THE POWER OF WINDSOR

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New Jersey and Illinois Trial Courts Advance Pending Marriage Equality Cases in September 27 Rulings

In a big day for the campaign for marriage equality, trial judges moved the ball forward significantly in New Jersey and Illinois on September 27. Mercer County (NJ) Superior Court Judge Mary C. Jacobson granted a motion for summary judgment filed by Lambda Legal on behalf of Garden State Equality, a gay rights group, ruling that New Jersey must begin issuing marriage licenses to same-sex couples beginning on October 21, 2013. Cook County (IL) Circuit Court Judge Sophia H. Hall denied a motion by several county clerks to dismiss two pending lawsuits brought by Lambda Legal and the ACLU contending that Illinois’ denial of marriage rights to same-sex couples violates equal protection and due process provisions of the Illinois Constitution. Garden State Equality v. Dow, 2013 WL 5397372 (N.J. Superior Ct., Mercer County); Darby v. Orr; Lazaro v. Orr, Case No. 12 CH 19718 (IL Circuit Ct., Cook County).

In both states, the decisions may have a quick political impact, since potential legislative action on marriage equality is pending and expected to come before legislators before the end of the year. In New Jersey, a marriage equality law approved by the legislature and vetoed by Governor Chris Christie could come up for a veto override vote in the lame duck session of the legislature after the November election. In Illinois, a marriage equality measure approved by the Senate could come up for a vote in the General Assembly during the “veto session” that will begin late in October. In both states, the looming possibility that the state courts will mandate same-sex marriage using state constitutional provisions that would not be susceptible to U.S. Supreme Court review might prod the last few reluctant legislators to take action on the pending bills, with their heavily negotiated procedural requirements and protections for religious dissenters, rather than to let same-sex marriage be mandated judicially without such provisions in place.

The New Jersey decision was of greater immediate significance for potential application elsewhere, because Judge Jacobson was the first judge to rule that the U.S. Supreme Court’s Windsor decision, striking down Section 3 of DOMA, made New Jersey’s failure to let same-sex couples marry unconstitutional, in light of New Jersey’s provision of civil unions that give same-sex couples the legal rights that accompany marriage under state law. Her opinion provides an analysis that can now play out in the pending Illinois, Hawaii and Nevada marriage equality lawsuits.

The New Jersey case, Garden State Equality v. Dow, was filed after the New Jersey Supreme Court split 3-3 on the question whether the New Jersey Civil Union Law had failed to fulfill the New Jersey Supreme Court’s mandate in its 2006 decision, Lewis v. Harris, that same-sex couples be provided the same legal rights and benefits as different-sex couples. The New Jersey legislature responded by passing the Civil Union Act, which also created a Commission to study whether the Act proceeding with discovery when the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act on June 26 in the Windsor case. Lambda promptly filed a summary judgment motion in the Superior Court, arguing that federal recognition of same-sex marriages meant that same-sex couples in New Jersey were being deprived of equal rights as a matter of law because they would not be entitled to federal recognition of their relationships.

This was clear from the Windsor ruling, in which the Supreme Court stated that the federal government’s obligation under the 5th Amendment guarantee of “equal liberty” was to recognize state-sanctioned same-sex marriages on the same basis as different-sex marriages, and only those marriages sanctioned by the states. This conclusion was bolstered by several county clerks to dismiss two pending lawsuits brought by Lambda Legal and the ACLU contending that Illinois’ denial of marriage rights to same-sex couples violates equal protection and due process provisions of the Illinois Constitution.

The Commission issued a report concluding that civil union partners were not receiving equal treatment from government officials and private businesses. Lambda Legal, representing the Lewis plaintiffs, petitioned the state Supreme Court to reconsider whether same-sex couples were entitled to marry, relying on that Commission report as evidence. But the Supreme Court couldn’t muster a majority in favor of Lambda’s petition, with some justices suggesting that Lambda needed to go back to the trial court to prove the unequal treatment before the Supreme Court could act.

Lambda’s new case survived a motion to dismiss last year and was

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over the ensuing months as federal agencies made clear that *Windsor* changed nothing so far as civil unions or domestic partnerships were concerned; federal recognition would extend only to same-sex marriages.

The state responded to Lambda’s motion with a variety of arguments, but the central one, which Judge Jacobson took most seriously, was that any difference in treatment between same-sex and different-sex couples after the *Windsor* decision was due to the federal government’s refusal to recognize civil unions, and not to any action taken by the state. New Jersey’s attorney general argued that New Jersey had not taken any action one way or the other after *Windsor* was decided, and that if there was any equal protection violation, it was being committed by the federal government in failing to recognize civil union partners as equal to marital partners. Thus, Attorney General Paula Dow argued, the plaintiffs were suing the wrong defendants. Civil union partners who were denied federal benefits should be suing the federal government for denial of their equal protection rights.

Judge Jacobson rejected this argument, finding that by creating a domestic relations law structure under which same-sex couples were excluded from equal access to the status of marriage, New Jersey had engaged in state action that resulted in same-sex couples having an inferior status in terms of their rights after the *Windsor* decision.

“By statutorily creating two distinct labels – marriage for opposite-sex couples and civil unions for same-sex couples – New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy,” she wrote. “Consequently, it is not the federal government acting alone that deprives plaintiffs of federal marriage benefits – it is the federal government incorporating a state domestic relations structure to make its determinations, and it is that state structure that plaintiffs challenge in this motion. That structure may not have been illegal at the time it was created – indeed, the parallel marriage/civil union statutory scheme was specifically sanctioned in advance in *Lewis* – but it was certainly an ‘action’ of the state.”

She also rejected the state’s argument that it was premature to make this decision because many federal agencies had not yet announced how they would adjust their policies in light of *Windsor*, and because bills had been introduced in Congress to extend federal recognition to civil union partners. Jacobson pointed out that under the federal policies that have already been announced since *Windsor* was decided, same-sex civil union partners were now experiencing unequal treatment in very tangible ways, particularly under the federal tax laws and the Family and Medical Leave Act.

“Following the *Windsor* decision of the United States Supreme Court and the subsequent implementation of that decision by several federal agencies,” wrote the judge, “same-sex couples are only afforded the same rights and benefits enjoyed by opposite-sex married couples if they are married. Since New Jersey currently denies marriage to same-sex couples, same-sex civil union partners in New Jersey are ineligible for many federal marital benefits. The parallel legal structures created by the New Jersey Legislature therefore no longer provide same-sex couples with equal access to the rights and benefits enjoyed by married heterosexual couples, violating the mandate of *Lewis* and the New Jersey Constitution’s equal protection guarantee. Under these circumstances, the current inequality visited upon same-sex civil union couples offends the New Jersey Constitution, creates an incomplete set of rights that *Lewis* sought to prevent, and is not compatible with ‘a reasonable conception of basic human dignity,’” quoting from the *Lewis* opinion. “Any doctrine urging caution in constitutional adjudication is overcome by such a clear denial of equal treatment.”

Jacobson concluded, “The equality demanded by *Lewis v. Harris* now requires that same-sex couples in New Jersey be allowed to marry.” However, bowing to reality, she delayed the effect of her decision for several weeks. “To allow the State adequate time to prepare to effectuate this ruling or to pursue appellate remedies, the court directs that it take effect on October 21, 2013.” There seems little doubt that Governor Christie will direct the Attorney General to file an appeal.

The Illinois ruling was of less immediate import, because it marks an earlier stage in the litigation. Unlike the Republican state administration in New Jersey, the Democratic state administration in Illinois was unwilling to defend the two marriage equality cases filed by Lambda Legal and the ACLU, so Judge Hall allowed a group of county clerks to intervene as defendants. The clerks filed a motion to dismiss the lawsuits, arguing that the existing law banning same-sex marriages did not discriminate unlawfully.

The plaintiffs claimed violations of the Illinois constitution on several theories: unlawful discrimination because of sexual orientation, unlawful discrimination because of sex, violation of the fundamental right to marry, violation of the right to privacy. In the end, Judge Hall concluded that the plaintiffs could pursue their claims of sexual orientation discrimination and deprivation of a fundamental right to marry.

In reaching her conclusion, Judge Hall found that the plaintiffs had put in play the possibility that the court could conclude that sexual orientation is a suspect or quasi-suspect classification under the Illinois constitution, which would mean that on the equal protection claim the defendants would have to prove that the state had a strong or compelling policy justification for excluding same-sex couples from the right to marry, and that the justifications argued by the defendants in their motion to dismiss
the case might prove insufficient to meet that burden. She also found that the plaintiffs might prevail on their claim that the same-sex marriage ban deprived them of a fundamental right, which would also shift the high burden of justification to the defenders of the law. The court’s analysis clearly signaled the likely outcome in favor of the plaintiffs if this case goes to trial or gets decided on a motion for summary judgment after discovery is concluded.

Judge Hall’s conclusion that plaintiffs could not advance a sex discrimination was a bit strange in light of her analysis of existing precedents on the issue. She noted that courts in other jurisdictions had been divided over whether a denial of marriage to same-sex couples constitutes sex discrimination, with a majority rejecting that theory, although it was accepted by the Hawaii Supreme Court in 1993 in the Baehr v. Lewin case and also by Judge Walker of the federal district court in California in the Proposition 8 case. More significantly, however, in terms of Illinois constitutional law, she mentioned a 1979 appellate court ruling, Wheeler v. City of Rockford, which, at least based on the excerpt she quoted from her opinion, seemed to adopt a theory of sex discrimination that would apply to the marriage case.

In Wheeler, the court was considering whether an ordinance regulating the massage industry violated the state constitutional ban on sex discrimination. The ordinance said that men were forbidden to massage women and women were forbidden to massage men. Somebody seeking a massage from a licensed operator could only get a massage from a person of the same sex. The state argued there was no sex discrimination in this, because men and women were treated equally. The court said there was discrimination, because “the basis for allowing or refusing the right to give a massage is determined solely on whether the person massaging and the customer are of the same gender.” Judge Hall then noted that the Illinois court had relied on the U.S. Supreme Court’s decision in Loving v. Virginia, which held that Virginia was discriminating based on race when it prohibited interracial marriage, even though the statute theoretically imposed equal burdens on both white and black people who wanted to marry. The evil was establishing a racial classification and making a person’s access to an important right – the right to marry the partner of their choice – depend on the race of the individuals. Similarly, Illinois establishes a sexual classification and makes the permissible choice of a marital partner turn on the sex of the parties.

But Hall insisted that the Illinois marriage law does not create a classification based on sex, but rather based on sexual orientation. This seems a bit strange, because the statute does not speak of sexual orientation at all; gay people are free to marry persons of the opposite sex, and straight people are prohibited from marrying persons of the same sex. But her conclusion is consonant with her rejection of the defendants’ argument that the marriage law does not discriminate because of sexual orientation, as she found that it precludes gay people from marrying their partners of choice but not straight people, thus imposing an unequal burden on gay people (assuming, of course, that straight people rarely have an interest in marrying a same-sex partner).

In the end, the main significance of Judge Hall’s rulings is that were the case to proceed as a sex discrimination claim, the requirement of heightened scrutiny could be assumed without need for further proof. As a sexual orientation discrimination claim, however, there is a burden on the plaintiffs to prove that heightened scrutiny is the appropriate standard for judicial review if they want to shift the burden to the defendants to prove that there is a significant policy justification for excluding same-sex couples from marriage in Illinois.

Actually, the plaintiffs pointed out, Illinois’ adoption of a Civil Union Act, which went into effect in 2011, significantly undermines the defendants’ rational basis argument, as Illinois has adopted a policy of extending equal treatment to same-sex couples under the state’s family law regime. This knocks the legs out of the defendants’ argument that the state can exclude gays from marrying

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due to concerns about the “best” circumstances for child-rearing, or that marital rights should be reserved to different-sex couples in order to channel responsible procreation.

The Windsor ruling, and the New Jersey Superior Court’s analysis of its impact on the equal protection claims of gay plaintiffs, will undoubtedly contribute to lightening the plaintiffs’ burden in Illinois, as Justice Antonin Scalia despairingly observed in his dissent in Windsor, where he predicted that the Supreme Court’s opinion would be very helpful to plaintiffs challenging the denial of marriage rights in the remaining non-equality states. The two decisions rendered on September 27 bring closer the fulfillment of Scalia’s prediction.
A third federal circuit court of appeals has weighed in on the question whether for-profit business corporations have a right under the 1st Amendment to free exercise of religion, and thus to claim a religious exemption from compliance with a valid general law. As in Hobby Lobby Stores, Inc. v. Sebelius, 2013 WL 3216103 (10th Cir., June 27, 2013), and Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs., 2013 WL 3845365 (3rd Cir., July 26, 2013), the case of Autocam Corp. v. Sebelius, 2013 U.S. App. LEXIS 19152 (6th Cir., Sept. 17, 2013), arises in the context of implementation of the Affordable Care Act regulations requiring that employer-provided health insurance plans include coverage for contraception for women. The spreading circuit splits will likely lead to Supreme Court review of the underlying constitutional question, which would be significant for enforcement of laws banning discrimination by businesses.

As in the earlier cases, the corporate defendants are not publicly-traded, but rather are closely held corporations owned entirely by individuals or groups of individuals whose religious beliefs deem contraception to be immoral. In Autocam, a 6th Circuit panel lines up with the 3rd Circuit in finding that such a business corporation cannot claim a right to free exercise of religion, either under the 1st Amendment directly or under the Religious Freedom Restoration Act (RFRA), which was passed by Congress in reaction to the Supreme Court’s 1990 ruling in Employment Division v. Smith, 494 U.S. 872, which had upheld the right of legislators to pass a “valid and neutral law of general applicability” outlawing conduct or requiring conduct that may be contrary to the teachings of a particular religion.

Both the 1st Amendment and RFRA speak in terms of protecting the right of “persons” to free exercise of religion, and the 3rd and 6th Circuits construe that to mean that neither the 1st Amendment nor RFRA protect business corporations from having to comply with valid general laws that contradict the religious beliefs of their shareholders. The 10th Circuit, by contrast, holds that as for-profit corporations are treated as “persons” for purposes of due process, equal protection, and freedom of speech, they should also be treated as persons who are capable of exercising the practice of religion. See, e.g., Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), holding that corporations are protected by the 1st Amendment from restrictions on their expenditures in political campaigns under the Freedom of Speech Clause.

The Autocam court stated its agreement with the Obama Administration’s position, presented in this case by the Justice Department, that preliminary injunctive relief against implementation of the statutory requirement should not be granted and that claims asserted by the owners of Autocam Corporation under RFRA should be dismissed. While acknowledging that the Supreme Court has recognized free speech rights for corporations under the 1st Amendment, Circuit Judge Julia Smith Gibbons wrote for the court, “No analogous body of precedent exists with regard to the rights of secular, for-profit corporations under the Free Exercise Clause prior to the enactment of RFRA. The Free Exercise Clause and the Free Speech Clause of the First Amendment have historically been interpreted in very different ways. Therefore, the Court’s recognition of rights for corporations like Autocam under the Free Speech Clause nearly twenty years after RFRA’s enactment does not require the conclusion that Autocam is a ‘person’ that can exercise religion for purposes of RFRA.” The court noted that Congress had specifically stated that it did not intend by enacting RFRA to expand 1st Amendment free exercise rights beyond what they had been prior to the ruling in Employment Division v. Smith, and no prior Supreme Court ruling had found any corporate exemption from compliance with general laws due to the religious beliefs of the corporation’s owners.

We previously suggested that it was likely that the Supreme Court would grant certiorari in one or more of these cases, since the Court has never previously ruled on the question presented here: Whether somebody who has decided to run their sole proprietor or family-owned business as a for-profit corporation may assert his or her individual free exercise of religion rights through the control of the corporation to avoid the requirements of a valid general statute. The question has great importance for LGBT legal rights, of course, since recognition of a right of business corporations to avoid complying with general laws based on the religious beliefs of their owners could undermine the application of enforcement against such corporations of laws forbidding discrimination in employment, housing and public accommodations, such as, for example, the recent New Mexico Supreme Court decision in Elane Photography, LLC v. Willock, 2013 N.M. LEXIS 284, 2013 WL 4478229 (August 22, 2013), holding that the owner of a wedding photography business did not enjoy a religious exemption from the state’s public accommodations law based on the owner’s religious objection to same-sex commitment ceremonies.

The question here has great importance for LGBT legal rights and the application of enforcement against such corporations of laws forbidding discrimination.
Wisconsin Court of Appeals Issues Confusing Ruling Regarding Same-Sex Couple Family Dispute

In the Wisconsin Court of Appeals case Bowden v. Korslin (In Re A.M.K.), 2013 Wisc. App. LEXIS 732 (Wis. Ct. App. Sept. 5, 2013), J. Belva Bowden and Amy Korslin, a former couple, received a verdict from the second highest court in the state regarding the placement and care of Korslin’s biological daughter. Bowden and Korslin were together for many years; in 1998, Korslin gave birth to a daughter, herein referred to as A.M.K. The couple raised A.M.K together in the same residence until 2006, when they terminated their relationship. They entered into a written agreement after their break-up, providing in part that they would have “equal shared placement of A.M.K, and that they would share her expenses.”

Korslin sought to change their agreement in 2008, and wanted to allow Bowden visitation rights every other weekend. In response, Bowden filed a petition in their county Circuit Court to gain equal placement of A.M.K pursuant to their original agreement. It is also important to note that A.M.K views Bowden “like a mom,” even though Bowden is not her biological parent.

The circuit court determined that it was in A.M.K’s best interest to have a set visitation schedule -- a schedule that allowed more visits than Korslin wanted, but also not equal placement, as Bowden had wanted. Following the court’s ruling, Korslin requested a court order requiring Bowden to pay child support. Although the circuit court initially questioned whether it had the authority to require Bowden to pay, it ultimately ruled that under the “equitable parent doctrine,” and the former couple’s 2006 agreement, it did have the authority. As such, Bowden appealed the decision regarding the payment of child support, and Korslin cross-appealed on the decision regarding visitation.

The Michigan Court of Appeals first considered Bowden’s argument against the circuit court’s ruling that she should be required to pay child support. Citing Wisconsin Stat. § 767.511(1) (a), Bowden asserted that there is no authority given to charge a non-parent to pay child support. Korslin conceded to this argument, but counter-argued that since the court cannot mandate child support because of a “lack of statutory authority,” the court should similarly lack the authority to enter a visitation order. The Court of Appeals, however, seems to suggest that Korslin may have been more successful with her child support request had she pushed the boundaries of the “equitable parent doctrine.” Under such, an “equitable parent” is ‘a person who through judicial determination is able to exercise the rights and responsibilities of a biological parent. See Randy A.J. v. Norma I.J., 2004 WJ 41, ¶32, 270 Wis. 2d 384, 677 N.W.2d 630.” The court did not apply the doctrine to the case because visitation schedule. Ultimately, the case came down to whether the court(s) believed that Bowden’s visiting rights were in A.M.K.’s best interests. There are a number of cases exploring the issue, including the Supreme Court case of Troxel, in which the court established that “if a fit parent’s decision becomes subject to judicial review, the court must apply the presumption that the parent’s determination is in the best interests of the child.”

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Korslin apparently failed to prove cases in which the doctrine had been invoked in a child support case regarding a non-parent, nor had she provided reasons for why the doctrine should be applicable in the instant case. The Court therefore reversed the circuit court’s ruling on child support and ordered the repayment of the money that had been paid thus far.

