivalent conduct. *Washington Post*, Dec. 6.

New York Hate Crimes — New York State's Division of Criminal Justice Service reported a significant increase in reported hate crimes in the state in 2009, including a substantial percentage increase in reported hate crimes against lesbians (up 200 percent over 2008) and gay men (up 32 percent in the same period). Although the actual numbers were small in light of the state's population, the percentage increase was noteworthy. All categories of reported hate crimes in New York State were up 14 percent; the rate of increase in New York City was six percent, the city accounting for 40 percent of the reported hate crimes in the state during 2009. Final figures for 2010 will not be available until late in 2011. *New York Post*, Dec. 31, 2010. A.S.L.

International Notes

United Nations — At the instance of the United States, a new vote was held on December 21 on including gay people in a United Nations General Assembly resolution condemning unjustified executions, and a prior vote to delete gay people from the resolution was reversed by a substantial margin, 93-55 with 27 abstentions. The decision of the Thai government to abstain on the vote sparked demonstrations against the government there by gay rights supporters.

Australia — The New South Wales Administrative Decisions Tribunal has ruled that a religiously-affiliated foster care agency enjoyed a religious exemption from the NSW Anti-Discrimination Act on the issue of refusing to place foster children with gay couples. Wesley Mission argued that providing foster care services to gay couples would endanger their funding and volunteer assistance from members of the mission whose religious beliefs would be violated by such activities. The Tribunal's decision overturned an administrative ruling that had required the Mission to provide such services. The Tribunal noted that the statutory exemption was broadly worded and perhaps should be adjusted legislatively, but neither the government nor the opposition supported any legislative change. *Australian*, Dec. 28.

Australia — The *Herald Sun* (Dec. 31) reported that the Victorian Civil and Administrative Tribunal, which had granted a gay pub in Collingwood the right to refuse entry to people who did not identify themselves as gay men if the staff believed their presence would adversely affect the pub's nature as a gay bar, has pulled back from that position. In a new ruling in December, the VCAT allows the pub "to explain the nature of the venue to prospective pa-

trons" and "to permit them to choose whether or not to enter," while retaining the right to exclude those whom the bar staff believe may threaten either the safety or comfort of patrons or the pub's nature as a gay bar. The key difference is that they may not enquire as to the sexual orientation of prospective patrons. Victoria's human rights law prohibits discrimination based on sexual orientation by places of public accommodation.

Australia — Justice Palmer issued a lengthy opinion in the case of *Re William and Jane*, BC 2010090570 (Dec. 6, 2010), explaining the decision to approve an adoption of two children by a male same-sex couple, as a first instance of application of the recently enacted Adoption Amendment (Same Sex Couples) Act 2010, which went into effect on September 15. The opinion goes step by step through the various considerations and factual findings necessary to approve the adoption, and makes the point that under the recently passed amendments to the adoption law, same-sex and different-sex couples are to be evaluated based on the same standards without discrimination.

Brazil — The government announced during December that same-sex couples in stable relationships are entitled to the same social security pension benefits that are provided to different-sex couples. Although same-sex marriages are not yet recognized in Brazil, as long as ten years ago a court in Rio Grande do Sul recognized inheritance rights for same-sex couples, and allowed same-sex partners to be added to health insurance and retirement plans. The new policy, announced by the Social Security Minister, will provide pension benefits to surviving same-sex partners of formally registered workers who had paid monthly social security fees. *Associated Press*, Dec. 10. * * * On Dec. 9, President Luiz Inacio Lula da Silva and Human Rights Secretary Paulo Vannuchi signed a decree creating a National LGBT Council, to "formulate and propose guidelines for government actions, at the national level, aimed at combating discrimination and promoting and defending the rights of lesbians, gays, bisexuals, transvestites and transsexuals," reported on-line journalist Rex Wockner in his International News bulletin #869 (Dec. 20).

Canada — Canadian newspapers highlighted an asylum case involving a brother and sister from Mexico, who are being subjected to deportation despite evidence that they have been the targets of anti-gay harassment and death threats in Mexico City. Canadian authorities, noting the great gains that have been made for gay rights in Mexico City (including same-sex marriage) and the purported existence of an active gay community there, have refused to credit the idea that persecution on the basis of sexual orientation is to be feared

by lesbian or gay Mexicans. *Toronto Star*, Dec. 27.