As for the visitation rights, Korslin argued that the circuit court incorrectly applied the test from Troxel v. Granville, 530 U.S. 57 (2000). The court determined that the circuit court had the authority to grant visitation rights to Bowden, following the two-part test established in Holtzman v. Knott, 193 Wis. 2d 649, 659-662, 533 N.W.2d 419 (1995). Korslin did not dispute that Bowden had a “parent-like” relationship with A.M.K, and that a “significant triggering event” occurred when Korslin terminated Bowden’s relationship with A.M.K. The court therefore determined that since the court cannot mandate child support because of a “lack of statutory authority,” the court should similarly lack the authority to enter a visitation order. The Court of Appeals, however, seems to suggest that Korslin may have been more successful with her child support request had she pushed the boundaries of the “equitable parent doctrine.” Under such, an “equitable parent” is ‘a person who through judicial determination is able to exercise the rights and responsibilities of a biological parent. See Randy A.J. v. Norma I.J., 2004 WJ 41, ¶32, 270 Wis. 2d 384, 677 N.W.2d 630.” The court did not apply the doctrine to the case because visitation schedule. Ultimately, the case came down to whether the court(s) believed that Bowden’s visiting rights were in A.M.K.’s best interests. There are a number of cases exploring the issue, including the Supreme Court case of Troxel, in which the court established that “if a fit parent’s decision becomes subject to judicial review, the court must apply the presumption that the parent’s determination is in the best interests of the child.”

Korslin therefore challenged the evidence presented by Bowden, in the form of expert testimony by Dr. Michael Nelson, a psychologist. Korslin argued that the court ignored Dr. Nelson’s testimony that A.M.K had not experienced any problems since the time of the restricted visitation, and that she would only be negatively affected if Bowden was completely restricted from visiting. The Court of Appeals declined to review the evidence because the lower court’s finding of fact was not clearly erroneous and therefore provided no basis for review. Dr. Nelson testified that any such restriction, either permanent or a strict limitation, could be detrimental.
over time. The circuit court therefore ruled that Bowden had met her burden of showing that such a lack of visitation would not be in A.M.K.’s best interest.

Finally, in what may have been some last-ditch effort to save her case, Korslin argued that the circuit court had applied the incorrect statute; that the court should have applied the visitation statute, and made its own assessment as to what was in A.M.K.’s best interests, rather than applying the criteria in the physical placement statute to evaluate “reasonable visitation rights.” The Court of Appeals denied this argument for two reasons: 1) Korslin did not make this argument during the circuit court hearing, and 2) there is no case or evidence that precludes a court from applying the “best interest” factors in the statute in question to evaluate what was in A.M.K.’s best interests. The court affirmed the ruling concerning Bowden’s visitation rights.

This case is a sad demonstration of the struggles that many fractured families face in U.S. courts over child support and visitation rights, but with a critical element missing: consistency. It seems as though Ms. Bowden got off easy, as the courts considered her “parent-like” enough to justify set visitation rights, but not enough to require her to pay child support. Ms. Bowden seemed to benefit from this strange double standard, demonstrating a clear gap in the way that laws apply to same-sex couples vs. heterosexual couples. The court’s ruling almost contradicts itself through essentially conducting two entirely separate analyses of Bowden’s “parental” status. It also provides a stark look at the work we have ahead of us -- either changing current laws or making entirely new ones. Unfortunately, short of some magical scientific discovery, there is no future in which a same-sex couple will be simultaneous and biological parents. The laws must somehow change to accommodate this and allow same-sex families the same legal protection and continuity offered to heterosexual couples. – Parul Nanavati

Parul Nanavati is a law student at New York Law School (’15).

Federal Court Denies Qualified Immunity Motion in Historic Litigation Challenge to Infant Sex Change Operation

The case against doctors and specialists who recommended and performed sex reassignment surgery on a 19 month old child has been allowed to proceed, after the defendants’ appeal of denial of qualified immunity was affirmed.

M.C. v Aaronson, No. 2:13-cv-01303-DCN (U.S. Dist. Ct., D. South Carolina, August 29, 2013). The child, referred to as M.C., was born with “ovotesticular difference/disorder of sex development” (DSD) in November 2004, and the parents were told that the child could be raised either male or female, after surgical reconstruction. This condition, sometimes referred to as intersexuality, refers to situations where a newborn’s gender physically appears to be ambiguous.

M.C.’s parents were investigated by the S. Carolina Department of Social Services (DSS) for neglect in the first few months of M.C.’s life, and as a result M.C. was removed from their custody. In September 2006 the parental rights of M.C.’s biological parents were terminated, and the child was placed with Pamela and Mark Crawford, who eventually adopted M.C. Prior to the adoption, while M.C. was with the Crawfords in foster care, the DSS retained custody.

While M.C. was still in DSS custody, defendants James Amrhein, Ian Aaronson, andYaw Appiagyei-Dankah examined the child and recommended that the child undergo sex assignment surgery to make M.C.’s body appear female. The surgery took place in April 2006, and the Crawfords legally adopted the child in December of that year.

The Crawfords raised M.C. as a female, as the child’s surgically altered physical gender suggested, but they soon found that “M.C.’s interests, manner and play, and refusal to be identified as a girl indicate that [his] gender has developed as male.”

On May 15, 2013, M.C., now living with the Crawfords as a boy, filed a complaint, through the Crawfords, against the physicians who ordered and carried out M.C.’s sex reassignment surgery, as well as the DSS workers who authorized it. M.C. alleges that his substantive and procedural due process rights guaranteed by the Fourteenth Amendment were violated and that this violation was made by the defendants while acting under color of state law, satisfying the requirements of a Section 1983 claim for a violation of federally-protected rights. Further, M.C. claims that the defendants, while acting under color of state law, violated M.C.’s procedural due process rights by failing to furnish him with a pre-deprivation hearing. These rights, M.C. alleges, were violated based on the allegation that the defendants permanently “destroyed [his] potential male reproductive function,” and indeed rendered M.C. unable to procreate because they removed his male organs, knowing that he did not have a functioning uterus.

The defendants moved to dismiss on the grounds of qualified immunity. In order to survive a motion for dismissal on the grounds of qualified immunity (a doctrine designed to shield government agents from the hassles and hangups of litigation and pre-litigation preparation for their discretionary acts), M.C. must show that his rights were violated and that the violated right was clearly established at the time of the violation. M.C. claims that the violated rights are his constitutional right to procreate, to bodily integrity, privacy, and to pre-deprivation notice and a hearing among others. Defendants argue that those rights were not clearly established at the time of M.C.’s surgery, though they seemingly offer little in the way of support for that conclusion, other than the lack of any case involving this precise fact pattern. Further, defendants claim that they did not violate any right, since according to
them M.C.’s birth mother consented to the surgery. However, no evidence of the mother’s consent is shown or even suggested, as the child was no longer in her custody when the decision was made to perform the operations, so the court rejects the argument out of hand. Perhaps more information will come to light further down the line, but at this juncture, assuming all M.C.’s allegations to be true, the argument simply “must fail.”

The court instead focuses on the question of whether M.C. had clearly established constitutional rights that were violated. Beginning with an examination of Substantive Due Process, the court finds that matters relating to family, marriage, procreation and bodily integrity have long been understood to be covered under the Due Process clause’s reference to “liberty.” Further, the Supreme Court has found that child rearing is at the core of the choices protected by the Due Process clause. The court draws analogies to cases regarding forced sterilization, where it has been determined that a person forcibly sterilized has been deprived of a basic liberty.

Further, taking M.C.’s complaint as true, M.C. was given no pre-deprivation hearing. Rather, his liberty was taken away with little or no due process at all. The defendants sought to defeat this claim by telling the court that M.C.’s mother consented to the surgery, therefore no due process rights were violated. However, the court points out that no factual information is available showing that to be true.

Accordingly, the court finds that the defendant’s assertion of qualified immunity must fail at this stage. The court does not examine the question of privacy and bodily integrity rights, since the defendants already are not entitled to qualified immunity on at least one claim. Of course, M.C. must still prove his case to prevail, but at least this initial hurdle is settled. – Stephen Woods

**Kentucky Court Rejects Marital Testimonial Privilege for Vermont Civil Union Partners in Murder Trial**

A Kentucky judge denied a motion by a lesbian murder defendant to invoke the spousal privilege to present her Vermont civil union partner from testifying at the trial. Ruling on September 23, Jefferson Circuit Judge Susan Schultz Gibson held that because a Vermont civil union is not a marriage, Kentucky’s marital testimonial privilege does not apply. *Commonwealth of Kentucky v. Clary* (Jefferson Cir. Ct., Gibson, J., Sept. 23, 2013).

Bobbie Jo Clary and Geneva Case were united in a civil union in Vermont in 2004, and later came to Kentucky. Clary is now on trial for the October 29, 2011, murder of George Murphy. The Prosecutor claims that shortly after the murder, Clary phoned Case to pick her up, told Case what she had done, and enlisted Case to obtain cleaning materials to remove blood stains from Clary’s van. The Prosecutor wants to call Case as a witness at the trial.

Under Kentucky’s evidence rules, “The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage,” The rule also provides, consistent with Kentucky law, that marriage “refers only to the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.” The state also forbids same-sex couples from marrying and refuses to recognize same-sex marriages their Vermont civil union gave them the same rights associated with marriage, there was essentially no distinction between a Vermont civil union and a Vermont marriage, and that Kentucky’s failure to recognize their spousal status would violate the United States and Kentucky constitutions, constituting a violation of their right to marry “on an arbitrary basis – the couples gender or sexual orientation.” They invoked the Full Faith and Credit Clause of the U.S. Constitution as well as the equal protection requirements of both constitutions. They also relied on the Supreme Court’s recent decisions in *U.S. v. Windsor* (DOMA) and *Hollingsworth v. Perry* (California Proposition 8), arguing that “it follows from these decisions that it is unconstitutional to create a system where a same-sex marriage is legal in the state where consummated, recognized by the federal government, but not recognized by the state in which the same-sex

The court concluded that “black-letter Kentucky law” bars the recognition of same-sex marriages or their equivalent.
Federal Court Rejects Anonymity for Lesbian Civil Rights Plaintiff

U.S. District Judge Gregory L. Frost, overruling a magistrate judge’s order, held that a lesbian who is suing the local government for being subjected to a strip search after her arrest may not proceed anonymously, rejecting her generalized argument that public disclosure of her homosexuality would subject her to harm. *Doe v. Franklin County, Ohio*, 2013 U.S. Dist. LEXIS 134743 (S.D. Ohio, Sept. 20, 2013).

The plaintiff was arrested on a disorderly conduct charge and detained at the Franklin County Workhouse. She was strip-searched incident to the arrest, presumable to determine whether she was carrying weapons or contraband. She alleges that several hours after being searched, she was asked whether she had any tattoos. Upon her affirmative response, she was required to strip again and submit to photographing of her tattoos. According to her complaint, she “had two tattoos on her mons pubis, including one approximately ½ inch from her clitoral hood, as well as several tattoos on other parts of her body.” The tattoos included a female symbol, a phrase in Italian, a poem, the words “beautiful disaster,” the words “living to die, dying to live,” a rainbow, and a flower. Two corrections officers, one male and one female, operated the cameras. According to the plaintiff, wrote Judge Frost, “several of her tattoos reflect her sexual orientation, as well as the placement of the tattoos near and/or on her genitals, would expose her to public ridicule if she were not allowed to proceed anonymously.”

The magistrate judge granted her motion to proceed anonymously two days after she filed her motion, before the County could respond to it, in a summary ruling.

Judge Frost observed that the Federal Rules of Civil Procedure requires that a complaint state the names of the parties, and thus the operating premise is that people have to sue in their own name unless the need for anonymity outweighs the presumption that parties’ names are public information. According to existing precedents, there are four grounds for the district court to exercise its discretion to allow a party to be anonymous, and this case turns on one of them: whether prosecution of the suit will compel the plaintiff to disclose information of the utmost intimacy. The plaintiff cited several prior cases in which litigants had been allowed to proceed anonymously where issues of homosexuality were involved, but Frost found them all to be distinguishable in some way, and some were quite old.

“In this case,” wrote the judge, “Plaintiff has not identified any real-world evidence that she would be subjected to significant social stigma or public ridicule if she were required to prosecute this case under her real name and identified as a homosexual. Proceeding anonymously is the exception, not the rule. Plaintiff has offered merely a generalized and unspecified fear of ridicule as a reason to proceed anonymously. This is not enough, however, to rebut the general rule that parties to litigation should proceed under their real names.”

This sounds a bit odd, coming from a trial judge in the Southern District of Ohio, a state that does not forbid sexual orientation discrimination and in which the public voted not so long ago to amend the state constitution to ban same-sex marriages. In such a jurisdiction, is it so surprising that an individual who feels she has suffered a violation of her civil rights would hope to be able to pursue her claim in court without having to “come out” to the community as a lesbian, perhaps putting her job, housing, and treatment in society in jeopardy? This court essentially holds that such “outing” is the price to pay for initiating litigation against the county in defense of one’s civil rights.
Gay Student Body President Wins $4.5 Million in Tort Damages Against Alumnus Persecutor


In August 2012, an Eastern District of Michigan jury ruled in favor of Christopher Armstrong, the former student body president, who claimed he suffered emotional distress after a blog created by Andrew Shirvell, the former Michigan assistant attorney general, accused him of enticing minors with alcohol, lying, and recruiting people to become homosexual at the university. Armstrong accused Shirvell of defamation as well as intentional infliction of emotional distress for his actions on the blog, in Facebook posts and during Shirvell’s visits to the Ann Arbor campus. Shirvell attacked Armstrong in about 100 separate statements he made on blogs he created about Armstrong. There were also a series of alleged stalking incidents. Shirvell called Armstrong a radical homosexual activist, a racist, an elitist, and a liar.

Shirvell, who defended himself at trial, said the jury award was “grossly excessive” for what he perceives as constitutionally protected speech. Shirvell argued that he was acting within his First Amendment rights and that his statements were either true or protected because of Armstrong’s role as a public figure. Shirvell believes he was “sandbagged” by the justice process.

Shirvell was fired in 2010 by then-Attorney General Mike Cox, after an investigation revealed his use of an office computer to create and post to his blog. Armstrong’s attorney, Deborah Gordon, had said Armstrong was willing to drop the lawsuit if Shirvell apologized and retracted his comments. Shirvell said that was disingenuous, since it wasn’t until closing arguments that a multimillion-dollar damage award was brought up. Shirvell said that he is unemployed and there is no way he could ever possibly pay such a judgment. Gordon responded that the jury could not make him apologize, so the money was the only answer. “We needed him to retract the flat-out fabrications he had come up with about Chris,” she said. “Once he refused to take responsibility, we put it in the hands of the jury.” [Michigan Lawyers’ Weekly, Aug. 24, 2012]

In the instant appeal, Shirvell sought judgment as a matter of law on all claims, a new trial, and in the alternative a remittitur of all damages awarded. Shirvell first argued that Armstrong is not a private individual for purposes of defamation analysis and therefore the negligence standard the jury used to find defamation should be vacated. Shirvell argued that Armstrong was a public figure because he was featured in some news stories, and therefore the “actual malice” standard for defamation should be used. The court did not find that argument persuasive. The court did not find Shirvell’s arguments on invasion of privacy and stalking persuasive, either.

Shirvell next argued against the jury’s finding as to the claim of intentional infliction of emotional distress, asserting that claim was not supported by evidence at trial and that his conduct was constitutionally protected, and, in any event, did not reach the level of outrageousness necessary for the jury to find him guilty on that charge. The court did not find this argument convincing because Shirvell never articulated which statements of his or what actions of his were protected, therefore the jury’s finding stands.

Those were the arguments Shirvell made for his motion for judgment as a matter of law. Shirvell also argued for a new trial. He made eight separate arguments for a new trial. First, Shirvell argued that he was prejudiced during trial. The court said Shirvell raised this argument before trial and that argument was rejected by the court. Second, Shirvell argued that the court excluded certain newspaper articles from evidence, and that prejudiced his case because those articles would have helped his claim. The court did not find Shirvell had shown his rights were violated or the exclusion was so erroneous as to affect the outcome.

Third, Shirvell claimed that the exclusion of two of his proposed witnesses led to an unfair trial. These witnesses would have established that stalking charges referred to state prosecutors did not result in his being criminally charged. The court did not find the exclusion to affect Shirvell’s substantive rights at trial, as their testimony did not go after Shirvell on a criminal charge of stalking was not relevant, in the court’s view, to Armstrong’s tort claim based on the same conduct.

Shirvell attacked Armstrong in about 100 separate statements he made on blogs he created about Armstrong. Shirvell called Armstrong a radical homosexual activist, a racist, an elitist, and a liar.
Fourth, Shirvell argued that the court failed to instruct the jury on his requested affirmative defenses, but court did not find this persuasive, as it had charged the jury on affirmative defenses that it had found relevant to the claims in the case. Fifth, Shirvell argued that he was prejudiced by the taking of de bene esse depositions, scheduled shortly before trial to preserve evidence of certain witnesses. Shirvell previously tried to quash these depositions and he incorporated that argument on appeal, but brought forth no new arguments or evidence. Shirvell kept attempting to re-litigate factual issues that were already decided, but without the introduction of new information.

Sixth, Shirvell tried to argue that he was prejudiced by his own testimony at trial because Armstrong’s counsel, Gordon was allowed to ask him about his being fired from the Attorney General’s office. The court found that omission of this information would not have changed the outcome of the trial and therefore did not warrant a new trial.

Seventh, Shirvell argued again unsuccessfully about jury instructions and, lastly, he about Gordon’s conduct at trial. The court did not find any validity in Shirvell’s critique of Gordon and denied Shirvell’s motion for a new trial.

With regard to remittitur of damages, the court gave short shrift to Shirvell’s argument that the damages were excessive. Judge Tarnow wrote that other courts had upheld damages of this amount in similar cases. Shirvell did not make any arguments that the court found had validity.

This case highlights how important it is to advocate against bullies. For a person in a position of authority to use their public position to mount scurrilous and unsubstantiated personal attacks on a student leader is unacceptable. An assistant attorney general’s primary role should be to resolve issues in the best interest of the people he represents. Instead, Shirvell focused his negative attention on a student whose primary focus was serving the student body of his university. The damages Armstrong was awarded, to the extent they can be collected, are going to a non-profit foundation he created. – Tara Scavo

Tara Scavo is an attorney in Wash., DC

Arkansas Appeals Court Affirms Adverse Custody Award Against Lesbian Mother

In Brimberry v. Gordon, 2013 Ark. App. 473, 2013 Ark App. LEXIS 490 (Sept. 4, 2013), the Court of Appeals of Arkansas affirmed a decision by Circuit Judge Richard Moore (Pulaski County) to award custody of a child born out of wedlock to its biological father, terminating the custody of the child’s lesbian mother.

The parents conceived the child out of wedlock as teenagers, and were able to work out a custody schedule on their own, but the arrangement “deteriorated” and the father filed a petition for paternity and custody, claiming that placement with him would be in the child’s best interest. Writing for the court, Judge Rhonda K. Wood found that the trial court erred in finding that a showing that “a material change of circumstances” had occurred was a prerequisite to making a custody determination, since this was the first time the issue of this child’s custody was presented to the court. The court also found that once paternity was established (and the mother did not contest the father’s paternity), the court should make a custody determination as between the two parents in the best interest of the child, with no presumptions concerning who should have custody.

Judge Wood wrote, “The mother incorrectly attempts to make the issue in this appeal about whether a circuit court can remove custody from a parent in a homosexual relationship for having her romantic partner in the home overnight with the child present. Instead, the issue is whether the circuit court was clearly erroneous in determining that it was not in the child’s best interest to remain in the custody of a mother who did not have a stable home environment.” The trial court said that it was the mother’s “lifestyle choices” that resulted in the custody award to the father.

“The evidence presented was that the mother had her romantic partner spend the night in the home, often when the child was present; that the child would climb into bed with them in the morning; and that the child’s grandmother, who also resided in the home, occasionally had a male companion in the home overnight. In addition, the court expressed frustration that the mother was not employed and was not progressing academically in college – yet she left the child in daycare. Further, she had no ability or plan to support the child.” By contrast, the court found that the father had stable employment as a paramedic and had established a relationship with the child through regular visitation. “The circuit court expressly stated that he did not judge what the parents did on their own time, but having a romantic partner present with the child in the home overnight, and in the same room and bed with the child, was inappropriate.”

Left unspoken by the court was that Arkansas forbids same-sex marriages through constitutional amendment and statute and provides no other form of legal status for same-sex partners, so the mother and father are not on equal footing concerning this “romantic partner” issue. But the court insisted, “It was not whether the mother in this case was in a heterosexual or homosexual relationship that resulted in her losing custody – it was her poor judgment and promiscuity in the presence of her child and the fact that the father provided a more stable home.” One can question the label of “promiscuity” in the absence of any mention that the mother had numerous different romantic partners rotating through her bedroom. The court may be using the word with all its negative connotations to describe any same-sex relationship, since all such relationship in Arkansas are by state law definition non-marital. In any event, having found that the circuit court’s decision to award custody to the father was not “clearly erroneous,” the court affirmed it.
A bill legalizing same-sex marriage has been introduced into the Legislative Assembly of the Australian Capital Territory (ACT – equivalent of the District of Columbia in the U.S.). Unlike bills that have been introduced into the parliaments of Australian states (Tasmania, South Australia and New South Wales), this bill will pass. There are three features of interest to Law Notes readers.

In Australia, power to legislate in respect of marriage is conferred by the Commonwealth (national) constitution on the Commonwealth. If the Commonwealth legislates in a way which effectively ‘covers the field’, any inconsistent state or territory law is invalid. Until 1968, there was no Commonwealth marriage law, and the subject was regulated by the states and territories. In 2004, the Commonwealth amended the Commonwealth Marriage Act to define marriage as being for men and women. Attempts recently in the Commonwealth Parliament to amend the definition to include same-sex couples have failed, albeit each by a decreasing margin.

In an attempt to avoid inconsistency, the model for the various states’ bills and now the ACT bill is a same-sex marriage law – for those who are not covered by the Commonwealth Act. All agree that there are problems with state-based same-sex marriage. Firstly, no one can predict whether state-based same-sex marriage laws will survive challenge in the High Court of Australia (Australia’s highest court). Traditionally, the High Court favors the centralization of power in the Commonwealth and, unlike the US Supreme Court, construes the constitution to ensure it accommodates the changes in institutions and concepts which occur over the years. Ironically, a decision that the Commonwealth has powers to legislate for same sex marriage (and thus no amendment of the constitution is required) will make state-based same-sex marriage vulnerable to being declared invalid. On the other hand, a question is who would mount the challenge. Undoubtedly the Commonwealth could, but there would have to be a serious question as to whether any other person would have standing. And, although the Commonwealth would have standing, a constitutional challenge would have political ramifications which will need to be considered.

Secondly, the Commonwealth has reserve powers to legislate for the government should respond to a same-sex marriage bill in the Commonwealth Parliament. And despite the change of government there are probably more supporters of same-sex marriage in the new Parliament than the old one. Also, voting for same-sex marriage is one thing; overriding a self-governing territory’s laws is quite another.

Thirdly, state-based same-sex marriage in Australia will plainly not be as good as marriage equality under the Commonwealth Marriage Act. If state-based same-sex marriage were to become lawful in a couple of states and territories, the absence of a framework for same-sex marriage in other states or in the Commonwealth sphere will mean that the ‘full faith and credit’ provision in the Commonwealth constitution will be ineffective to ensure recognition in other states and, importantly, in the multitude of Commonwealth laws and agencies that differentiate between married and single couples. Those who would prefer a national solution see state-based same-sex marriage as a political catalyst for marriage equality at a national level.


– David Buchanan
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EMPLOYEE BENEFITS SECURITY ADMINISTRATION – The U. S. Department of Labor’s Employee Benefits Security Administration, which oversees enforcement of the Employee Retirement Income Security Act (ERISA), issued Technical Release 2013-04 on September 18, 2013, stating that for purposes of determining spousal status under employee benefits plans subject to regulation under ERISA, the term spouse should be interpreted to cover same-sex spouses who married in states authorizing such marriages. This embraces the place of celebration rule, under which legally-married same-sex couples will be recognized as such for employee benefit purposes under ERISA even if they live or work in states that do not recognize their marriages due to state laws or constitutional amendments. The Technical Release states that “where the Secretary of Labor has authority to issue regulations, rulings, opinions, and exemptions in title 1 of ERISA and the Internal Revenue Code, as well as in the Department’s regulations at chapter XXV of Title 29 of the Code of Federal Regulations, the term ‘spouse’ will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages.” Further, the term “marriage” will be construed along the same lines. The Release also stated that this interpretation would not extend to same-sex partners in domestic partnerships or civil unions. BloombergBNA Daily Labor Report, 181 DLR A-17 (2013).

INTERNAL REVENUE SERVICE – The IRS issued Notice 2013-61, providing guidance for employers and employees to make claims for refunds or adjustments of overpayments for social security taxes and federal withholding taxes due to the federal government’s refusal to recognize legitimate same-sex marriages prior to the Windsor decision. To reduce administrative burdens, the IRS has set up special simplified procedures, described in the notice, for employers to follow in making these claims. The procedures are optional, and employers can continue to follow existing procedures if they prefer. This follows up on Revenue Ruling 2013-17, previously reported in Law Notes, under which IRS adopts the “place of celebration rule” in determining the validity of marriages for federal tax purposes. Same-sex couples with valid state law marriages celebrated in a marriage equality jurisdiction will be considered married for federal tax purposes regardless where they are domiciled.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD – The FRTIB published a new regulation in the Federal Register on September 20, to amend 5 CFR Parts 1651 and 1690 to provide that it will look to the laws of the jurisdiction of celebration to determine whether a Thrift Savings Plan participant is married. FRTIB administers the tax-deferred retirement savings plan for Federal civilian employees and members of the Armed Forces. This is similar to ERISA-regulated cash or deferred arrangements enjoyed by private sector employee retirement savings plans under IRC Sec. 401(k). The new regulation will supplant an existing one that uses the law of the domicile of a participant to determine their marital status. The existing rule would prohibit the agency from offering certain benefits to same-sex spouses of participants living in states that don’t recognize their marriages. The proposed new regulation would eliminate that problem. “The current choice-of-law is detrimental to a population of TSP participants and does not serve to defray the expenses of administering the Thrift Savings Fund,” wrote the agency. “Therefore, the FRTP is revising its regulations. . .” The published interim rule will be followed by the agency during the comment period and will be made final after consideration of any public comments submitted. Comments can be sent by mail to Office of General Counsel, Attn: James B. Petrick, Federal Retirement Thrift Investment Board, 77 K St., N.E., Washington, D.C. 20002; by Hand Delivery or Courier to the same address; or by Fax to 202-942-1676. For some reason, this agency does not appear to accept email submissions or direct submissions through its website. “The most helpful comments explain the reason for any recommended change and include data, information, and the authority that supports the recommended change,” comments the agency.

NATIONAL GUARD -- The Defense Department notified state National Guard units on September 3 that members with same-sex spouses should be entitled to get the same benefits as members with different-sex spouses, but the Texas and Mississippi National Guards immediately informed their members that those seeking to register same-sex spouses for military spousal identification cards and benefits could not do so on bases established by the state, but would have to go to a federal installation to register. The Louisiana National Guard quickly chimed in its agreement the next day, and a week later the Alabama National Guard concurred (see Huntsville Times, Sept. 11). In these states, officials took the position that a state constitutional and statutory ban on same-sex marriages would take priority over the directive from the Department of Defense. The DoD policy extends such recognition wherever a military member is stationed, regardless of local law on same-sex
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marriage. One would have thought that the DoD policy would prevail on a straightforward preemption analysis, but the die-hard homophobes insisted that their local policies would govern the state National Guard units, at least in state-run installations or when under the command of state governors. One senses a lawsuit brewing. Washington Post, New York Times, September 4. Lambda Legal sent a letter to the commander of the Texas National Guard on behalf of a lesbian who was denied enrollment at a National Guard base on the ground that Texas did not recognize her California marriage to a female lieutenant. Lambda’s letter made the case that the Texas National Guard is bound to follow federal recognition rules, intimating that a lawsuit may follow. * * * Governors and Guard officials in some other anti-marriage states, such as Virginia and Arkansas, saw things differently, in light of the high percentage of National Guard costs paid by the federal government. Arkansas Governor Mike Beebe announced that he was inclined to follow the Defense Department’s directive to allow LGB Guard members with same-sex spouses to register for the benefits, although he was “researching” the matter. Arkansas Daily Weblog, Sept. 4. Virginia Governor Robert F. McDonnell stated more decisively, that he rejected a request by a Virginia legislator to follow the lead of Texas on this. “Our position is, we’re going to follow all of the Department of Defense rules and regulations and policies. Ninety percent of the funding for the state National Guard comes from the federal government, so we intend to follow all of the DOD guidelines.” Washington Post, September 5. In Oklahoma, some local Guard officials started to process applications, but were countermanded by the governor. Washington Post, Sept. 22. In Missouri, a spokesperson for the state National Guard indicated that same-sex spouses could be registered for benefits despite the state’s ban on recognizing same-sex marriages. KMOX, Sept. 20. In North Carolina, Lt. Col. Maury A. Williams announced on September 9 that the Guard would conform to Defense Department policy and allow same-sex spouses of members to register for benefits, according to an Associated Press report, despite the state’s adoption of an anti-marriage constitutional amendment in 2012. In New Mexico, a state where clerks in eight counties are issuing licenses and the state’s highest court has scheduled oral argument on marriage equality to take place in October, the National Guard began implementing the Defense Department policy and processing applications for benefits towards the end of September. Albuquerque Journal, Sept. 27.


PROTECTION FOR SOME DISCRIMINATORS – U.S. Representative Paul Labrador (R-Idaho) drafted a bill called the “Marriage and Religious Freedom Act,” HR 3133, which quickly picked up about sixty co-sponsors in the House, even though a formal copy of the text had not been submitted. Although Rep. Labrador represented the bill as being intended to protect religious institutions from suffering any penalty under federal law for refusing to recognize or deal with married same-sex couples, the version of his draft in circulation was much broader, purporting to protect individuals, not just organizations. The general provision states: “The Federal Government shall not take an adverse action against a person, on the basis that such person acts in accordance with a religious belief that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.” “Adverse action” is defined first in terms of action by the Internal Revenue Service concerning tax exemptions and tax deductions for charitable donations, but then goes on to mention denying or excluding individuals from receiving federal grants, contracts, cooperative agreements, loans, licenses, certifications, accreditation, employment “or other similar position or status,” denial or withholding of benefits under a federal program, or “to otherwise discriminate against such person.” In other words, the intent of the statute is to endow a special right on religious objectors to same-sex marriage to be shielded from any negative consequence under federal laws or programs. Why those who have objections that are philosophical or political rather than religious in nature should not be equally protected is not explained, probably because the bill as drafted creates “special rights” to discriminate because of religious beliefs, which would seem to raise 1st Amendment Establishment Clause issues. Rep. Labrador describes his bill as bipartisan because he found some conservative Democrats fearful of Tea Party challengers in their re-election campaigns who have agreed to be co-sponsors.

ALASKA – The state’s Personnel Board has voted to include same-sex spouses
of state employees as immediate family members, under regulations that will allow state employees to take leave to care for same-sex spouses with serious medical conditions. The Anchorage Daily News reported that qualifications for this benefit will turn on an eight-factor test, for which at least five factors must be met. The factors focus on tangible indicia of couple status, such as joint mortgage or rental agreement, joint vehicle ownership, or being named as beneficiary in a will. Applicants for the benefit must also show that they have cohabited for at least a year. The new rules take effect October 19.

**ARIZONA** – Equality Arizona, the ACLU of Arizona, Human Rights Campaign, and Freedom to Marry announced that they have launched a campaign titled “Why Marriage Matters Arizona” to coordinate public education and advocacy efforts to increase support for marriage equality in the state. There had previously been talk about attempting to put an initiative on the ballot to repeal the state’s anti-marriage amendment and substitute a provision guaranteeing freedom to marry regardless of sex or gender, but these groups considered that more work needs to be done in building public support before such an initiative should be attempted, and Equal Marriage Arizona announced on September 10 that efforts towards a 2013 ballot initiative had been abandoned, with most groups agreeing to wait at least until the 2016 election cycle. The new campaign’s website can be visited at http://whymarriagemattersarizona.org. Within days after it was announced on September 17, it had attracted more than 10,000 Facebook “likes”.

**ARKANSAS** – Attorney General Dustin McDaniel announced on September 17 that proposed language for an Arkansas Marriage Equality Amendment was insufficiently precise to be placed on the ballot. The proposed wording of the amendment is as follows: “Be it enacted by the people of the State of Arkansas: •SECTION 1. The right to marry shall not be abridged or denied on account of sex or sexual orientation. •SECTION 2. No member of the clergy or religious organization shall be required to provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of marriage. The refusal to do so shall not create any civil claim or cause of action.” McDaniel contended that the language did not make clear that its passage would authorize same-sex marriages in Arkansas. He had previously rejected a proposed initiative that would repeal the state’s existing anti-gay marriage provision, saying that the proposal did not make clear that its effect would be to allow same-sex marriages in Arkansas. Daily Journal, Sept. 18; Arkansas Marriage Equality Amendment webpage, visited 9/18/13. McDaniel finally approved a proposed measure that would repeal the anti-marriage amendment without doing more, thus effectively restoring the status-quo ante prior to its passage. He deemed acceptable the name “Repeal of the Arkansas Marriage Amendment” as the title. 78,133 signatures will be required to put it on the ballot, and its passage would not enact marriage equality, but would make it possible for the Arkansas legislature to adopt a marriage equality bill. Talk Business, Sept. 20.

**CALIFORNIA** – Last month we briefly noted a decision by U.S. District Judge Consuelo B. Marshall (C.D. Cal.) in Cooper-Harris v. United States, 2013 U.S. Dist. LEXIS 125030, 2013 WL 4607436 (Aug. 29, 2013), ruling that a lesbian military veteran was entitled to have her same-sex marriage recognized for purposes of federal veterans benefits for her spouse. As of our deadline for the September issue of Law Notes, we did not have a copy of the opinion, only press reports. But the opinion itself is quite brief, and does not provide much more than the press reports in the way of analysis. The plaintiffs challenge the definition of “spouse” in Title 38, the part of the U.S. Code governing veterans’ benefits, which requires that a spouse be of the “opposite sex” of a veteran to qualify for coverage. The wording is strikingly similar to the definition of “spouse” in Section 3 of the Defense of Marriage Act (DOMA), the provision declared unconstitutional in United States v. Windsor, 133 S.Ct. 2675 (2013). Plaintiffs married in California in 2008 during the five-month period prior to enactment of Proposition 8, and by decision of the California Supreme Court, the same-sex marriages contracted during that period remained valid and recognized in California. The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) had intervened in the case to defend Section 3 of DOMA, but after Windsor, BLAG moved to withdraw from the case. The court’s analysis is contained in a handful of sentences. “Plaintiffs state that Congress enacted Title 38 to remove ‘unnecessary gender references,’ and promote gender equality and expand the availability of veterans’ benefits. The Court finds that the exclusion of spouses in same-sex marriages from veterans’ benefits is not rationally related to the goal of gender equality. Plaintiffs also argue that Title 38 is not rationally related to any military purpose, and cite Expert Declarations. Plaintiffs’ experts state that veterans’ benefits are essential to ensuring that Servicemembers perform to their ‘maximum potential,’ and other purposes justifying veterans benefits including readiness, recruiting, cohesion, and retention. The denial of benefits to spouses in same-sex marriages is not rationally related to any of these military purposes. Additionally, Title 38 is not rationally...
related to the military's commitment to carrying for and providing for veteran families.” This opinion came just shortly after Secretary of Veterans Affairs Eric Shinseki told House Minority Leader Nancy Pelosi (by letter) that his department was compelled by statutory language (Title 38) to withhold recognition from same-sex spouses until ordered to the contrary by Congress or the courts. Presumably this opinion provides a basis for changing that position, assuming that the Justice Department will be utterly uninterested in appealing it to the 9th Circuit, and BLAG has withdrawn from the case.

CALIFORNIA – Responding to an inquiry from State Assemblymember Tom Ammiano, the California Department of Corrections announced that state inmates could marry same-sex partners, provided that the partner was not also incarcerated at the time of the wedding. In other words, the department would adopt the same rule for same-sex and different-sex couples seeking to marry. This marked a restoration of the right inmates had previously enjoyed for the five months in 2008 between implementation of the In re Marriage Cases decision and the enactment of Proposition 8. Proposition 8 is no longer in effect, as a result of the 9th Circuit’s dismissal of an appeal from the trial court ruling that Proposition 8 violated the 14th Amendment, upon orders of the U.S. Supreme Court, which found that the appellants lacked Article III standing to bring the case to the appellate courts. Advocate.com, Sept. 4, 2013.

HAWAII – Governor Neil Abercrombie announced on September 9 that he would call a special session of the legislature to convene on October 28 to consider the marriage equality bill that had been introduced over the summer at his request. Abercrombie had previously indicated when introducing his measure that he would call a special session if legislative leaders informed him that there was sufficient support to make passage likely. Otherwise, a special session could be called only by a super-majority vote of the legislators. Abercrombie indicated that he had selected this date with the idea of a session lasting a few days, resulting in a law that could go into effect by mid-November, making it possible for same-sex couples to marry before the end of the calendar year. This date is important for those who could realize immediate tax benefits, since the federal Internal Revenue Service considers a couple to be married for the calendar year if they are married on the last day of the year. Thus, anybody who married before January 1, 2014, could file their 2013 federal (and state) taxes in married status.