Czech Republic — The European Union's Agency for Fundamental Rights, and the Czech Republic's human rights commission, have criticized the government's use of the penile plethysmograph to evaluate applicants for asylum on grounds of sexual orientation. The government maintains that this is the only way to determine whether the applicants' claims to be gay are credible. The instrument involves attaching sensors to the subject's penis to measure blood flow when the subject is exposed to images of men and women, to determine whether they are aroused by viewing images of the same-sex. It is not used by any other country in the European Union, and the EU agency suggested that its use may violate the European Convention on Human Rights, stating "this exam is particularly inappropriate for asylum seekers, given the fact that many of them might have suffered abuse due to their sexual orientation." The Interior Ministry, defending use of the test, claimed that it had been used in only ten cases and was "voluntary" — available to asylum seekers who wish to provide proof of their claims of feared persecution based on their sexual orientation. *Daily Telegraph* (UK), Dec. 10.

Hungary — ILGA/Europe reported that the Hungarian Constitutional Court has rejected a challenge to the equal age of consent for same-sex and different-sex sexual conduct. The court observed that the principles of non-discrimination and protection of human dignity should be observed in criminal law. Hungary actually decriminalized consensual sodomy as long ago as 1962, but had long maintained a lower age of consent for different-sex contact, 14, than for same-sex contact, 18. The ages were equalized at 14 by judicial decree in 2002.

France — France created the *pacte civil de solidarite*, or PACS, a variety of civil union, with the idea of making available a legal status for same-sex couples, but did not restrict eligibility on the basis of sex. To the surprise of just about everybody, the PACS has become very popular among young different-sex couples, to the point that 95 percent of the 173,045 civil unions formed in 2009 were among different-sex couples, up from 75 percent in 2000. By comparison, in 2009 there were 250,000 weddings in France, down from almost 400,000 in 1970. It seemed that if current trends continue, in future civil unions might outnumber marriages as more couples opt for the flexibility of the PACS. *New York Times*, Dec. 15. Here, of course, is an argument why opponents of same-sex marriage who argue that it will undermine heterosexual marriage are shown to have things completely backwards, as it appears that

creating alternative legal statuses is more likely to have that result.

Malta — The Constitutional Court ruled on Nov. 30 that Joanne Cassar, a transsexual woman, is entitled to marry as a woman. The Court referred to the European Court of Human Rights' ruling in *Goodwin v. U.K.* as binding on Malta, a signatory to the European Convention on Human Rights, and reversed a lower court ruling that had insisted on traditional gender definitions in the national marriage law. *Malta Today*, Nov. 30.

Portugal — A new law went into effect November 25 authorizing issuance of government documentation of gender identity without the necessity for surgical alteration, making Portugal one of only three countries in Europe (the others are Spain and the U.K.) where surgical alteration is not a prerequisite to official recognition of gender transition, according to an Nov. 29 release from ILGA/Europe.

Spain — *European Court of Human Rights* — On November 30, a chamber of the European Court of Human Rights ruled in *P.V. v. Spain*, Application No. 35159/09, that the transsexual applications rights under Articles 8 and 14 of the European Convention on Human Rights were not violated when the Spanish courts had moved to restrict her contact with her son while she was going through the gender transition process. The opinion of the court was made available only in French, and this report is based on the English press release posted by the Court. The child was born in 1998, when P.V., then male-identified, was married to the child's mother. The parents separated in 2002, pursuant to an amicable agreement on custody and visitation. However, when P.V. began transitioning, the mother sought to terminate P.V.'s parental responsibility and suspend her contact with the child, on the ground that P.V. had shown lack of interest in the child and was undergoing gender transition. The court rejected the neglect argument, but found that the psychological effect of P.V.'s transition on the child would justify modified contact provisions while the transition was occurring. P.V. appealed this ruling, which was affirmed in the Spanish courts and by the European Court. In the course of its ruling, the Court acknowledged that discrimination based on gender identity is a prohibited ground for unjustified discrimination under the Convention, but concluded that the restriction were based on the psychological impact on the child, according to expert testimony, not on the gender identity of the parent. As stated in the press summary, "The overriding factor in that decision had been the child's best interests and not the applicant's transsexualism, the aim being that the child would gradually become accustomed to his father's gender reassignment. The Court further noted that the contact arrangements had been extended al-

though there had been no change in the applicant's gender status during that period. The Court therefore considered that the restriction of the contact arrangements had not resulted from discrimination on the ground of the applicant's transsexualism and concluded that there had been no violation of Article 8 taken in conjunction with Article 14."