ILLINOIS – A marriage equality bill, S.B. 10, passed the state Senate earlier in the year, but the chief sponsor in the House, Rep. Greg Harris, did not bring it up for a vote during the spring session because his count showed insufficient votes for passage. At that time, he indicated that there were members who had told him they would be ready to vote for the bill after meeting with their constituents over the summer, so he indicated that he might try to bring it up for a vote during the “veto session” of the legislature that takes place between October 22-24 and November 5-7, when legislators have an opportunity to respond to any vetoes by the governor of bills passed earlier in the year. S.B. 10 could be passed during the veto session with majority support and go into effect in June 2014, but if Harris could round up at least 71 votes, eleven more than necessary for passage, he might be able to secure an amendment that would allow the measure to go into effect thirty days after the vote. This would have the merit of making it possible for same-sex couples to marry before the end of the calendar year, and thus be able to file their 2013 taxes in married status, which could be advantageous for many, depending upon their income and benefits situation. An analysis published early in September by Windy City Times showed a closely divided chamber, with about sixteen members whose views on the bill had still not yet been publicly announced. Windy City Times, September 9. * * Illinois House Majority Leader Barbara Flynn Currie sent a letter to all House members in October, urging them to support marriage equality both as a matter of equal protection of the law and as a boost to the Illinois economy. Currie’s letter noted the recent expedition to Illinois by Minneapolis Mayor R.T. Rybak, who encouraged same sex couples to bring their wedding business to Minneapolis. Now that the federal government is recognizing same-sex marriages under the “place of celebration” rule for many purposes, Illinois residents may find an incentive to go nearby out-of-state to get married. “Illinois has been missing out on this economic opportunity long before Minneapolis’ mayor unleashed his advertising campaign in our state,” Currie wrote, observing that the wedding industry is big business in Illinois and tacitly acknowledging that same-sex couples from Illinois have been going to Iowa to get married for several years now. Arlington Heights Daily Herald, Sept. 23.

KENTUCKY – The Kentucky Equality Federation filed a lawsuit in Franklin Circuit Court seeking an order overturning the state’s 2004 constitutional amendment banning same-sex marriage. Kentucky Equality Federation v. Beshear. The suit was filed by Mark A. Morenz-Harbinger and Jillian Hall, both Kentucky
attorneys holding leadership positions in the Federation. Named defendants include Governor Steve Beshear, Attorney General Jack Conway, and Fayette County Circuit Clerk Don Blevins. In addition to the Federation, named plaintiffs include Lindsey Bain and Daniel Rogers, a same-sex couple who reside in Kentucky and were married in Connecticut. They sought recognition of their marriage or a license for a Kentucky marriage from the Fayette County Clerk’s office and were turned down. The lawsuit seeks no damages, just declaratory and injunctive relief to invalidate the state’s anti-marriage amendment, adopted in 2004, and to order the state to authorize and recognize same-sex marriages. The suit asserts federal 14th Amendment equal protection and due process claims, as well as state constitutional claims, asserting, among other things, that the 2004 amendment was invalidly enacted as an initiative proposing to violate the equal protection rights of gay citizens of Kentucky. The suit also argues that Kentucky’s traditional marriage recognition rules should be used to recognize the marriage of plaintiffs Bain and Rogers. The text of the complaint can be found on the Federation’s website. *Lexington Herald-Leader*, Sept. 12.

**LOUISIANA** – Department of Revenue issued a ruling providing that same-sex married couples residing in Louisiana (i.e., same-sex couples residing in Louisiana who married in other jurisdictions that authorize same-sex marriages) will have to file their state income tax returns as “single” or “unmarried,” even though the state’s tax law provides that taxpayers must file their state returns using the same marital status as their federal turns. This would seem to have dictated that Louisiana would require them to file as “married,” since effective September 16 all such married same-sex couples are required by federal law to file their federal tax returns as “married.” However, Department of Revenue Secretary Tim Barfield wrote in the ruling that any recognition of a same-sex filing status in Louisiana as promulgated in IRS Revenue Ruling 2013-17 would be a clear violation of the Louisiana Constitution’s amendment forbidding recognition of same-sex marriages. We see a federalism clash looming, and we wonder when the first lawsuit will be filed, since it seems unlikely that the Louisiana legislature is going to amend their tax statute quickly enough to avoid this problem. *Baton Rouge Advocate*, September 14.

**MICHIGAN** – Attorney General Bill Schuette has filed a brief in *DeBoer v. Snyder*, 2013 U.S. Dist. LEXIS 98382, 2013 WL 3466719 (E.D.Mich., July 1, 2013), in which the court rejected the state’s Motion to Dismiss a week after the Supreme Court issued its decision in *U.S. v. Windsor*. In his brief, Schuette makes the argument, implicitly rejected by the Supreme Court in *Windsor*, that a ban on same-sex marriage is justified as a regulation of sexual relationships to promote procreation within traditional married different-sex couples. Or, as Schuette’s staff puts it in the brief, according to a September 19 report in the *Detroit News*, states adopt laws authoring only different-sex marriages because “the unique procreative capacity of such relationships benefits rather than harms society,” and that marriage has historically been closely linked to “responsible procreation and child-rearing.” Since similar arguments were put forward in support of Section 3 of DOMA, which the Court struck down in *Windsor* as lacking sufficient justification, this does not sound like a winning argument, especially as the trial judge invited the plaintiffs to amend their complaint to add a challenge to the state’s denial of marriage to same-sex couples.

**NEW JERSEY** – There was continued speculation about the possibility that Governor Chris Christie’s veto of a marriage equality bill might be overridden during the lame duck session of the legislature. Polls show that Christie will probably be re-elected in November by a large margin, and it was uncertain whether Democrats would retain control of one or both houses of the legislature, so action on this during the next legislature appears uncertain at best. Some Republicans who had not voted for the bill when it passed in 2012 have signified their willingness to vote for an override, although not all of those commitments were made publicly as of September. Chance of override in the Senate were seen as very strong, but the Assembly was considered a long shot.

**NEW MEXICO** – As of September, clerks in eight counties were issuing marriage licenses to same-sex couples. Responding to urgent petitioning by 31 county clerks, the New Mexico Supreme Court agreed to consider whether same-sex couples are entitled to marry in that state, setting oral argument for October 23. The Court had previously refused to allow plaintiffs to skip the lower courts and bring the question directly to the top court, but events on the ground made it increasingly urgent that there be a definitive ruling. On August 30, seven Republican state legislators had sued Dona Ana County Clerk Lynn Ellins, who had begun issuing marriage licenses to same-sex couples on August 21. Attorney General Gary King had previously announced that he would not oppose local clerks issuing such licenses, so the legislators decided to step in and sue to “enforce” the existing marriage law, which does not expressly authorize (or forbid) same-sex marriages. Their authority to bring such a suit is one of the issues in the case, since Ellins’ actions did not cause any harm to the legislators or affect their individual rights in any way, and
the Attorney General did not join their suit on behalf of the state. On August 29, Gail Gering and Carolyn Van Housen filed suit in the 13th Judicial District Court in Sandoval County, seeking an order that County Clerk Eileen Garbagni issue them a marriage license. Gering and Van Housen had applied for a license after hearing news reports about licenses being issued to same-sex couples in other counties of New Mexico, in some cases as a result of local court orders, but were turned down. They are represented by lawyers from the American Civil Liberties Union of New Mexico. The women have been in a committed relationship for 18 years, and attempted to marry in 2004 in California during the brief period when San Francisco County was issuing licenses. They moved to New Mexico in 2005. Although they realized they could have just driven to one of six other counties to get their license, they decided they wanted to get their license from their home county. Shortly before the suit was filed, County Clerk Garbagni received a letter from the Attorney General’s Office, informing her that marriage licenses issued to same-sex couples in Sandoval County briefly in 2004 by former Clerk Victoria Dunlap remained valid unless a court of competent jurisdiction moved to invalidate them. Albuquerque Journal, Aug. 31. District Judge J.C. Robinson issued an order to Grant County Clerk Robert Zamarripa that his office must issue licenses to same-sex couples, and Zamarripa said his office would comply beginning September 9. However, Los Alamos County Clerk Sharon Stover decided to contest a similar order, and asked Judge Sheri Raphaelson to put a pending same-sex marriage case on hold until the issue is resolved by the Supreme Court in another pending case. The Republic, September 4. Judge Raphaelson then ruled at a show-cause hearing that the Clerk must issue the licenses (Albuquerque Journal, Sept. 5), focusing on the gender neutral marriage statute which requires clerks to issue licenses to those who qualify, making Los Alamos County the eighth in the state, and bringing the percentage of the state’s population covered by marriage equality practices or rulings to over 58% by September 5. On September 24, the Albuquerque Journal reported that more than 900 licenses had been issued to same-sex couples, and that a “flurry” of briefs had been filed by the court’s September 23 deadline, arguments from Republican legislators, three county clerks, more than a dozen University of New Mexico law professors, the ACLU and other state and national groups. Alliance Against Freedom represents a group of current and former Republican state legislators, arguing that “the judiciary should exercise caution when asked to divine fundamental and important constitutional rights not expressly provided in the Constitution’s text.” We thought the Constitution expressly provides for equal protection of the laws in the 14th Amendment, but perhaps we were mistaken? Same-sex couples participating in the case are represented by the National Center for Lesbian Rights, the ACLU of New Mexico, and local counsel. The Attorney General filed a brief with the Supreme Court, asking it to declare that denial of marriage license to same-sex couples was unconstitutional, because there is “no rational basis” for treating same-sex couples differently from different-sex couples. His position is that this is a civil rights matter to be decided by the courts, not a political question to be resolved by the voters. Governor Susana Martinez, who did not intervene in the case, continues to call for a referendum on the question.

NEW YORK — The New York State Department of Taxation and Finance posted Technical Memorandum TSB-M-13(5)(I), (10)(M), on its website to provide information about the impact of U.S. v. Windsor on New York taxpayers who are in same-sex marriages, particularly noting that since New York enacted Marriage Equality in 2011 and began recognizing same-sex marriages from other jurisdictions in 2008, people may be eligible for refunds depending on their individual circumstances and the dates of their marriages. The Memorandum notes, in light of federal developments, “For tax years 2011 and 2012, same-sex married couples must file their New York State personal income tax return(s) using a married filing status even if they used a filing status of single or head of household on their federal income tax return(s). For tax years 2013 and after, same-sex married couples must file using the general married filing status rules.” The Memorandum also describes the possibility of filing for estate tax refunds for “estates of individuals who were legally married to same-sex spouses and died prior to July 24, 2011.”

NORTH DAKOTA — The Grand Forces City Council’s Finance and Development Committee voted unanimously on September 23 to approve a bill banning housing discrimination because of sexual orientation or gender identity. The measure was to be presented to the full Council on October 7. Grand Forks Herald, Sept. 24.

OHIO — Last month, we reported that U.S. District Judge Timothy S. Black (S.D. Ohio) had issued a temporary restraining order requiring state officials to recognize the same-sex marriage of a Cincinnati couple who had flown to Maryland to be married, specifically to ensure that one of the men, who was near death, would be recorded on his death certificate as married and his surviving spouse would receive all appropriate recognition as surviving spouse, including eventually

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the right to be buried beside his husband in a family plot. Obergefell v. Kasich, Case No. 1:13-cv-501, 2013 WL 3814262, 2013 U.S. Dist. LEXIS 102077 (July 22, 2013). Soon another gay Cincinnati man, David Michener, petitioned the court to join the lawsuit as a co-plaintiff. Michener and his longtime partner, William Herbert Ives, who had adopted three children together, had been married in Delaware on July 22, 2013, the very date that Judge Black issued his temporary restraining order. Little more than a month after they returned home from their wedding, Mr. Ives died unexpectedly on August 27. Wrote Judge Black, in an Order issued on September 3, “His remains are currently at a funeral home in Cincinnati, and his cremation is scheduled for tomorrow, September 4, 2013. In order for the cremation to proceed, a death certificate must be issued. Accordingly, Plaintiff Michener is seeking a death certificate that accurately reflects Mr. Ives’s status as married and lists Mr. Michener as the surviving spouse in order to bring closure to the family in a manner that respects their marriage and Mr. Ives’s wish to be cremated.” Judge Black granted Michener’s request to become a co-plaintiff in the case, and issued the requested temporary restraining order. After noting that Ohio routinely recognizes marriages contracted out of state between different-sex couples, even when they couldn’t be performed in Ohio due to consanguinity or age, he wrote, “On this record, there is insufficient evidence of a legitimate state interest to justify this singling out of same sex married couples given the severe and irreparable harm it imposes on David Michener.” State officials had not appealed the temporary restraining order previously issued in the case, although they have insisted that ultimately they will defend the state’s law against same-sex marriages at an appropriate time. Perhaps they sense that public opinion would be outraged were they to actively oppose the award of temporary relief in very sympathetic cases such as these.

OHIO – “Why Marriage Matters Ohio” is a marriage equality campaign launched on September 9 to lay the groundwork for a major legislative push for same-sex marriage rights in Ohio. WMMO is a joint project put together by Equality Ohio Education Fund, Freedom to Marry, Human Rights Campaign Foundation, and the ACLU Foundation of Ohio. Recent polling shows that public opinion on same-sex marriage is about evenly divided in the state. The new project will engage in public educational activities, and is separate and distinct from an effort by another organization that is seeking to put a pro-marriage-equality constitutional amendment on the ballot.

OHIO – U.S. District Judge Timothy Black has issued two temporary restraining orders in Obergefell v. Kasich, 2013 WL 3814262, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio, W. Div., July 22, 2013), mandating that officials in charge of issuing death certificates recognize same-sex marriages conducted outside the state in designating surviving spouses and indicating the marital status of the deceased. The Orders were issued on behalf of individual plaintiffs, but attorneys representing the plaintiffs subsequently moved the court to expand the lawsuit to a class-action, seeking an order that the state health department director require all funeral directors and coroners to list gay decedents as married if they were legally married in another state. Judge Black approved this request on September 25, and indicated that he would issue a ruling on the merits in December, according to a September 25 report by the Associated Press. In his opinion accompanying the first TRO, Judge Black explained his reasoning. In light of Ohio’s established law for recognizing marriages contracted out of state, the place of celebration rule has been consistently followed for marriages performed out of state that could not be performed in Ohio due to consanguinity or age requirements, and Judge Black could see no rational justification for refusing to apply the same rule to recognize same sex marriages, so failure to do sue was discrimination in violation of the 14th Amendment’s Equal Protection Clause, which would trump the state’s anti-marriage amendments and statutes. Judge Black never mentioned Section 2 of the Defense of Marriage Act in his opinion; that section would be irrelevant because the plaintiff’s theory of the case was not premised on recognition under the Full Faith and Credit Clause.

PENNSYLVANIA – To defend the American Civil Liberties Union’s lawsuit challenging the constitutionality of Pennsylvania’s ban on same-sex marriage, the administration of Governor Tom Corbett has hired William Lamb, a former justice of the Pennsylvania Supreme Court, and his West Chester-based law firm, Lamb McErlane. Philly.com identified Lamb in a September 5 report as “one of the most prominent figures” in the state’s legal community. Corbett needed to hire litigation counsel to defend the case because Attorney General Kathleen Kane announced in July, after the lawsuit was filed, that she would not defend the state’s laws, as she believed they were unconstitutional in light of the U.S. Supreme Court’s ruling in United States v. Windsor. The lawsuit will be heard by U.S. District Judge John E. Jones III. This case is distinct from one filed by the Corbett administration in the state’s Commonwealth Court, seeking to enjoin Montgomery County Register of Wills, D. Bruce Hanes, from continuing to issue marriage licenses.
to same-sex couples (see below). * * * On September 26, Cara Palladino and Isabelle Barker, who were married in Massachusetts in February 2005 and then moved to Pennsylvania, where they work at Bryn Mawr College and are raising their four-year-old son, filed suit in U.S. District Court in Philadelphia, seeking an order that Pennsylvania recognize their marriage despite the state’s Defense of Marriage Act. The action invokes the Full Faith and Credit Clause, and thus provokes a direct challenge to Section 2 of the federal Defense of Marriage Act, which purports to relieve states of any federal constitutional obligation to recognize same-sex marriages contracted in other states. Their suit names as defendants Governor Tom Corbett and Attorney General Kathleen Kane. Kane has previously stated that she would not defend the state’s Defense of Marriage Act in court, so the defense will fall to the Governor’s Office of General Counsel. The Philadelphia Inquirer article (September 27) reporting about the lawsuit did not identify the couples’ counsel, but quoted some law professors from Pennsylvania (John Culhane at Widener University and Kermit Roosevelt at University of Pennsylvania) as giving the case a good chance of proceeding, although Roosevelt discounted the plaintiffs’ “right to travel” argument as a basis for victory in the case. The Boston Globe also reported on the lawsuit without identifying counsel for the plaintiffs.

**Pennsylvania** — On August 5, 2013, the Pennsylvania Department of Health filed a Petition and Application in the Commonwealth Court seeking a writ of mandamus to compel D. Bruce Hanes, in his official capacity as the Clerk of the Orphans’ Court of Montgomery County, to comply with Pennsylvania’s ban on same-sex marriages contained in Sections 1102 and 1704 of the Marriage Law. The writ sought was issued on September 12 in Commonwealth of Pennsylvania v. Hanes, No. 379 M.D. 2013 (Commonwealth Court) (unpublished opinion). According to news reports, Hanes had issued more than 160 licenses since July 24, shortly after the Attorney General declined to defend the marriage ban in a case brought by the ACLU (Whitewood v. Corbett, no. 13-1861) [M.D. Pa.]). Hanes opposed the application, arguing: [1] that because he is a “judicial officer,” only the Pennsylvania Supreme Court can review his issuance of marriage licenses; [2] that the Department lacks standing; and [3] failure to state a claim because the Department cannot show Hanes lacks discretion to determine the constitutionality of the Marriage Law. On September 12, 2013, President Judge Dan Pellegrini ordered Hanes to, inter alia, cease and desist from issuing marriage licenses to same sex couples and from accepting the marriage certificates of same-sex couples for filing. The opinion was notable for beginning with Windsor v. United States, 133 S. Ct. 2675 (2013), summing the case up only based upon that opinion’s federalism-based language overturning the federal Defense of Marriage Act codified at 1 USC § 7. Perhaps Judge Pellegrini was showing his proverbial cards as to his thoughts on whether Pennsylvania’s own DOMA was constitutional. Nonetheless, Judge Pellegrini ruled against Hanes on each of his arguments. He noted the lack of any legal support for the contention that the Clerk of Orphan’s Court acts in a judicial capacity when issuing marriage licenses. As for standing, there was no dispute that the Attorney General had standing to bring the petition and the Attorney General authorized the Department to bring the proceeding on her behalf (Commonwealth Attorneys Act § 204 [c]). Judge Pellegrini also noted that the Department had standing pursuant to its authority under Section 2104 (c) of the Administrative Code of 1929. Finally, Judge Pellegrini ruled that because the statute granting Hanes his power to issue licenses does not give him any discretion in the exercise of his duties, he could not rely on his own determination that the relevant provisions of the Marriage Law were unconstitutional. Hanes did attempt to argue that same-sex marriage ban was itself unconstitutional. However, because this was a mandamus action, that “defense” was really a counterclaim since statutes are presumptively constitutional, and counterclaims are not permitted in such proceedings. Eric J. Wursthorn Hanes announced on September 17 that he will appeal Pellegrini’s ruling, according to a report in the Bucks County Courier Times of September 18. Twenty-one couples who have married using licenses issued by Hanes’ office have filed their own suit in the Commonwealth Court, seeking a declaration as to the validity of their marriages (and that the state’s Defense of Marriage Act is unconstitutional). The suit was filed in response to Judge Pellegrini’s statement to their counsel during oral argument, “Why don’t you just file an action?” rather than seek to intervene in the state’s case. Philadelphia Inquirer, Sept. 26.

**Pennsylvania** — David and Joan Farley, parents of the late Sarah Ellyn Farley, have decided to abandon the appeal filed in their name in Cozen O’Connor v. Tobits, 2013 U.S. Dist. LEXIS 105507, 2013 WL 3878688 (E.D.Pa., July 29, 2013), in which the U.S. District Court ordered that their daughter’s surviving same-sex spouse was entitled to treatment as a surviving spouse under her employer’s employee benefit plan. The women were married in Canada and resided in Illinois, where Farley was an attorney in the Chicago office of Cozen O’Connor. When both the surviving spouse, Jennifer Tobits, and Farley’s parents applied for the death benefit, the firm filed an interpleader action in federal district court in Pennsylvania. The court ruled that, under federal law, the death benefit was a joint and survivorship benefit, which belongs to the surviving spouse, while Pennsylvania law ruled that the death benefit was a survivor benefit, which belongs to the parents. The court ruled in favor of the firm, but the parents appealed. Farley, who was a volunteer with the firm, and the firm’s clients have decided to drop the appeal.
court seeking a judicial determination of who should get the benefit. The district judge, reasoning that under the Illinois Civil Union Act Ms. Tobits would have the legal rights of a surviving spouse, concluded that this would provide a basis for treating her as the surviving spouse under an ERISA-regulated employee benefit plan. Subsequently, the IRS issued guidance indicating that for federal tax purposes all same-sex marriages that were lawful where they were made would be recognized by the federal government, which tended to support the district court’s ruling, albeit on a different ground: that the federal government would recognize the Canadian marriage of Farley and Tobits, regardless of local law in their state of domicile.

SOUTH CAROLINA – Katherine Bradacs and Tracie Goodwin, a same-sex couple who married in the District of Columbia in 2012 but reside in South Carolina, filed suit in the U.S. District Court in Columbia, South Carolina, on August 28, seeking declaratory and injunctive relief to get their marriage recognized by their home state, Bradacs v. Haley, No. 3:13-cv-02351-JFA [2013 WL 4603857]. Plaintiffs are represented by Carrie A. Warner of Warner, Payne & Black LLP, and John S. Nichols, of Bluestein, Nichols, Thompson & Delgado LLC, both Columbia law firms. The named defendants, sued in their official capacities, are Governor Nikki Haley and Attorney General Alan Wilson. The complaint asserts claims under the 14th Amendment due process and equal protection clauses and the Full Faith and Credit Clause, arguing that South Carolina’s refusal to recognize their marriage is unconstitutional under any level of judicial scrutiny, and relying on the U.S. Supreme Court’s determination in United States v. Windsor that none of the justifications advanced for Congress’s decision to bar federal recognition of same-sex marriages sufficed. The complaint sets forth in detail various state and federal rights and responsibilities that are withheld from same-sex couples who have been married in other jurisdictions but live in South Carolina, particularly emphasizing that Bradacs is a public employee whose spouse is being excluded from various benefits routinely available for spouses of public employees, and that Goodwin is a military veterans with service-related disabilities whose spouse is deprived of various benefits because their state of domicile does not recognize their marriage. This last point is correct, for now, concerning Social Security. Whether it is or remains correct for veterans’ spousal benefits remains to be seen, as ongoing litigation puts that in issue.

TENNESSEE – Same-sex couples who go out of state to get married are finding that Tennessee officials are not cooperative about allowing them to get their names changed on driver’s licenses, even when they present valid marriage certificates. This is because local officials have been construing Tennessee’s constitutional ban on same-sex marriage as precluding any form of recognition for any reason. Reported The Tennessean on September 21, “While the federal government recognizes same-sex marriages for the purposes of ID, Tennessee does not. When gay husbands and wives show up at Tennessee driver’s license stations with marriage certificates and freshly minted Social Security cards in their married names, they’re turned away – with a quote from the state constitution and an admonition to come back with a court order.” Courts are granting legal name changes, for the payment of a fee, and the individual then can bring the judicial name change order back to the motor vehicle bureau to get a license issued in their new name. One individual complained to the newspaper that this process had delayed getting his new “open carry” gun license in his new name. One would think that the 2nd Amendment exponents would be all over this one.

VIRGINIA – U.S. District Judge Michael F. Urbanski has scheduled a trial for June 2-13 at the U.S. District Court in Harrisonburg in Harris v. McDonnell, the pending marriage equality case in the Western District of Virginia brought by the ACLU of Virginia Foundation and Lambda Legal. The court’s order sets out a schedule for motions, discovery, and other pretrial issues. If the parties are interested in settlement, they can contact a magistrate judge to set up a conference. This last is not such an idle hope; the Democratic candidate for governor, ahead in the polls as of mid-September, supports marriage equality. Depending how the election turns out, it is possible that some settlement might be in the cards. Winchester Star, Sept. 21. But, not counting on this, plaintiffs’ counsel announced in the end of September that they were filing a motion for summary judgment in the case, arguing, in light of Windsor, that they are entitled to win as a matter of law. ACLU, Lambda News Release, Sept. 30. * * * The Washington Post (Sept. 30) reported the celebrity attorneys David Boies and Ted Olson, flush from their victory in the California Proposition 8 case, are becoming co-counsel in the other pending marriage equality case in Virginia, brought in Norfolk in July by same-sex couples Timothy Bostic and Tony London, who were denied a marriage license, and Carol Schall and Mary Townley, whose California marriage is not recognized because of the Virginia anti-marriage amendment. Olson indicate to the Post that he anticipated the case being decided on a summary judgment motion. Depending on the timing of the two pending cases,
one would expect a consolidation for oral argument before the 4th Circuit, a court that was traditionally quite conservative but has been pulled back toward the center by some retirements and President Obama’s appointments. However, the litigation in Virginia might be rendered happily moot were the 9th Circuit to reverse the district court’s decision in the pending Nevada marriage equality case, and the Supreme Court to take it for review quickly. All speculation, of course.

**WEST VIRGINIA** – At the end of September, Lambda Legal issued a press release stating that it would be holding a press conference in West Virginia on October 1 to announce the filing of a major federal lawsuit. We are guessing it will be a marriage equality case.

**WISCONSIN** – The State Department of Revenue issued “Tax Guidance for Individuals in a Same-Sex Marriage” on September 6, advising same-sex couples who had married in other jurisdictions but who reside and pay taxes in Wisconsin that the state would not recognize their marriages for tax purposes, pursuant to a state constitutional amendment that was adopted in 2006. Thus, each member of the couple must file an individual income tax in Wisconsin. Since many of these couples will be filing their federal income tax forms jointly as married and would not in the normal course prepare individual federal returns, Wisconsin is devising a new form for them to attach to their state individual tax returns, in which they will show the breakdown and allocation of their income for state tax purposes. This will be in lieu of the copy of their federal return that would normally be filed with their state return. The new Schedule S was to be available from the Revenue Department’s website by September 30, could also be used by couples who were filing late returns from prior tax years, and would have to be used for returns filed for tax year 2013 and following. The Wisconsin State Journal reported on September 10 that some same-sex couples living in Wisconsin who had married elsewhere planned to defy the Guidance by attempting to file their state tax returns jointly as married, and then if rejected to bring lawsuits. There is a particular incentive to do it, as Wisconsin allows married couples to take a $480 tax credit. Some are counting on the state to accept the returns, since there is no indication on the state tax return for the sex of filers. Commented one Wisconsin tax attorney, “Virtually nobody’s state tax returns with very few exceptions are looked at by human beings. Even if you look at a tax return, you can’t tell what gender people are.” So it is possible that these returns will be processed without any problem, and it would only be of one is spotted on a random audit and flagged for taking the marital tax credit that a problem could arise. Anybody who encounters difficulties might file a lawsuit, relying on United States v. Windsor to argue that there is no rational basis for the state to discriminate against married same-sex couples by treating them differently.

**CIVIL LITIGATION NOTES**

**U.S. 5TH CIRCUIT COURT OF APPEALS** – Sitting en banc, the U.S. Court of Appeals for the 5th Circuit reversed a three-judge panel and upheld a jury verdict finding that an employer violated Title VII due to the hostile environment sexual harassment of a male employee by a male supervisor, but remanded the case for reconsideration of damages, finding that the evidence would not support an award of punitive damages in the case.

**EEOC v. Boh Brothers Construction Co.**, 2013 WL, 5420320, 2013 U.S. App. LEXIS 19867 (Sept. 27, 2013). The evidence, summarized for the court by Circuit Judge Jennifer Walker Elrod, showed that the supervisor subjected the employee to frequent verbal humiliation, calling him “pussy” and “faggot” and criticizing him as unmanly, particularly for his use of “Wet Ones” instead of toilet paper, which the supervisor characterizes as “kind of gay” and “feminine.” The employee complained about the harassment to a higher level supervisor, but the company, as usual in hostile environment cases that end up getting litigated, didn’t do much of anything to cure the problem. (It was only when the employee suggested that the supervisor was engaging in other improprieties that the company undertook a real investigation producing consequences for the supervisor.) There was also evidence that the company made no real effort to train supervisors about hostile environment harassment or to adopt policies specifically addressing the issue, so it could not benefit from the affirmative defenses the Supreme Court has made available to companies who do undertake reasonable efforts to prevent sexual harassment. There was testimony from the supervisor in question as well as higher-level supervisors that they were unaware that same-sex harassment could be unlawful under Title VII. Their assumption was that calling somebody “faggot” or “gay” can never be actionable under Title VII, since that statute does not forbid sexual orientation discrimination. The jury found a violation of the statute and made a large punitive damages award as well as a back-pay and attorneys fee award, which the trial judge cut down to come within statutory limits. The en banc Court of Appeals majority thought that the statutory prerequisite for punitive damages hadn’t been met here, astonishingly, due to the professed innocence of management as to the
possibility that this kind of harassment could violate Title VII. (Perhaps that’s not so odd when one considers that the 5th Circuit was an outlier among the circuits on the question whether same-sex harassment could be actionable under Title VII, suffering reversal of its position by the Supreme Court in the *Oncale* case.) Simply striking the punitive damages was not seen as appropriate, however, because the trial judge had allocated damages with the cap in mind and upon a remand might allocate them differently. The Circuit was divided about this outcome for the case, voting 16-10. The Supreme Court has not yet ruled on the question of same-sex harassment on the merits, *Oncale* having been limited to the question whether the 5th Circuit had correctly ruled that same-sex harassment cases were never actionable under Title VII, so this case looks like a plausible candidate to bring the issue back to the Court. Since the statutory maximum of $300,000 was awarded after the trial and something in that neighborhood is likely to be awarded on remand, the employer has an incentive to file a certiorari petition in this case.

**U.S. 9TH CIRCUIT COURT OF APPEALS** – On September 18 the 9th Circuit heard oral argument in *SmithKline v. Abbott Laboratories*, an appeal of an antitrust jury verdict in which the appellant, SmithKline, asserts that respondent’s use of a peremptory challenge to dismiss a gay prospective juror was a constitutional violation requiring that the verdict be vacated and the case remanded. The trial judge allowed the peremptory, and Abbott advanced no argument as to why the juror, who referred to his same-sex partner during voir dire, should be struck for cause. The case concerned a claim that Abbott had used monopoly power to artificially inflate the price for an important HIV medication, and the argument goes that Abbott sought to keep off the jury a gay man who would be disposed to look with disfavor on a drug company charged with engaging in such behavior. An audio recording of the oral argument can be heard on the 9th Circuit’s website. The Supreme Court precedent on unconstitutional use of peremptory challenges is *Batson*, in which the issue was use of peremptories to keep black people from sitting on a jury. The Court held that such use of peremptory challenges violated the Equal Protection rights of the challenged juror. In subsequent cases, federal courts have applied the *Batson* rule where it was shown that peremptories had been used to exclude people based on other characteristics recognized as “suspect” or “quasi-suspect” under federal equal protection jurisprudence. The “heightened scrutiny” requirement would mandate that a party challenging a juror provide a non-discriminatory reason why the juror shouldn’t serve on the case, and the assumption that a black or female juror would sympathize with one side or the other solely due to their race or sex was unacceptable under this standard. This appeal was pending when the U.S. Supreme Court announced its decision in *U.S. v. Windsor*, striking down Sec. 3 of the Defense of Marriage Act as a violation of the “equal liberty” of gay people guaranteed by the 5th Amendment. The 9th Circuit panel asked the parties to submit supplementary briefing on the impact of *Windsor* prior to the oral argument. At the argument, counsel for SmithKline, Lisa Blatt, contended that their case for finding a constitutional violation was improved by *Windsor*, where the Court’s methodology suggested it was using some form of heightened scrutiny to decide whether Section 3 of DOMA withstood constitutional review. Counsel for Abbott argued to the contrary, noting that the Supreme Court had not explicitly ruled that sexual orientation discrimination claims require heightened scrutiny, and that the Court’s language could in places lend itself to a rational basis approach – under which the *Batson* rule would not apply. Abbott also contends that its counsel did not know that the juror was gay when it moved to strike him. From the oral argument, it appeared that the court would be likely to find that *Batson* applies, although there were various complications in the trial record that could give the judges a basis for avoiding the question, including – if credible – ignorance of the juror’s sexual orientation. But Judge Stephen Reinhardt suggested that this did not seem credible in light of the voir dire transcript. The issue of the level of judicial review for sexual orientation claims is particularly weighty just now in the 9th Circuit, where two appeals in marriage equality cases – from Hawaii and Nevada – are pending before the Circuit. (The Hawaii case may be mooted, however, if a special session
of the legislature called for late in October passes the governor's proposed marriage equality bill, as seems likely.) If, as Abbott argued, Windsor effects no change, then the prevailing 9th Circuit precedent would not use heightened scrutiny in such cases. If, as SmithKline argues, Windsor renders the 9th Circuit precedent (last expounded in military cases such as Witt and Log Cabin Republicans) obsolete, heightened scrutiny would apply to the marriage equality cases, more likely resulting in rulings in favor of the plaintiffs-appellants in those cases. Los Angeles Times, Sept. 19. Of course, it is possible that the marriage cases could be decided in favor of plaintiffs using rational basis review, if the Court's reasoning in Windsor correctly characterizes how to perform rational basis review in a sexual orientation discrimination case!

**U.S. 9TH CIRCUIT COURT OF APPEALS** – According to the 9th Circuit, conditions for transgender individuals in Mexico – at least in larger cities – have improved sufficiently to make it difficult to meet the standard for protection under the Convention Against Torture (CAT). So holding, the court denied a petition to review the determination against such protection by the Board of Immigration Appeals in Gutierrez v. Holder, 2013 U.S. App. LEXIS 19033 (9th Cir., Sept. 15, 2013). Wrote the court: “Ms. Gutierrez’s testimony shows that she was tortured by the police in her home town of Jerez before she moved to Zacatecas in 1993. Her testimony is also reasonably understood not to allege any incidents of torture by the police or others between 1993 and 1999, when petitioner lived in Zacatecas and later Guadalajara. In addition, the evidence presented by Ms. Gutierrez and the Department of Human Services shows that Mexico has made strides toward protecting the civil rights of gay, lesbian, and transgender persons. The BIA reasonably determined that Ms. Gutierrez likely will not suffer torture if she is returned to a larger city in Mexico, even though the culture may remain highly repressive in its attitude toward gay, lesbian, transgender and HIV-positive persons.” In other words, in the view of the 9th Circuit LGBT people from Mexico confront a high barrier to establishing entitlement to refugee status in the United States. One suspects that this will generally be true for people coming from countries where there is some official level of non-discrimination policy, positive high court opinions, and jurisdictions allowing same-sex marriages, which is now true of Mexico and several other Central and South American countries from which claims for asylum, withholding of removal or CAT protection used to be plausible. In the past, credible evidence that a petitioner had actually been tortured by police due to transgender status would have won relatively easy protection under the CAT; no longer so, as this case illustrates, when the torture was well in the past and not more recently repeated before the petitioner’s entry to the United States.

**U.S. 9TH CIRCUIT COURT OF APPEALS** – Binary thinking predominates when federal immigration officials evaluate asylum claims from aliens claiming to be gay. Either you are or you aren’t, evidently, and bisexuality does not exist in the frame of reference of U.S. immigration authorities. In Karanja v. Holder, 2013 U.S. App. LEXIS 19853 (9th Cir., Sept. 27, 2013) (not officially published), the applicant testified that “he was persecuted in Kenya because he is a homosexual.” The BIA found this was not credible, because “it is undisputed that Karanja had significant heterosexual relationships in the United States; he was married to one woman and fathered a child with another woman.” The 9th Circuit decided that this “undisputed” evidence about Karanja’s relationships in the U.S. provided a reasonable basis for the BIA to conclude that his testimony about being persecuted in Kenya was “not sufficiently corroborated.” “We cannot conclude that ‘any reasonable adjudicator would be compelled to conclude to the contrary,” wrote the court, noting that “Rizk v. Holder, 629 F.3d 1083 (9th Cir. 2011), as circuit authority for this approach to judicial review of the BIA’s decisions. In other words, people who are bisexual need not apply, even if they could show persecution in their home country due to their sexual identity and conduct, if their conduct in the U.S. included evidence of heterosexual functioning. Sounds kind of lame to us.

**ARIZONA** – An HIV-positive state prison inmate serving a life sentence suffered summary judgment of his 8th Amendment suit against the dental services provider contracted to the Arizona Department of Correction in a dispute over dental care. Worley v. Correctional Medical Services, 2013 WL 4874456 (D. Ariz. Sept. 12, 2013). Upon initial examination, it was clear that tooth #19, which was causing intense pain to the plaintiff, needed treatment. After examination, the dentist said it needed to be extracted with restorative work on surrounding teeth. The plaintiff refused extraction and demanded that a root canal be performed. He claims that the dentist told him that as a life-sentence prisoner he could not get a root canal. In subsequent examinations plaintiff continued to request a root canal on the infected tooth, and the dentist continued to insist on extraction as the appropriate procedure. Plaintiff claims that the lack of treatment resulted in a cyst that burst and spread infection to his tongue and inner cheek; that another dentist performed the root
canal to save the tooth several months later. Granting summary judgment to defendants, Senior District Judge Robert C. Broomfield found that the dentist and DOC were entitled to qualified immunity, stating that there is no well-established federal right for an inmate to get a root canal when the dentist believes that the correct procedure would be an extraction. A difference of opinion between the inmate and the health care provider about the appropriate treatment does not constitute “deliberate indifference to a serious medical condition” by the health care provider, which is the 8th Amendment standard. Although there were several references to the inmate’s HIV status in the opinion, and the dentist testified that administration of the antibiotics that the inmate claimed he should have received could be problematic in light of HIV infection, there was no indication that the denial of root canal was premised on the inmate’s HIV status.