United Kingdom — British tabloids were agog about a situation where a teenage boy secretly donated sperm so that his aunt's same-sex partner could conceive two children. The matter came to light when the sperm donor, Charlie Lowden, unexpectedly died, age 20, after routine surgery. His mourning parents, Lynn and Charles Lowden, professed to be delighted when they were informed that their son had left two biological offspring, and that their lovely niece and nephew were actually also their grandchildren, being raised by Mrs. Lowden's sister and her partner, Sarah and Claire Ashman. *Daily Mail*, Dec. 31.

United Kingdom — *The Birmingham Post* (Dec. 23) reported that a former member of the European Parliament for the West Midlands, Nikki Sinclair, had prevailed in her claim to having been discriminated against by her party, the UK Independence Party, due to her lesbian sexual orientation. The Exeter Employment Tribunal found in her favor when the party failed to enter a defense to her claim. One of the party leaders listed as a respondent, Godfrey Bloom MEP, claimed not to have been informed that a charge was filed naming him until after news reports of the verdict. A.S.L.

Professional Notes

Lavender Law 2011 — For those who like to plan far ahead, the National LGBT Law Association has announced that its annual Lavender Law Conference and Job Fair will be held in Los Angeles on September 8-10, 2011. More details available as they develop can be found on the NLGLA website.

Belated Confirmation — In the final hours of the lame duck session, the Senate voted to confirm several commissioners of the Equal Employment Opportunity Commission who had been serving on recess appointments, including Chai Feldblum, the first openly LGBT member of the Commission. Commissioner Feldblum's term will run through July 1, 2013. The Commission is responsible for enforcement of federal employment discrimination laws which, unfortunately, do not yet include protection against discrimination based on sexual orientation or gender identity. Federal law does include disability discrimination however, an area of particular concern to Commissioner Feldblum, who played a major role in the drafting and enactment of the Americans With Disabilities Act and the subsequent ADA Amendments Act of 2008. A.S.L.

AIDS & RELATED LEGAL NOTES

Workers' Compensation Held Not to Bar HIV Confidentiality Suit

On November 24, 2010, the Court of Appeals of Tennessee at Jackson reversed a trial court's decision dismissing a case brought by an HIV+ woman and her husband arising from the unauthorized dissemination of her HIV status *Doe v. Walgreens Co., et al.* No. W2009-02235-COA-R3-CV.

An HIV+ woman identified by the court as Jane Doe was employed as a pharmacy technician by Walgreens and worked at the store located on Winchester Road, Memphis, Tennessee. She was also a customer of Walgreens, and had all of her prescriptions filled at a different location (3177 S. Perkins, Memphis, Tennessee), in an effort "to keep her HIV status secret and confidential from her co-workers and the public."

The complaint alleges that on August 24, 2004, Jane Doe's immediate supervisor, Dr. Saxton, a registered pharmacist at the Winchester Road store, called John Doe, Ms. Doe's fiancé at the time, and told him about Jane Doe's HIV status. Dr. Saxton also told Jane Doe that he overheard other employees discussing her HIV status. Paris Ghoston, one of Jane Doe's coworkers, told Jane that she "deliberately accessed Walgreens' database to review Jane Doe's file to ascertain her medical condition." Ms. Ghoston, along with another coworker, had previously agreed to be a bridesmaid at Jane Doe's wedding. On September 4, 2004, they both "dropped out of the wedding, without explanation".

Sometime during September 2004, Jane Doe quit working at Walgreens. On February 24, 2005, she filed a health information privacy complaint against Walgreens with the US Department of Human Services Office for Civil Rights. The Does did eventually marry.

In their complaint, Jane and John Doe sued Walgreens, Dr. Saxton and Ms. Ghoston, asserting causes of action sounding in: [1] personal injury resulting from the defendants' disclosure of her HIV status as prohibited by TCA Sec. 63-10-412; [2] personal injury resulting from the defendants' disclosure of her HIV status as prohibited by TCA Sec. 10-7-504; [3] gross negligence; [4] loss of consortium; [5] intentional infliction of emotional distress; [6] invasion of privacy and intrusion upon seclusion; and [7] constructive discharge. The plaintiffs sought compensatory and punitive damages.

The defendants moved to dismiss, arguing that plaintiffs' complaint was barred by the exclusive remedy provision of the Workers' Compensation Act, TCA Sec. 50-6-108. The trial court granted the defendant's motion, finding that the complaint fails to allege a cause of ac-

tion sounding in worker's compensation, and that the acts alleged by plaintiff's coworkers were insufficient to take her claims outside the worker's compensation law, which bars tort actions against employers by employees. The plaintiffs then appealed.