GEORGIA – In Moore v. Treatment Centers of America Group, LLC, 2013 U.S. Dist. LEXIS 131703 (M.D. Ga., Sept. 16, 2013), Senior U.S. District Judge Hugh Lawson granted summary judgment in favor of defendant in a same-sex harassment suit brought under Title VII of the Civil Rights Act of 1964. Plaintiff Tonyia Wilson Moore alleged that she was subjected to unwanted touching of a sexual nature by the woman assigned to train her, which allegedly continued even though she complained about it to a supervisor (who happened to be the alleged harasser’s sister-in-law). Although the alleged harasser gave Moore generally good job evaluations, she was terminated at the end of her 90-day probationary period, ostensibly for subpar work performance. Relying on the Supreme Court’s same-sex harassment ruling, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the court found that Moore had failed to provide evidence supporting any one of the scenarios under which the Supreme Court would find alleged same-sex harassment to be actionable. This was not an overt quid-pro-quo case, the alleged acts of unwanted touching were not frequent or severe enough to convince the court that they met the high bar of establishing a hostile work environment, and Moore presented no evidence that the alleged harasser was a lesbian or treated men and women differently in the workplace. As to retaliation, the court found that Moore failed to show that she had a good faith, objectively reasonable belief that she had been subjected to unlawful conduct. “Because the conduct fell well below the threshold for actionable severe or pervasive conduct,” wrote Judge Lawson, “Plaintiff did not have an objectively reasonable belief that she was opposing unlawful conduct under Title VII. Therefore, her retaliation claim fails because she cannot establish that she engaged in statutorily protected conduct.” Is this a case where an employee was dismissed because she was oversensitive about being touched by another female employee, as the court seems to conceptualize it, or was this a genuine case of hostile environment harassment and retaliation, as plaintiff alleged? It is hard to know from the conclusory statements by the court in its opinion, but the court’s discussion of the legal issues illustrates the very demanding evidentiary standards that federal courts now apply to reject such cases on pre-trial motions.

ILLINOIS – One of the circumstances in which the U.S. Supreme Court has suggested that hostile environment same-sex harassment claims may be actionable under Title VII is when a homosexual supervisor “hits” on a male employee. A potential example is found in Zuidema v. Raymond Christopher, Inc., 2013 U.S. Dist. LEXIS 128623 (N.D. Ill., September 10, 2013), but U.S. District Judge Robert M. Dow, Jr., after concluding that this was a “close case” in terms of the necessary factual allegations by the plaintiff, granted summary judgment to defendant based on the Supreme Court’s recent decision in Vance v. Ball State University, 133 S.Ct. 2434 (2013), where the Court took a narrow view of employer liability for harassing conduct by supervisors. Bryan Zuidema was hired to be manager of a new Cinnabon outlet in the Chicago Ridge Mall food court. Jonathan Ackerman was the corporate trainer assigned to help Zuidema get the new store up and running. According to Zuidema’s allegations, Ackerman is gay, very open about it, flirty and assertive, and subjected Zuidema to a steady stream of unwanted comments and attention. According to Zuidema, Ackerman referred to him as “sexy” and on their second day for work said that “he would like to take [Plaintiff] out in the back in the shed and have his way with him” and that he was going to “bend Bryan over and have his way with him.” Zuidema told Ackerman to “knock it off” but, allegedly, to no avail. Zuidema quickly decided that this would not work out and applied for a job with another company, giving notice that he was leaving less than two weeks after he arrived. Zuidema sued the company under Title VII for sexual harassment and constructive discharge, adding state law claims for battery (based on Ackerman twice touching him in what might be considered a sexually provocative manner) and intentional infliction of emotional distress. Ruling on the company’s summary judgment motion, Judge Dow found that this conduct might be sufficiently severe and pervasive to create a hostile environment based on sex, but that under Vance it was clear that Ackerman was not a supervisor – he had no authority to make or recommend tangible personnel actions concerning Zuidema – and so the
ILLINOIS—U.S. District Judge Michael Reagan decided upon preliminary review of a pro se prisoner complaint that inmate Steve Collier may pursue his 42 USC 1983 8th and 1st amendment claims against Charles W. Conrad, supervisor of the dietary department at Big Muddy River Correctional Center. Collier alleges that Conrad may unwanted sexual advances, and threatened Collier that he would lose his coveted assignment working in the department if he did not submit to Conrad’s advances. Collier also claimed that Conrad subjected him to arbitrary strip searches, had him blackballed, and issued retaliatory disciplinary reports. Reagan wrote that courts have recognized sexual harassment claims by prisoners under the 8th Amendment, and also noted that strip searches cannot be performed without a valid penological purpose. He also wrote, “An oral complaint regarding a matter of public concern – such as prison personnel sexually harassing prisoners – could arguably suffice to trigger First Amendment protection against retaliation.” Collier v. Conrad, 2013 U.S. Dist. LEXIS 133057 (S.D. Ill., Sept. 18, 2013).

MARYLAND—U.S. District Judge Ellen L. Hollander denied the government’s motion to dismiss a Title VII sex discrimination claim by a transgender former Internal Revenue Service agent. Ruling September 23 in Hart v. Lew, 2013 U.S. Dist. LEXIS 135330 (D. Md.), Judge Hollander rejected the defendants’ move to convert a dismissal motion into a summary judgment motion, finding that the plaintiff should be entitled to discovery and that credibility issues concerning factual allegations figured against deciding the case without a trial. The court dismissed those of Sydney Hart’s claims relating to various complaints about her treatment by supervisors on grounds that they had not been administratively exhausted and, in some cases, were expressly waived in settlement agreements of individual grievances. However, the judge found that the factual allegations in the pro se complaint were sufficient to state a sex discrimination claim of wrongful discharge and a retaliation claim, taking particular note of allegations that various supervisory personnel at the IRS made adverse comments to Hart in response to her filing discrimination grievances. The court accepted the plaintiff’s claim that discrimination because of her gender transition would state a sex discrimination claim, pointing out that the government did not contest that point, which is consistent with the Obama Administration’s current position that gender identity discrimination is a form of sex discrimination prohibited by Title VII. The bulk of the opinion is taken up with a lengthy summary of the plaintiff’s factual allegations, which suggest active and open hostility because of her gender identity and transition from male to female gender expression.

NEVADA—In Baldazo v. Elko County, 2013 U.S. Dist. LEXIS 131251 (D. Nev., Sept. 13, 2013), U.S. District Judge Larry R. Hicks granted the employer’s motion for summary judgment on Title VII discriminatory discharge and retaliation claims brought by a lesbian former sheriff’s deputy, but denied the motion as to her hostile environment claim. Under the collective bargaining agreement governing county employees, Cecilia Baldazo’s discharge was automatically brought to arbitration, and the arbitrator found there was just cause for the discharge. The county argued that this should preclude Baldazo’s Title VII discharge claim. Judge Hicks rejected the argument, noting that the CBA specifically excluded discrimination claims from the arbitrator’s jurisdiction. However, he found that the county had
presented sufficient legitimate reasons for discharge to rebut Baldazo’s prima facie case, and since she did not present contrary evidence to show pretext, her discharge claim should be denied. Furthermore, apart from conclusory allegations regarding timing of the discharge, she had not alleged sufficient facts to support a retaliation claim, failing to tie specific adverse actions to specific statutorily protected activity. However, the court found that Baldazo’s allegations about her treatment by her supervisor, Sergeant Hester, were sufficient to state a prima facie case of hostile environment harassment during her employment. “While Defendants concentrate their Motion on Baldazo’s termination,” wrote Judge Hicks, “they do not address Baldazo’s allegations relating to severe or pervasive harassment, in particular by defendant Hester.” Hicks found that the allegations “gave rise to a genuine issue of material fact that Hester’s conduct was so severe or pervasive as to alter Baldazo’s conditions of employment.” So this claim would survive summary judgment and the case can continue. Although the court mentioned that Baldazo is a lesbian, its rendition of her factual allegations suggest that most of the alleged discrimination had to do with her gender, as such, and not particularly her sexual orientation. Although Nevada state law bans sexual orientation discrimination, there is no mention of any state law supplementary claim in this federal Title VII action. Baldazo is represented by Jeffrey A. Dickerson of Reno and Julie Cavanaugh-Bill of Elko, Nevada.

NEW YORK – Queens County Supreme Court Justice Duane Hart rejected a motion to dismiss a discrimination suit against a Catholic prep school by a veteran teacher who was discharged after informing the school that she was transgender. Ruling from the bench in Krolikowski v. St. Francis Preparatory School, the judge questioned the school’s claim that the plaintiff was discharged for insubordination. “Insubordination after thirty-two years of teaching?” asked the judge. “And the insubordination seems to coincide with the expression of being transgender?” New York City’s Human Rights ordinance forbids discrimination on the basis of sex, sexual orientation or gender identity or expression. After Marla Krolikowski was dismissed in August 2012, an online petition asking for a formal apology from the school circulated by her former students drew over 14,000 signatures. According to her attorney, Andrew Kimler of Vishnick McGovern Milizio LLP, she was well-liked by students, parents and staff and had routinely won praise, outstanding reviews, and awards during her extensive teaching career. The plaintiff is seeking damages for economic loss and emotional distress. The bench ruling was to be followed by a written decision, which we will report when it becomes available.

NORTH CAROLINA – U.S. District Judge Louise W. Flanagan upheld a denial of Social Security disability benefits to a person living with HIV in Broussard v. Colvin, 2013 U.S. Dist. LEXIS 136722 (E.D. N. Car. September 24, 2013). Judge Flanagan found that Ronald Broussard’s appeal essentially asked the court to reweigh the evidence and overrule the Administrative Law Judge, and stated that this was not the job of the court, which was to affirm any decision supported by substantial evidence. Judge Flanagan adopted the recommendation of a magistrate judge to deny plaintiff’s motion for judgment on the pleadings and grant the cross-motion by the government.

OREGON – The Oregon Bureau of Labor and Industries has imposed a $400,000 damages award on Christopher Penner, the owner of The P Club bar in Portland, ruling on a complaint by a group of transgender friends who were told by Penner not to come to his bar on Friday nights. Penner claimed he was losing patronage from people who thought his club had become a “tranny bar” or a “gay bar.” The Bureau said that this was not a legitimate defense to the discrimination charge. Advocate.com, Aug. 31.

SOUTH DAKOTA – Lambda Legal has announced a settlement in the employment discrimination case of Cori McCrery, a transgender woman who was terminated from her job at Don’s Valley Market after telling her employer that she would be transitioning from male to female while continuing to work. McCrery filed a sex
discrimination claim under Title VII with the EEOC, which now recognizes that discrimination because of gender identity is a form of sex discrimination prohibited by Title VII. Under the terms of the settlement, McCreery receives the maximum damages authorized under the statute for an employer of this size, $50,000. In addition, according to a Lambda news release, there will be a public notice on the EEOC website, public notice on a bulletin board on the employer’s premises, a mandatory policy adopted by the employer of non-discrimination, mandatory annual training for staff, and a letter of apology and letter of recommendation for McCreery. Lambda had previously achieved a successful settlement of another transgender workplace discrimination case on behalf of an anonymous client in Maryland. As a result of its internal administrative rulings, building on federal circuit court decisions, the EEOC has turned around 180 degrees from its previous position on transgender discrimination, and is now apparently eager to receive discrimination complaints from transgender individuals. Lambda Legal News Release; CCH Workday (Sept. 18).

TENNESSEE – In Bah v. Millstone Medical Outsourcing, 2013 U.S. Dist. LEXIS 126502 (W.D.Tenn., Sept. 5, 2013), District Judge S. Thomas Anderson granted summary judgment to the employer on a claim that the plaintiff’s discharge violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. section 1981. The plaintiff, a black Muslim from Guinea, was discharged after a gay co-worker complained that plaintiff had made threatening and sexually harassing statements to him. As recounted by the court, the gay co-worker, Muntz, alleged that “Bah made repeated threats that he wanted to sodomize Muntz with various surgical instruments and a gun. Muntz also alleged Bah told Muntz that Muntz was “doomed to eternal damnation for being gay.”” Muntz told an HR representative that “Bah said he wanted to have intercourse with his girlfriend on Muntz’s bed.” Muntz also reported that on one occasion he had “pulled a gun” on Muntz in the company parking lot.” Company officials interviewed Muntz several times but were purportedly afraid to interview Bah because of the allegation that he had a gun. After Bah was discharged, he brought claims of discrimination based on race, religion and national origin, and asserted that the charges against him were untrue and that when harassment charges were made against another employee, the company had interviewed the employee and imposed a lesser sanction. Judge Anderson found the two cases distinguishable, and ultimately determined decided a jury trial was not needed. “The Court finds that Millstone has established that it reasonably relied on Muntz’ allegations by making an informed decision before terminating Bah. After Muntz spoke with Brock, Brock brought the complaint to the attention of Neuberger and Cusson. They then immediately contacted Millstone’s counsel and over the next few days, they interviewed Muntz several times. Although the management did not interview Bah regarding the allegations, Neuberger states he did not interview Bah because of his concern that Bah might have a gun in his vehicle. Based on these interviews and an additional conversation with Bowen, Neuberger and Brock reasonably believed in the credibility of Muntz’ allegations and terminated Bah on that basis. Bah’s contention that a more thorough investigation would have revealed that the allegations were false does not make Millstone’s belief at the time of discharge an issue for the jury.” In other words, to prove discrimination, a Title VII plaintiff has to prove that the employer had a discriminatory motive based on a prohibited ground under the statute. The court found that Bah’s allegations, taken together with Millstone’s rebuttal, left no issue concerning discriminatory motive for the company’s action.

TENNESSEE – U.S. District Judge S. Thomas Anderson is apparently quite perturbed by a prison inmate’s repeated filing of pro se actions asserting claims relating to her gender identity. Quick a/k/a Champion v. Conley, 2013 U.S. Dist. LEXIS 134578 (W.D. Tenn., Sept. 20, 2013). Plaintiff sought to proceed in forma pauperis to avoid paying a filing fee, but did not disclose in the complaint her status as a “three-strike filer,” which precludes such a status. Her ongoing dispute is with the refusal of prison authorities to treat her as a woman. She was convicted under the name Patrick Neal Champion and claims ongoing mental and emotional distress at being referred to by that name. In this action, she sought an order that she be referred to as Catherine Lynn Quick, asserting: “I am a FEDERALLY diagnosed M.T.F. Transsexual, have been in Mental turmoil all my life and fight daily the urge to commit suicide and to do dangerous self surgery!” Judge Anderson stated that a decision on the merits could not be rendered unless Plaintiff paid the filing fee, the only exception being if Plaintiff was an imminent danger of serious physical injury. “Plaintiff’s suggestion that he might attempt suicide or self-mutilation if Defendants are permitted to address him by the name under which he committed his federal crimes is insufficient to satisfy the “imminent danger” exception,” wrote the judge. Furthermore, for taking up the court’s time, Plaintiff must pay the filing fee, even if she isn’t getting a ruling on the merits, and the judge ordered the trust fund officers at the prison to withdraw $350 from her trust fund account and forward that amount to the Clerk of
the Court. The court’s order contains detailed instructions on how the fee is to be paid off if the plaintiff’s account is insufficient to do so immediately.

SOCIAL SECURITY DISABILITY CLAIMS BY HIV-POSITIVE APPLICANTS – Chief U.S. District Judge Brian A. Jackson rejected an appeal of denial of disability benefits by the Social Security Administration to an HIV-positive individual, finding that the ALJ had properly ruled that the individual’s residual functional capacity was sufficient to perform work. Wood v. Astrue, 2013 U.S. Dist. LEXIS 134991 (M.D. La., Sept. 20, 2013). Such decision are reviewed using a deferential “substantial evidence” standard. * * * U.S. Magistrate Judge Vernelis K. Armstrong rejected an appeal of denial of disability benefits to an HIV-positive individual in Daniels v. Astrue, 2013 U.S. Dist. LEXIS 129875 (N.D. Ohio, Sept. 11, 2013), upholding a final decision of the Commissioner and finding that the ALJ’s decision was supported by substantial evidence that the plaintiff was capable of working. * * * U.S. Magistrate Judge Bert W. Milling, Jr., affirmed a decision rejecting disability benefits for an HIV-positive applicant in Danley v. Colvin, 2013 U.S. Dist. LEXIS 139134 (S.D. Alabama, Sept. 27, 2013), in which the ALJ found that the applicant, although clearly impaired, still had residual functional capacity to perform some work. * * * In Stephens v. Colvin, 2013 U.S. Dist. LEXIS 139577 (D. S. Carolina, Sept. 27, 2013), by contrast, Senior District Judge Sol Blatt reversed the Commissioner’s denial of benefits, finding several errors by the ALJ in determining whether the HIV-positive applicant was disabled within the meaning of the statute. * * * U.S. Magistrate Judge Laurel Beeler remanded a case to the Commissioner to reconsider a denial of benefits in Ronald v. Prince, 2013 U.S. Dist. LEXIS 137859 (N.D. Calif., Sept. 25, 2013). * * * In Hudson v. Commissioner, 2013 U.S. Dist. LEXIS 137270 (E.D. Mich., Sept. 25, 2013), the court adopted a magistrate judge’s recommend to reject the appeal and uphold denial of disability benefits to an HIV-positive applicant who was protesting the finding that she had the residual functional capacity to engage in gainful employment.

VIRGINIA – Does the sphere of sexual autonomy invoked by the Supreme Court in Lawrence v. Texas extend to a claim by a 19-year-old that he should be entitled to resume his sexual relationship with his female high school English teacher, which was interrupted by her prosecution on grounds of taking indecent liberties with a minor and is now impeded by the terms of her probation that restrict her from contact with him? Well, no, says U.S. District Judge James C. Cacheris in Zargarpur v. Townsend, 2013 U.S. Dist. LEXIS 136854 (E.D.Va., Sept. 24, 2013), denying a motion for preliminary injunctive relief. Judge Cacheris found that the plaintiff had failed to show any likelihood of success on the merits of his claim. “Plaintiff’s right to engage in a non-marital romantic relationship with [the teacher] is not a fundamentally protected right encompassed by due process,” wrote the judge. Thus, his claim would be evaluated using the rational basis test. “The Court is satisfied that the probation restriction at issue here, which prevents a convicted sex offender from contact with a prior victim, is rationally related to the government’s interest in rehabilitation,” citing numerous prior court opinions upholding probation restrictions of similar type. The court also said that Zargarpur had no standing to bring a challenge to the probation terms prescribed for his former teacher, since they did not restrict his liberty, inasmuch as “Plaintiff is free to associate as he chooses without penalty.” That is, the only person who would suffer a penalty if the probation restriction is violated is the teacher, not Zargarpur.

CRIMINAL LITIGATION NOTES

CALIFORNIA – On September 17, Yolo County Superior Court Judge David Rosenberg accepted a guilty plea from Clayton Daniel Garzon in the hate crime beating of a gay man. Under an agreement negotiated by counsel, Garzon pled no contest to charges of battery causing serious bodily injury with an enhancement designating the attack as a hate crime because of the sexual orientation of the victim. Under the deal Garzon will get five years in prison when Judge Rosenberg formally sentences him on October 30. The beating victim, Lawrence Parftida, expressed satisfaction with the plea agreement, under which Garzon obligates himself to compensate Partida for medical bills, lost wages, and other expenses resulting from his injuries. As part of the agreement, the District Attorney’s Office dismissed other counts in the prosecution, including felony assault and criminal threats. The plea places a “strike” on Garzon’s record, meaning he will suffer a double sentence for any future felony, and the agreement also takes into account a pending assault case against Garzon in another county involving a stabbing at a house party. Partida was hospitalized for two weeks as a result of the March 10 assault, suffering a fractured skull and bleeding to the brain; he required reparative therapy to recover speech and motor skills. Davis Enterprise, Sept. 18.

KANSAS – The Court of Appeals of Kansas affirmed a district court’s rejection of several post-trial motions filed by an HIV-positive man who had
been convicted of two counts of battery of law enforcement officers in Gaines v. State, 2013 Kan. App. Unpub. LEXIS 777 (Aug. 30, 2013). Criminal charges stemmed from a physical altercation between the appellant, a state prison inmate, and a correctional officer, during which the officer allegedly spit saliva and blood at the officers, hitting their faces. Gaines contended that the trial court erred, and the prosecutor engaged in misconduct, by repeatedly raising the issue of his HIV status during the trial, and that his trial counsel was ineffective in dealing with this issue. Trial counsel had made a motion in limine to restrict testimony about Gaines' HIV status, but did not follow up on it. In an unpublished per curiam opinion, the court wrote, “Assuming, without decided, for purposes of our analysis that Gaines' trial counsel was deficient in failing to secure a ruling on the motion in limine and to lodge an objection at trial, we find Gaines has failed to allege any facts which, if true, would show there probably would have been a different outcome at trial in the absence of counsel’s deficient performance. To that end, the jury acquitted Gaines on one of the three crimes charged related to the incident, a fact which strongly suggests that the jury did not place undue emphasis on Gaines' offensive comments or the fact that Gaines was HIV positive.”

TEXAS – The Court of Criminal Appeals of Texas, the state’s highest court for criminal cases, ruled on September 18 that a trial court committed an abuse of discretion in a sexual misconduct case by admitting into evidence “thousands of extraneous-offense pornographic images” obtained from the defendant’s computer. Pawlak v. State of Texas, 2013 WL 5220872. The defendant was charged with sexual assault, sexual assault of a child, and attempted sexual assault, and convicted by a jury. During the investigation of his case, police analyzed two disks taken from his home, which contained thousands of images, most of which were described as “gay porn.” The state’s expert testified that many of the images were “child porn images floating around the Internet.” All of the images were provided to the jury, in response to a note from the jury during deliberation asking to see “all of the evidence in the case.” During the trial, only two of the images were “published” to the jury. Justice Hervey wrote for the court: “Here, the State needed to show that Appellant sexually assaulted, or attempted to sexually assault, five complainants. The admitted digital images referred to a crime for which Appellant was not on trial – possession of child pornography.” The state claimed the images were relevant to rebut defendant’s testimony that “he was not sexually interested in men or boys.” While conceding that his possession of these pictures “might rebut Appellant’s claims that he was not interested in men,” the court noted that “there was no allegation that Appellant took the pictures or that he in any way participated in coercing children to be involved in producing child pornography, much less that he assaulted them,” so the court said “it did not show that an assault or attempted assault was more likely to have occurred.” In this case, the five complainants were all available to testify as witnesses. “When we examine the potential to impress the jury in some irrational but unforgivable way, we cannot ignore out statements that sexually related acts and misconduct involving children are inherently inflammatory,” wrote Hervey. “Under these facts, the sheer volume of extraneous-offense evidence was unfairly prejudicial and invited the jury to convict Appellant of sexually assaulting or attempting to sexually assault the victims because Appellant possessed 9,900 images that included homosexual child pornography. The facts of this case do not require us to determine the exact point at which the admission of voluminous amounts of extraneous-offense character evidence crosses the threshold to unfairly prejudicial. Even if we were to decide that at least some of the extraneous-offense digital images of pornography were admissible, the trial court abused its discretion when it admitted all 9,900 images of pornography without regard to the amount of evidence, kind of evidence, or its source, and over Appellant’s Rule 403 objection.” The court of appeals decision affirming the verdict was vacated, and the case remanded for a “harm analysis.”

LEGISLATIVE NOTES

FEDERAL – Senators Tammy Baldwin (D-WI) and Susan Collins (R-ME) jointly introduced the Domestic Partnership Benefits and Obligations Act of 2013 on September 19. The measure responds to recent actions by the Obama Administration in the wake of U.S. v. Windsor, recognizing legally married same-sex couples for federal benefits purposes but not recognizing domestic partners or civil union partners. The intent of the measure is to adopt for the federal government the same benefits practices that are followed by most Fortune 500 corporations that extend benefits eligibility to same-sex domestic partners of their employees. Companion legislation was introduced in the House by Representatives Mark Pocan (D-WI), Ileana Ros-Lehtinen (R-FL) and Gerry Connolly (D-VA). The measure would provide benefits parity between same-sex domestic partners of federal employees and different-sex spouses of such employees, regardless of the state where they reside or are employed. This would cover the federal retirement plan, life insurance, health insurance, worker’s compensation, and family and medical leaves. Advocate. com, Sept. 19.
**CALIFORNIA** – A new law scheduled to go into effect on January 1 promoting transgender inclusion in the state’s public schools has generated a storm of controversy – but not until after Governor Jerry Brown had signed it into law. Suddenly California news media were full of stories about parents protesting the possibility that their children would be sharing restroom and locker room facilities with children of “the opposite sex” who identified with their child’s gender, and a furious movement to put a repeal initiative on the ballot seemed to materialize overnight. Although the Los Angeles and San Francisco school districts already have policies consistent with the new law and haven’t encountered any particular difficulties in maintaining them, the idea of such policies outside a handful of large cities has fueled a conflagration of public discourse. *Bloomberg News Service*, September 15. * * * The legislature approved a bill to make it easier and less expensive for transgender Californians to obtain new birth certificates. As we went to press, Governor Brown had not announced whether he would sign A.B. 1121 into law.

**CALIFORNIA** – The Porterville City Council voted to remove Mayor Virginia Gurrola, disapproving of her decision to issue a 2013 LGBT Pride Month proclamation in June. The city voted to rescind the proclamation in July. There was some controversy about the reasons for the council’s September vote, but the new Mayor, Cameron J. Hamilton, one of those who had voted to rescind the proclamation, told Huffington Post that the proclamation was a factor in the decision. *Huffington Post*, Sept. 24.

**FLORIDA** – Boca Raton’s City Council unanimously voted on September 10 to add sexual orientation, gender identity and gender expression to the city’s equal opportunity policy. Then the Council voted 4-1 to provide spousal benefits to domestic partners of city workers. Prior to the vote, Boca Raton was the largest holdout from among the 38 Palm Beach County cities in adopting such an anti-discrimination policy, and the only city to do so, although a few other cities have not yet gotten to domestic partner benefits for their employees. The lone dissenter on the benefits vote said he was doing so because of its “unintended consequences” of undermining heterosexual marriage by providing benefits for different-sex domestic partners. Anthony Majhess pointed out that 83% of those receiving partner benefits in other municipalities in the county, as well as from the county government, involved different-sex couples. Florida bans same-sex marriage by constitutional amendment and statute. *Sun Sentinel*, Ft. Lauderdale, Sept. 12.

**FLORIDA** – The Palm Beach County Commission decided on September 10 that county employees who were receiving benefits coverage for partners should not have to suffer additional tax burdens from the federal government, so they have approved a “tax equity” measure using local tax revenue to reimburse employees who are federally taxed on the imputed value of those benefits. (The value of benefits for legal spouses is not subject to taxation). Florida does not have an income tax, so the issue only concerns federal taxes. The federal Internal Revenue Service’s announcement that it will recognize same-sex marriages does not solve this problem for those county employees who are receiving the benefits without having married their partners, since the federal government is not recognizing domestic partners or civil union partners. Pending federal legislation that would recognize domestic partners in this context would cure the problem, but has just been introduced in Congress and is given little chance of speedy passage. *Sun Sentinel*, Sept. 11. * * * Previously, the Palm Beach Gardens City Council voted unanimously on September 10 to offer health insurance benefits to municipal employees’ domestic partners and their dependent children. Existing policies already provide similar coverage for personal leave, acute illness leave, bereavement leave, and Employee Assistance Program, according to a news release by the Palm Beach County Human Rights Council.

**IDAHO** – Idaho Falls has adopted a local ordinance banning discrimination in hiring and employment because of sexual orientation or gender identity, the *Spokesman Review* of Spokane, Washington, reported on September 15. This was the seventh jurisdiction within Idaho to adopt such a ban. The *Idaho State Journal* (September 14) reported that the measure passed by one vote, when Mayor Jared Fuhriman broke a tie to put the bill over the top. The city’s ordinance also covers public accommodations, but this category was left out of the SO/GI bill, due to controversy about restrooms. A version of the bill that covered public accommodations had been voted down, but sponsors then amended their bill to remove that category before the final vote, saying that this issue would be addressed again at a later date. It is quite amazing that after numerous states and municipalities have banned gender identity discrimination in public accommodations without leading to massive restroom confrontations this is still raised as an issue when new jurisdictions consider the legislative proposals. It is as if every jurisdiction legislates in a vacuum, oblivious to the experiences of other jurisdictions. Is Idaho Falls so different in social climate from every other jurisdiction that has legislated on this issue that the
same bizarre restroom arguments can be raised to stall a bill?

**KANSAS** – The Topeka City Council voted 6-2 on September 17 to approve an ordinance authorizing the city’s Human Relations Commission to address discrimination because of sexual orientation or gender identity as part of its educational activities. Topeka’s ordinance does not actually outlaw any form of discrimination, yet opponents of the measure indicated they would circulate a petition seeking to have the Council reverse its vote, presumably because they think it is a bad idea to try to persuade people not to discriminate based on these characteristics. *Topeka Capital Journal*, Sept. 18.

**MICHIGAN** – The Delhi Township Board of Trustees voted at its September 17 meeting to approve an ordinance forbidding discrimination because of sexual orientation or gender identity. The measure requires passage at a second meeting, scheduled for October 1, because if can go into effect. Violators of the ordinance could suffer fines up to $500, after complaints are reviewed by a committee of the Board. The vote responded to efforts by a local gay rights organization to secure passage of similar ordinances throughout the Lansing metropolitan area. Meridian Township adopted an ordinance that addresses just discrimination in housing. Delta Township is considering an ordinance. Lansing and East Lansing already adopted such measures years ago. Township Supervisor C.J. Davis, speaking in support of the measure, stated, “When the state does not have the cojones to act, then we at the township will.” *Lansing State Journal*, Sept. 22.

**OHIO** – Summit County’s Council approved the extension of health-care benefits to domestic partners of county employees in September. The measure applies to both same-sex and different-sex couples, who already enjoy sick leave and medical leave rights. Applicants for the benefits must sign an affidavit that they are in an exclusive relationship and share responsibilities for common welfare, providing evidence of a common address. *Akron Beacon Journal*, Sept. 20.

**PENNSYLVANIA** – The Bristol Council voted on September 9 to amend its local Human Relations Commission ordinance to add “sexual orientation, gender identity or express” to the list of prohibited grounds for discrimination. Similar measures have been passed in dozens of Pennsylvania municipalities and counties while a statewide measure remains buried in the legislature. *phillyburbs.com*, September 10.

**TEXAS** – The San Antonio City Council voted 8-3 on September 5 to pass amendments to the city’s anti-discrimination ordinances, adding “sexual orientation” and “gender identity” to the prohibited grounds of discrimination. The measure covers municipal employment, employment by city contractors, housing, and public accommodations, but does not affect businesses that do not have city contracts. The measure had strong backing from Mayor Julian Castro, a Democrat, but was strongly criticized and opposed by various Republican office-holders, including Texas Attorney General Greg Abbott, campaigning to succeed Rick Perry as governor, and U.S. Senator Ted Cruz. The vigorousness of Republican statements was a bit surprising, since several other large Texas cities (including Dallas, Houston and Austin) already have such local laws. San Antonio is the seventh-largest city in the United States in population, and has a large Hispanic population. News reports sometimes referred to the measure as a “comprehensive” anti-discrimination bill, which was clearly incorrect in light of the limited application of the employment provisions. mysanantonio.com, September 5. A.G. Abbott had threatened a lawsuit challenging the ordinance, but backed down after one provision that raised potential 1st Amendment issues was deleted prior to passage.

**WISCONSIN** – The city of Appleton added sexual orientation and gender identity to the prohibited grounds for housing discrimination under local law, reported *USA Today* on September 5.

**LAW & SOCIETY NOTES**

**AFL-CIO** – The American Federation of Labor-Congress or Industrial Organizations (AFL-CIO), the United States’ largest federation of labor unions, has amended its constitution to add gender identity and gender expression to the list of prohibited grounds for discrimination by the federation and its member unions. The action was taken on September 9 at the federation’s annual convention, according to a report by *Buzzfeed.com*.

**EXXONMOBIL** – Here’s the art of getting good press just for changing a much-protested policy in order to comply with the law. ExxonMobil has long been a visible holdout among the nation’s largest corporations on the issue of domestic partnership benefits for employees. Despite repeated shareholder resolutions and excoriation in the gay press (and sometimes the mainstream press), ExxonMobil, which had terminated such benefits at Amoco after a merger, seemed impervious to persuasion. Then, after the IRS
issued its revenue ruling on the effect of Windsor on federal tax law and, subsequently, the Labor Department issued its notice of the impact on ERISA-regulated employee benefits plans, ExxonMobil suddenly changed its tune, stating that it would recognize legally-married same-sex couples for benefits purposes, still leaving all of its employees living in states that don’t authorize same-sex marriage out in the cold – unless they go and get married in the 13 states (plus the District of Columbia) that do authorize same-sex marriages. ExxonMobil won headlines and favorable mentions in the media for responding to these federal developments by essentially agreeing to treat couples as married if the federal government was treating them as married. The fact that their policy falls far short of other major corporations that provide benefits for same-sex partners regardless of marital status went largely unmentioned in mainstream media coverage.

COLORADO – The University of Colorado Board of Regents voted on September 17 to add “gender identity” to the list of prohibited grounds for discrimination in the state’s university system. At the same time, responding to complaints about pervasive discrimination against conservative faculty and students, the Board also voted to add “political affiliation” to the list. InsideHigherEd.com, Sept. 18.

GEORGIA – The Atlanta Journal & Constitution published polling results on Sept. 24 indicating that a plurality of Georgians now support marriage equality. According to the poll, 48 percent favored “gay marriage” while 43 percent opposed it, the remainder not taking a position. Breaking down the results by age cohorts, almost 2/3 of those ages 18-39 supported same-sex marriage, while 59 percent of those older than 65 oppose it. The poll was conducted by telephone (both cell and landlines) between September 12 and 17, obtained opinions from a random sample of 801 adults, and had a margin of sampling error of 5%, so a tie could be within the margin of error. This was the first time the AJC poll has produced a plurality in support of same-sex marriage. LGBT political advocates in the state indicated they were not inclined to push for marriage equality until the support exceeds 50%.

OREGON – Sweet Cakes by Melissa, the Oregon bakery charged with violating the state’s public accommodations law after refusing to provide a cake for a lesbian couple’s partnership ceremony, announced that it was ceasing to operate as a public business on August 31. The proprietors, Aaron and Melissa Klein, who declined the cake order due to their religious objections to homosexual unions, stated on the store’s facebook.com page that “we are moving our business to an in-home bakery.” Evidently, they plan to continue doing business but hope to operate in a way that would exempt them from compliance with the public accommodations law. We will be interested to see how this works out. Huffington Post, Sept. 2.

D.C. MARRIAGES – Increased demand for marriage licenses and the performance of weddings for same-sex couples, sparked by the Windsor decision and subsequent extension of federal rights and benefits to married same-sex couples, has led D.C. Superior Court officials to open a new wedding chapel, the Washington Post reported on September 17. Prior to July 2013, the court received between 300 and 400 marriage license applications a month. The numbers for July and August were 977 and 908, many of them federal government employees and military members living in the D.C. metropolitan area, for whom I.R.S. and Defense Department rulings open up the possibility of significant benefits for same-sex spouses.

WISCONSIN – Oconomowoc Area School District has decided to provide gender-neutral restrooms for students and staff after an incident involving a transgender elementary student whose restroom use had been restricted. The district issued a press release, stating: “The Oconomowoc Area School District has worked with the parents of a transgender elementary student, in order to ensure that no discrimination is directed at the student, and in order to fully observe the legal rights of this student and all other students in the district.” The gender-neutral restrooms are single occupancy and can be used one at a time by staff or students of any sex or gender identity. Said School Board President Don Wiemer, “It’s a great fix for the issue. You can’t disrupt a student’s right to privacy.” The move was not unprecedented for the district, as its high school has been providing gender neutral restroom facilities for several years. The Freeman, Sept. 12.

INTERNATIONAL NOTES

BAHRAIN – The Gulf Daily News (September 15) reported that Fowzi Janahi, a Bahraini attorney, is representing five clients who are seeking a legal change of sex due to Gender Identity Disorder. Since Ms. Jahani’s willingness to take such cases became known, she has that she has been “bombarded with phone calls” from people both in Bahrain and abroad seeking her legal assistance, with calls coming from as far away as Australia and Turkey, and many calls coming from Saudi Arabia and the various constituent parts of the United Arab
Emirates. The news report identifies her as “the only Arab lawyer specializing in transsexual cases in the region,” and said that she has two cases pending in the High Civil Court on behalf of women seeking “sex changes.”

**CANADA** – New amendments to the Civil Marriage Act will allow same-sex couples who married in Canada but live in jurisdictions that do not recognize their marriages to file divorce actions in Canadian courts, according to a September 4 report in *BC Family Law Resource Blog*, 2013 WLNR 21990941. Order in Council 2013-889 amended the Act as of August 14 opens up Canadian courts for such divorces for couples who married in Canada but cannot get a divorce in their place of residence. Section 7 of the new act states: “(1) The court of the province where the marriage was performed may, on application, grant the spouses a divorce if (a) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application; (b) neither spouse resides in Canada at the time the application is made; and (c) each of the spouses is residing – and for at least one year immediately before the application is made, has resided – in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.” The measure provides that such an action can only be maintained with the consent of both spouses unless one is incapable of consenting due to mental disability, or is unreasonably withholding consent, or cannot be found. There are two cautionary notes. A person seeking such a divorce cannot apply for custody or access to any children or for child support or spousal support, and the validity of the divorce in the applicants’ place of residence depends upon the law of their domicile. Such divorces will be, of course, effective in Canada. The Globe and Mail reported on September 11 that the first such divorce had just been granted by a Toronto judge to a couple that had married in Canada but were domiciled in Florida and Britain. The government had opposed the divorce when the petition was filed, but their attorney filed a challenge to the government’s action under the Charter of Rights and Freedoms, which led the government to issue the amendment noted above.

**COLOMBIA** – Is there or is there not a right for same-sex couples to marry in Colombia? There are reports now of at least two instances where civil judges have declared same-sex couples to be married, and local authorities in several parts of the country have begun to formally sanction same-sex marriages. The nation’s highest court, the Constitutional Court, ruling in 2011, told the legislature to deal with the situation so as to provide equal marital rights to same-sex couples, but the legislature refused. The National Judicial Council, which oversees the judicial and notary system, has amplified the court’s ruling, but many local notaries are not complying, authorizing relationships but not calling them marriages. Things remain unclear.

**EUROPE** – Amnesty International issued a report asserting that LGBT people face high levels of violence, discrimination and abuse in Europe, noting gaps in EU and national legislation that deprive such individuals of the opportunity to obtain justice and contributing to a climate of fear in many European countries. The report documented bias-related killings, beatings, and other physical assaults, as well as widespread discrimination and many jurisdictions still withholding legal recognition for same-sex relationship, mainly in Eastern Europe. The report noted that hate crimes legislation at both levels conspicuously omits sexual orientation and gender identity. The report noted that statistics released by the EU’s Agency for Fundamental Rights should that one in four gay people experienced violence because of their sexuality, and more than half reported having suffered discrimination. Given the state of social attitudes and law in Eastern European countries that are currently candidates for admission to the Union, matters are likely to get worse unless the EU can take some sort of action to ensure that mandatory anti-discrimination laws are actually enforced. *Independent* (UK), Sept. 19. * * * The European Parliament has approved two resolutions proposed by the European Commission dealing with property rights for bi-national married and registered couples. (Some countries in Europe have embraced marriage equality, while others have created registered partnerships for same-sex couples.) The resolutions as approved equate the rights of all couples without distinction. If accepted by the Council of Europe, the same legal choices would be available for both married and registered couples, according to an October 1 news release by ILGA-Europe.