The appellate court agreed with the trial court insofar as the plaintiffs had failed to allege a cause of action sounding in worker's compensation law. The two courts disagreed, however, on whether the acts alleged were sufficient to take the claims outside the workers' compensation law bar against employee tort claims. First, the appellate court found that the dissemination of Jane Doe's medication information arose from her capacity as a customer, and not "out of" or "in the course of" her employment because Walgreens would not have had her prescription records in its "secure database open only to those employees who serviced patients and customers and who had a business reason to know the [customer's] medical status" otherwise.

The next issue entails whether the plaintiffs had sufficiently pleaded that the defendants acted with the requisite intent necessary to remove their claims from the worker's compensation law. The appellate court found that giving the complaint a liberal reading, the acts of Dr. Saxton and Ms. Ghoston were deliberate and without any medical, legal, business or job related justification. Therefore, the court concluded that the aforementioned acts as alleged in the complaint were made with actual intent to injure the Does, thus constituting intentional torts.

As to whether the plaintiffs' injuries arose out of Jane Doe's employment, the appellate court answered this question in the negative. It found that absent a legitimate work-related reason for the Winchester store employees in this case to access Jane Doe's confidential health information, the injuries could not have arisen out of Jane Doe's employment, whereas any claims brought against the Perkins store employees would arise out of the scope of their employment because those employees would have had a legitimate business reason to access Jane Doe's prescription records.

The appellate court also rejected an argument made by the defendants in reliance upon *Holder v. Wilson Sporting Goods, Co.*, 723 S.W.2d 104 (Tenn. 1987). Specifically, the defendants argued that it is "reasonable to conclude that co-workers will discuss each other throughout the day". In *Holder* the Tennessee Supreme Court held that it was reasonable for employees to take personal breaks during the course of the work-day, and that injuries sustained during those personal breaks are compensable under worker's compensation law.

The appellate court found *Holder* was inapposite, and because the plaintiffs had sufficiently pleaded that the defendants acted with actual intent to injure, to conclude that the claims should nevertheless be adjudicated under worker's compensation law because coworkers may typically talk about each other during the course of the day would be "incongruous." *Holder* does not apply. *Eric J. Wursthorn*

AIDS Litigation Notes

Georgia — In a per curiam decision long on its recitation of procedural detail and standards of review but frustratingly short on discussion of the facts or the rationale for the court's decision, a panel of the U.S. Court of Appeals for the 11th Circuit affirmed a grant of summary judgment in favor of the Director of Nursing at a Georgia jail who was charged by an HIV+ man with deliberate indifference to his medical needs. *McDaniels v. Lee*, 2010 WL 5158197 (Dec. 20, 2010) (non-argument calendar, not selected for official publication). McDaniel argued on appeal that the district court erred by denying his request for appointment of counsel, in light of the "complicated" medical issues in his case, and also erred in granting summary judgment, claiming he had "produced evidence showing that no medical personnel examined him until approximately a month after he arrived at the jail, medical personnel did not timely provide his medications, and he did not receive the special diet that a doctor had ordered for him." The court rejected the first ground, stating that appellant "did not demonstrate that exceptional circumstances existed in his case that required the assistance of counsel," and the second, stating that McDaniel had "failed to show either that Lee was deliberately indifferent to his HIV status or that he suffered any injury that was attributable to Lee's alleged indifference." The court provided no explanation of the evidence that McDaniel presented, making it impossible to evaluate its ruling.

New York — in *In re Noah Jeremiah J.*, 2010 WL 5156425 (Dec. 21, 2010), the Appellate Division, 1st Department, voting 4-1, affirmed a decision by New York County Family Court Judge Rhoda J. Cohen that an infant born HIV+ to a mother with various medical and mental health problems should be adjudged a "neglected child" and placed in the custody of public welfare authorities. In a much lengthier opinion in such a case than one might normally encounter, undoubtedly due to the lengthy dissenting opinion by Justice Saxe, Justice Catterson provided a detailed review of the record, showing that the mother suffered from bipolar

disorder and had difficulties keeping up with her own medication schedule, and that prior to the child's birth there had been an adjudication of neglect respecting the mother's other children. Justice Saxe argued at length that the record did not show that the child was neglected or in imminent danger.