**FINLAND** – The only nation in Scandinavia that does not allow same-sex marriage may soon fall into line with the others, if the Parliament responds affirmatively to a petition signed by more than 162,000 citizens. The Parliament’s Legal Affairs Committee voted not to advance a marriage equality bill in February, sparking a petition campaign. Under Finnish law, a petition bearing at least 50,000 certified adult signatures must be voted upon by the Parliament. The campaign to compel a vote on marriage equality achieved the minimum necessary signatures on its first day.
GUYANA – Acting Chief Justice Ian Chang announced a decision by the Constitutional Court on September 6, interpreting a criminal statute on cross-dressing in public to be limited to such activity done for an “improper purpose” such as prostitution. Justice Chang wrote that people could not be prosecuted for cross-dressing “for the purpose of expressing or accenting his or her personal sexual orientation in public,” and ordered compensation for some litigants who had been arrested for cross-dressing. As thus construed, Justice Chang rejected the argument, advanced by the Society Against Sexual Orientation Discrimination, that the law as written unconstitutionally discriminates because of gender. The Society plans to appeal the judgment, arguing that it is a “dubious decision” whose ambiguity leaves too much discretion to police officers and prosecutors. One of the litigants told the Associated Press (September 9), “The trans community is very worried and still fearful of arrests in light of this decision.”

ISRAEL – The High Court of Justice has ruled that a transgender robber’s prison term should be reduced because the inmate would be held in solitary confinement, according to a September 15 report by The Times of Israel. The defendant’s name was not revealed in the news report, which said that the individual, identified as female at birth but identifying as male, had his sentence reduced from 15 to 10 months. The defendant has already undergone surgery to remove his breasts. Writing for the court, Justice Neil Hendel said, “The personal circumstances of [the defendant] at this stage of her life are not routine or common, but are unusual. I am of the belief that it is appropriate for additional leniency when it comes to [her] sentence.” The judges held that sentencing for transgender prisoners should take into account the fact that they are placed in solitary confinement under Israel Prison Service regulations “to prevent harm to themselves or other prisoners,” the newspaper reported.

JAPAN – The Osaka Family Court rejected a claim by a transgender man that the child born to his wife through donor insemination should be regarded as his “legitimate child,” reported Legal Monitor Worldwide, 2013 WLNR 22989853, on September 14. According to the news report, Judge Keiko Kuboi wrote: “It is obvious that his wife could not conceive the boy through sexual intercourse with the man.” The husband, previously identified as female, transitioned to male and, under Japan’s law dealing with gender identity issues, was able to be recognized as a man and to marry a woman. The couple has two boys, both conceived through donor insemination, and both registered at birth as out-of-wedlock children, a status their father seeks to change through lawsuits. This case involved the second son; litigation regarding the first son was unsuccessful at the family court and the Tokyo High Court, and is on appeal to the Supreme Court.

LEBANON – The Lebanese Psychiatric Society and the Lebanese Psychological Association held a joint press conference with the Lebanese Medical Association for Sexual Health to announce their conclusion that gay should are not abnormal or ill, the first time scientific professional associations in the Arab world have made such a statement. Executive-Magazine.com, Aug. 31.

MALAYSIA – A three-judge panel of the Court of Appeal ruled that a decision by police to ban a Sexuality Festival that had been held without incident for several years was not subject to judicial review, according to a report in New Straits Times. The activity, named Seksualiti Merdaka, was an annual festival celebrating human rights of people of diverse sexual orientation and gender identity, and promoted LGBT rights in Malaysia. The police ruling was evidently made in response to complaints about the event by faith-based organizations. The police contended that the festival was “deviationist activity” that could destroy “the practice of religious freedoms” that it could create disharmony, enmity and disturb public order and threatened national security. There was no proof as to any of these allegations, but they were accepted by the court. The court said that a ruling now on the police decision to ban the event in 2011 was “academic,” inasmuch as the festival went on for two days with official approval. An extensive discussion of issues raised by the decision by Brooklyn Law School student Ricky Sim, who interned as a Human Rights Fellow in Malaysia during the summer, can be found in a blog posting: http://www.loyarburok.com/2013/19/03/sekualiti-merdaka-judicial-review.

MEXICO – Marriage equality continued to spread in Mexico, as a court ruled in favor of a gay male couple who sought a marriage license in Chihuahua State. A local judge issued the order on August 22, which was then implemented through a special procedure by the nation’s Supreme Court, which has already ruled in favor of same-sex couples in a few other states. Although
these rulings technically bind only the parties, as they mount up they may eventually constitute a nationally-binding precedent. The Supreme Court ruled several years ago, in response to litigation arising out of the Mexico City government’s adoption of a marriage equality measure, that same-sex marriages formed in local jurisdictions that allow them must be recognized as marriages throughout the country so, in effect, Mexico has same-sex marriage nationally, but licenses can be obtained and ceremonies performed only in certain states and municipalities.

**OMAN** – The government of Oman has suspended publication of *The Week*, a tabloid newspaper, in reaction to the publication of an article suggesting that Oman provided a more sexually tolerant atmosphere than the other Gulf states. The suspension was imposed even though the publisher of the paper printed an apology in the next edition, disclaiming any intent to “knowingly or unknowingly cause harm, offend, or hurt the sentiments of the people.” The article, titled “The Outsiders,” related the story of a young gay man in the country. The ministry of information blasted the newspaper for “harming society, its principles, religion, values, the dignity of its people or public manners.” Daring to suggest that Oman might be tolerant of homosexuality could not be tolerated. In fact, however, Oman provides a lighter maximum penalty for homosexual conduct, three years, than the surrounding Gulf states, all of which impose longer sentences, in some cases accompanied by flogging, so in that sense the implication of the article seems to have been factual. *ArabianBusiness.com*, Sept. 6.

**RUSSIA** – Dmitry Isakov conducted his own protest about the Russian law barring gay-positive public statements on July 30, appearing in public in Kazan holding a sign that said (in translation from the Russian), “Being gay and loving gays is normal. Beating gays and killing gays is a crime!” A teenage boy who saw a youtube.com video of Isakov was “forced” by his father to file a complaint with the police, which led to Isakov’s arrest and threatened prosecution under the statute. The penalty for a violation of the law is a fine of up to 5,000 rubles (about $150). According to press reports, Isakov may end up being the first person to be convicted under the statute, as prior arrests have not resulted in completed prosecutions. *Buzzfeed*, August 31.

The ongoing public controversy inspired Alexei Zhuravlev, a member of the lower house of the legislature, to propose a bill to take deny custody of their children to gay parents. Other grounds for denying custody under this bill would include alcoholism, drug use, and abuse. Zhuravlev said that this was a logical extension of the recently-enacted legislation against exposing children to homosexual “propaganda;” he said that such propaganda should be banned not only in public places “but also in the family.” *Washington Post*, September 5. President Obama, visiting Russia to attend a G20 summit meeting, met with a group of social activists and included some gay activists to signal support for their struggle and disagreement with the policies that Russia has been adopting towards its gay citizens. * * * Customarily the country hosting an Olympics competition drafts an “Olympic Truce” resolution for adoption by the United Nations, providing that athletes from any country, race, gender can compete without discrimination. This year, Russia balked at including sexual orientation or gender identity in the list of prohibited grounds for discrimination during the Olympic Games to be held next winter in Sochi, but negotiations with U.N. representatives has led to a redraft that promises to “promote social inclusion without discrimination of any kind” without specifying particular prohibited grounds for discrimination. *New York Times, Huffington Post*, September 15. * * * Yevgeny Arhipov, chair of the Association of Russian Lawyers for Human Rights, has come out as transgender and now has assumed the name of Masha Bast. Bast gave an interview to the *Moscow Times* in which she talked about her transition process and critiqued the legal and social treatment of sexual minorities in Russia. *Moscow Times*, Sept. 13. * * * The International Olympics Committee announced on Sept. 26 that it was satisfied by representations by Russian officials that gay people could attend or participate in the Winter Olympic Games in Sochi next year without fear of being prosecuted under the recently-enacted anti-gay laws (which Russia officially refuses to recognize as anti-gay laws), and IOC Chair Jean-Claude Killy announced that the IOC believe that it lacked the authority to criticize a host country’s laws so long as they did not overtly violated Olympic rules. *Washington Post*, Sept. 26.

**SCOTLAND** – The Scottish Government announced that it would call for a vote in Parliament on the same-sex marriage bill early in the new legislative session, with the hope that passage and Royal Assent could be achieved by March. The bill was published before the summer recess, and legislative leaders called for expedited consideration, no doubt reacting to the quick recent passage of a same-sex marriage bill by the British Parliament, which will probably be in effect by next summer. The Equal Opportunities Committee was taking up the Bill on September 5, with debate to follow later in the month. A spokesperson for the government stated that upon receiving Royal Assent, the government would “make an Order under the Scotland Act 1998 to allow the Equality Act 2010 to be amended to
provide further protection for religious and belief celebrants.” HeraldScotland.com, Aug. 31.

**SERBIA** – For the third consecutive year, the government refused official sanction to a gay pride march in Belgrade. Prime Minister Ivica Dacic said, “After long discussion on whether the march would pass without severe consequences, the security assessments indicated severe threats to public safety,” but insisted, “This is not a capitulation to the hooligans.” Irish Times, Sept. 28. But hundreds turned out and marched at the appointed time without any official police permit.

**THAILAND** – A parliamentary committee has drafted a bill that would provide legally-recognized civil partnerships for same-sex couples, which would provide most of the rights, benefits and protections available to different-sex couples through marriage. Among the benefits affected would be insurance, pensions, tax breaks and inheritance rights, but it would not automatically extend to adoption and child custody. Petitioning is now underway to get the bill placed on the legislative agenda, which would require 10,000 signatures from citizens. Sydney Morning Herald, Sept. 21. The newspaper report about the bill noted that Thailand has been a leading jurisdiction on gay rights in mainland Asia, having abolished criminal penalties for homosexual sex in 1956, ended its ban on gay military service, and removed the listing of homosexuality as a mental illness in 2002. A spokesperson for the government said, “The partnership will give them rights, benefits, and protection similar to most rights granted to heterosexual couples.”

**VIETNAM** – One step at a time towards marriage equality in Vietnam: The National Assembly has agreed to repeal an explicit ban on same-sex marriages, but has not yet adopted any formal recognition for such relationships, announced state media on September 11 (Vietnam News Briefs). The chair of the Judicial Committee, Nguyen Van Hien, stated that Vietnam should move gradually on this issue in light of slowly developing cultural changes. Other officials indicated that it would take some time for the public to be more open to accepting same-sex couples as married, although some officials had previously voiced support for same-sex marriage as a means of allowing gay people in Vietnam to “lead a normal life without serious social discrimination.”

**PROFESSIONAL NOTES**

The U.S. Senate confirmed **Todd Hughes** to be a judge of the U.S. Court of Appeals for the Federal Circuit on September 24 on a vote of 98-0. Hughes had been unanimously approved by the judiciary committee. He is the first openly gay person to be confirmed for a U.S. Court of Appeals seat. The Federal Circuit is a specialized court with nationwide jurisdiction over cases involving international trade, government contracts, patents, trademarks, money claims against the federal government, federal personnel, veterans’ benefits, and public safety officers’ benefits claims. Hughes has been the deputy director of the Department of Justice Civil Division, and has a practice background that particularly qualifies him to serve on this specialized court.

The U.S. Senate confirmed openly-lesbian attorney **Elaine Kaplan** to be a judge of the U.S. Court of Federal Claims by a vote of 64-35 on September 17. Kaplan had been serving as acting Director of the U.S. Office of Personnel Management since the retirement of John Berry earlier in 2013. Her appointment to this non-Article III court is for a 15-year term. The court hears claims against the federal government. Her previous government service included an appointment by President Bill Clinton to head the U.S. Office of Special Counsel. She is a 1979 graduate of the Georgetown University Law Center.

President Obama’s nomination of openly-gay Miami-Dade (Florida) Circuit Judge **William Thomas** to the U.S. District Court for the Southern District of Florida, initially with the approval of both U.S. Senators from Florida, has been waylaid by Senator Marco Rubio, a Republican. As the New York Times explained on September 23, Rubio appears to be concerned about losing right-wing support because of his advocacy of immigration reform, and now wants to avoid leaving himself open to right-wing attack for approving the appointment of an openly-gay African-American man to the federal bench. (If confirmed, Thomas would be the first openly-gay African-American man to serve as a federal district judge.) In a feeble attempt to make his objections appear substantive, Rubio has cited some of Thomas’s sentencing decisions, but further investigation by The Times revealed these to be pretextual.

**National Center for Lesbian Rights** (NCLR) has an opening for a staff attorney in its San Francisco office. The position involves all aspects of litigation, including trial and appellate work, analyzing legislation, developing publications, public education activities, training professionals and community members, and dealing with the media, among other things. Qualifications include
2-5 years of litigation experience, and fluency in Spanish is preferred. NCLR is an equal opportunity/affirmative action employer, and encourages women, people of color, LGBT persons and people with disabilities to apply. Applications should be sent by email or surface mail to: Chris Zaldua, Legal Assistant, NCLR, 870 Market Street, Suite 370, San Francisco, CA 94102; czaldua@nclrights.org. Full details about the position can be found on NCLR’s website. No telephone calls, please.

THE NATIONAL LGBT BAR ASSOCIATION’s Out & Proud Award Reception in Washington, D.C., on October 17 will honor GORDON TANNER, Principal Deputy General Counsel of the U.S. Air Force. BAKER & MCKENZIE is hosting the reception. Lawyers in corporate legal departments, government lawyers and non-profit lawyers are invited to attend as guests of the Association, while others will be asked for a fee. RSVPs and information: Kelly Simon at 202-637-7661; Kelly@LGBTBar.org. * * * The Out & Proud Corporate Counsel Award Reception in Boston on October 10 will honor BERNADETTE HARRIGAN, Assistant Vice President and Counsel at Mass Mutual Financial Group. The event will be at the Harvard Club. RSVPs and information: Kelly Simon at 202-637-7661; Kelly@LGBTBAR.org.

THE AMERICAN BAR ASSOCIATION COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY and the NATIONAL LGBT BAR ASSOCIATION, which is an affiliate association of the ABA, will jointly publish Our and About: The LGBT Experience in the Legal Profession, a collection of personal essays, in 2014. The editors are seeking submissions, consisting of personal stories (desired length 800-1200 words) on experiences of the LGBT legal community. According to a solicitation announcement distributed by the LGBT Bar Association, “The focus of the essays may be as broad or narrow as each author desires, generally discussion when, where, and how she or he has progressed or advanced in his or her career, and, whether/how being LGBT impacted them.” Submission should be emailed to OutandAbout@lgbtbar.org, and should be accompanied by a brief biographical statement.

The ASSOCIATION OF AMERICAN LAW SCHOOLS has announced that its Midyear Meeting Workshop for 2014 will include a program on SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES. The Workshop will be held in Washington, D.C., from June 5 to June 7. The two-day program is planned to create opportunities for dialogue about the meaning, contours and status of equality for sexual minorities, including discussions on “beyond identity” and “new frontiers,” and will include two concurrent sessions for scholars to present completed articles or works in progress. Faculty from AALS-member schools are invited to submit proposals for presentation of papers, works in progress, or discussion topics. Proposal submissions, which should be limited to 1000 words and accompanied by the proponent’s C.V., should be sent to 14sogicfp@aals.org by October 15, 2013, and questions can be submitted to the same email address. The Planning Committee will contact those selected to be presenters at the conference by November 30, 2013. Members of the Planning Committee are Barbara J. Cox (California Western), Chair; Mary Anne Case (University of Chicago); Sarudzayi Matambanadzo (Tulane); Clifford Rosky (University of Utah); and Kenji Yoshino (New York University).
1. Altman, Dennis, The End of the Homosexual (Univ. of Queensland Press, 2013) (Australia's leading gay academic thinker on the history and current status of the LGBT rights movement “down under.” Altman’s “Homosexual: Oppression and Liberation” (1971), written while he was living in the U.S., was an important early document of the modern LGBT rights movement.)


26. Flynn, Danielle, All the Kids Are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children and Teenagers, 47 New Eng. L. Rev. 681 (Spring 2013) (argues that criminal prosecution of consenting teenagers close in age for engaging in sex violates the 8th Amendment).


37. Maguire, James, “Everyone Does It To Everyone”: An Epidemic of Bullying and the Legislation of Transgression in American Schools, 16 New Crim. L. Rev. 413 (Summer 2013).

38. Meiselman, Alyson Dodi, and Katrina Rose, Employment of Trans-Individuals,


46. Paizs, Ceecee, Mediation of Same Sex Issues: A Brave New World, Or Not?, 46-OCT Md. B.J. 32 (LGBT Law Special Feature).


58. Scurti, Mark F., From Stonewall to the Supreme Court, 46-OCT Md. B.J. 4, (LGBT Law Special Feature).


60. Sheikha, Danish, The Road to Decriminalization: Litigating India’s Anti-Sodomy Law, 16 Yale Hum. Rts. & Dev. L. J. 104 (2013).


64. Stabile, Emily, Getting the Government in Bed: How to Regulate the Sex-Toy Industry, 28 Berkeley J. Gender L. & Just. 161 (Summer 2013) (since almost three-quarters of gay people use them, would it not be in our interest for federal consumer protection laws to apply to sex toys?)


66. Villareale, Catherine, The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland, 42 U. Balt. L. Rev. 365 (Winter 2013).


70. Wood, Peter, The Campaign to Discredit Regnerus and the Assault on Peer Review, 26 Academic Questions 171 (Summer 2013)(editor of conservative scholars journal defends the Regnerus “Study”, which he calls “authoritative”).


SPECIALY NOTED

Cambridge University Press has published “Dressing Constitutionally: Hierarch, Sexuality, and Democracy from Our Hairstyles to Our Shoes,” by Professor Ruthann Robson of City University of New York School of Law. Prof. Robson explores personal appearance and constitutional rights in a multitude of settings, with interesting results for all students of sexuality and law. * * * The American Bar Association has published Ally Windsor Hall’s “Transgender Persons and the Law,” a comprehensive guide on the current state of the law on legal issues and obstacles facing transgender people. The book comes with a supplementary DVD containing state-specific forms for name changes and birth certificate changes throughout the U.S. The treatise is available from the ABA’s website.

EDITOR’S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

All points of view expressed in Lesbian/Gay Law Notes are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

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 all correspondence electronically to info@le-gal.org.

Lesbian/Gay Law Notes Podcast

Check out the Lesbian/Gay Law Notes Podcast each month to hear our Editor-In-Chief New York Law School Professor Art Leonard and Brad Snyder, the Executive Director of LeGaL, weigh-in on contemporary LGBTQ legal issues and news.

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