Wisconsin — Lambda Legal announced the satisfactory resolution of *Rose v. Cahee*, No. 09-CV-0142 (E.D.Wis.), in which an HIV+ woman alleged that she had been denied medical services on account of her serostatus. Lambda News Release, Dec. 28. In 2008, Ms. Rose was diagnosed with gallbladder disease requiring surgery, and was referred to Dr. Steven Cahee at Fond du Lac Regional Clinic, a facility operated by Anesian Healthcare. Dr. Cahee declined to perform the surgery, purportedly due to fear of exposure to HIV. Ms. Rose ultimately obtained treatment at another facility in what was characterized as a normal procedure that went off without incident. She

sued, represented by Lambda Legal and the AIDS Resource Center of Wisconsin, to vindicate the principle that HIV+ individuals have an equal right to medical services. Lambda's press release did not specify the terms under which the suit was resolved, but noted that the case had survived pretrial motion practice and was set to proceed to trial. Presumably, the defendants have agreed at the least to change their policies and provide training for health care workers about how to safely provide medical services to HIV+ individuals, and to provide some compensation to Ms. Rose.

Texas — The Court of Appeals in Dallas affirmed a jury verdict under which an HIV+ man who was found to have infected six women with HIV through unprotected intercourse prior to which he did not disclose his HIV+ status to his sexual partners. *Padieu v. State*, 2010 WL 5395656 (Dec. 30, 2010). According to the opinion for the court by Justice Molly Francis, appellant Philippe Padieu sought relief on the

grounds of ineffective assistance of counsel at trial. The evidence, as summarized by Justice Francis, showed that Padieu's doctor informed him he was HIV+ in September 2005 and counseled him on the need to practice safe sex, but he ignored the doctor's warning and had unprotected sex with the six complainants in the case, each of whom subsequently testified HIV+. Evidence showed Padieu continued in this conduct even after learning that some of the women had tested positive, and even after he was served with a health directive from the County Health Authority ordering him to cease and desist from the conduct. The court indicated that in the absence of evidence of outrageous incompetence by trial counsel, it would not overturn a jury verdict on direct appeal on a claim of ineffective assistance, advising Padieu that if he sought to make a record on trial counsel's failing, he should file a petition for habeas corpus. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Freedom to Marry Seeks D.C.- Based Federal Campaign Director

Freedom to Marry, an organization that seeks to advance the right of same-sex couples to marry, announced that it is seeking a Federal Campaign Director to establish a D.C. presence for the organization (which is headquartered in New York) and to help build a coalition of organizations to achieve congressional repeal of the Defense of Marriage Act and passage of legislation affording appropriate federal regulation to lawful same-sex marriages. For details, check the organization's website: freedomtomarry.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Berall, Frank S., *Update on Evolving Legal Status of Same-Sex Marriages*, 37 Estate Planning No. 12, 21 (Dec. 2010).

Collins, Jessica C., *The Bogyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. Rev. 1225 (Oct. 2010).

Davis, Adrienne D., *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955 (Dec. 2010)

(refutes analogy between same-sex marriage and polygamy).

Freeman, Marsha B., *Their Love Is Here to Stay: Why the Supreme Court Cannot Turn Back the Hands of Time*, 17 Cardozo J.L. & Gender 1 (2010).

Greenesmith, Heron, *Drawing Bisexuality Back Into the Picture: How Bisexuality Fits Into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 Cardozo J.L. & Gender 65 (2010).

Kagan, Sarah, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 Hastings Const'l L. Q. 233 (Fall 2010).

Levin, Hillel Y., *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 Fla. L. Rev. 47 (January 2011).

Moreno, Justice Carlos R., *The Promise of Equality: The Evolution of the Family in California*, 44 UC Davis L. Rev. 1 (2010).

Nicholas, Peter, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 Fla. L. Rev. 97 (January 2011).

Perez, Shannon Shafron, *Has President Obama Abandoned His Promises? The Denial of Federal Health Benefits for Same-Sex Spouses*

of Ninth Circuit Employees, 32 U. La Verne L. Rev. 105 (Nov. 2010).

Schraub, David, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. Chi. L. Rev. 1437 (Summer 2010).

Strasser, Mark, *On Same-Sex Marriage and Matters of Conscience*, 17 Wm. & Mary J. Women & L. 1 (Fall 2010).

AIDS & RELATED LEGAL ISSUES:

Jones, Jeffrey Douglas, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 Okla. L. Rev. 667 (Summer 2010).

EDITOR'S NOTE:

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