Hawaii & Illinois join marriage equality club
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The states of Illinois and Hawaii embraced marriage equality legislatively during November, as the proportion of the United States population living in states that allow same-sex marriages continued its rise toward 40%. Prior to the votes in those two states, the recent addition of New Jersey to the marriage equality column during October had lifted the proportion to about a third of the population. The Illinois measure will go into effect on June 1, 2014, while the Hawaii law became effective on December 2, 2013. This brings the number of states authorizing same-sex marriage to sixteen, in addition to the District of Columbia.

The final vote on the Illinois bill, S.B.10, took place in Springfield, the bill was taken up for consideration during the veto session in November, it had been amended to change the effective date in order to avoid a state constitutional requirement of 71 votes to pass a bill considered during the fall “veto session” of the legislature unless its effect was delayed until the following June. Three Republican members crossed party lines to vote for the bill, but it received just one more vote than necessary. The Senate was sitting in anticipation of House passage, and approved the new version expeditiously. Senator Heather Stearns was the lead sponsor in that chamber. Governor Pat Quinn had already indicated several times that he would sign the bill if it passed the legislature, and he signed it into law on November 20. Both Quinn votes for passage in both houses. He also indicated he hoped that a special session could act expeditiously so that it would be possible for same-sex couples in Hawaii to marry before the end of the year if they wanted to be able to file taxes as “married” for the 2013 tax year. His announced goal was a bill that would go into effect on November 18. The bill specifically referenced the Windsor decision, pointing out that Hawaii civil unions would not provide equal rights because of federal recognition of same-sex marriages. Although Democrats control both houses, there were some doubts about whether the necessary majorities were there. But the governor received the assurances he was seeking, and scheduled the special session to begin on October 28. In both houses, relevant committees invited the public to sign up to comment, resulting in extensive hearing days in both chambers. The Senate went first, voting on October 30 to approve the bill by 20-4. The House committees began their public hearing the next day. Over five thousand people signed up to address the committees, each being allotted up to two minutes, and the hearings stretched on through several days until an affirmative committee vote was taken, 18-12, on November 5. On November 6, the House voted 30-18 to approve the amended bill on “second reading,” and the third and final reading, on November 8, resulted in an affirmative vote of 30-19. However, the House had amended the bill to change the effective date to December 2 and to incorporate rather broader religious

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Illinois, on November 5, the House voting 61-54 and the Senate then promptly confirming its acceptance of the House version by a vote of 32-21. Illinois already had a Civil Union Law, conferring virtually all the state law rights and responsibilities of marriage on same-sex couples, which went into effect in 2011. The marriage equality bill had passed the state Senate by a narrow vote in May, but lead House sponsor Greg Harris had decided not to call for a vote during the final days of the House session, having determined that he did not have affirmative commitments from enough members to pass it. That version of the bill would, if adopted, have gone into effect before the end of 2013, thus giving same-sex couples who married by the end of the year the requisite marital status for filing their taxes for 2013. When and Chicago Mayor Rahm Emanuel had reportedly contacted wavering or undecided members of the House to lobby for passage. House Speaker Michael Madigan, who departed from custom by speaking from the floor in favor of the bill to end the debate, claimed credit for personally turning around several House members on the issue.

In Hawaii, where the legislature had enacted a Civil Union Law a few years previously, the crucial vote on a marriage equality bill introduced during the summer by Governor Neil Abercrombie, S.B.1, finally took place on November 6. When he introduced the measure, Governor Abercrombie stated that he would call a special session of the legislature specifically to consider this bill if he was advised by legislative leaders that there were sufficient
exemption language than the Senate version. (The language was patterned on Connecticut’s marriage equality law.) The Senate voted to approve the amended version on November 12 by a vote of 19-4, and it was signed into law by Governor Abercrombie on November 13. At the signing ceremony, Gov. Abercrombie stated that he would give the pen he used to sign the bill to retired Hawaii Supreme Court Justice Steven Levinson, whose opinion for a plurality of the court in *Baehr v. Lewin* was the first appellate decision anywhere to suggest that same-sex couples might have a constitutional right to marry. Since retiring from the court, Justice Levinson has been an advocate for marriage equality.

On November 14, Hawaii Circuit Court Judge Karl Sakamoto rejected a bid by opponents of the measure to get a temporary injunction against its implementation, pending a ruling on the merits of their claim that the 1998 Hawaii Marriage Amendment deprives the legislature of the authority to affirmatively adopt a marriage equality law. The plaintiffs’ argument is that regardless of what the amendment actually says, it was promoted to the public as a measure to enshrine traditional different-sex marriage in the Hawaii constitution. Judge Sakamoto said that the state legislature has inherent authority to define marriage, independent of the marriage amendment, which by its terms gave the legislature the power to reserve marriage to different-sex couples but did not compel it to do so, according to the plain language used in the amendment. However, the judge rejected the state’s argument that plaintiffs, including Representative Bob McDermott (Rep.), lacked standing to bring their challenge, so the case is not over, and McDermott said that he would appeal the ruling and try to block the measure from going into effect in December. In the meantime, he filed a motion with Judge Sakamoto asking for reconsideration of his ruling on November 27. “This is a serious issue, and we have case law and precedent on our side,” insisted McDermott in a statement announcing the motion. McDermott continues, “U.S. Supreme Court Law affirms that the will or intent of the people on a Constitutional Amendment, when reasonably inferred, supersedes and subordinate [sic] statutory language or committee reports.” McDermott said that the court had scheduled a hearing on his motion for January 13, 2014, too late to stop implementation of the law on December 2. *Honolulu Star-Advertiser, Nov. 27.*

On November 26, U.S. District Judge Susan Oki Mollway rejected another attempt to delay the implementation of the Hawaii law, dismissing the complaint in *Amsterdam v. Abercrombie*, 2013 U.S. Dist. LEXIS 168319, in which a native Hawaiian claimed that enactment of the law violated the terms under which Hawaii was admitted to the union as a state. C. Kaui Johanan Amsterdam asserted a violation of Section 5(f) of the Admission Act that Congress passed in 1959. The Admission Act established a public trust of lands granted by the federal government to the state. Amsterdam contended that the state violated that trust by enacting the same-sex marriage law even though a majority of native Hawaiians who testified in the public hearing opposed the law. Evidently his theory is that the state government may not take any action implicating state resources that is opposed by most native Hawaiians. Judge Mollway found that Amsterdam lacked individual Article III standing to present this “theory” to the federal court, and dismissed the complaint.

Because of the timing of signing and effective dates, Hawaii could claim priority as the fifteenth state to authorize marriage equality. Illinois’s ranking on the list might depend on developments in some other states where lawsuits are pending, most notably New Mexico, where the Supreme Court recently held oral arguments on marriage equality. Marriage equality litigation is pending in many other jurisdictions, but none were in a position to generate a final, binding ruling before June 1, 2014.

In both states, the legislative and gubernatorial action likely put an end to pending lawsuits that had not yet produced affirmative rulings on the merits, but were widely expected to do so if they proceeded.

In Hawaii, the U.S. District Court had ruled in *Jackson v. Abercrombie*, 884 F.Supp.2d 1065 (D. Haw., August 8, 2012), that the U.S. Supreme Court’s 1972 dismissal of the appeal in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972), was dispositive in holding, without opinion, that a state’s denial of the right to marry to same-sex couples did not present a “substantial federal question,” thus rejecting the plaintiffs’ 14th Amendment claims. Senior U.S. District Judge Alan C. Kay also opined that even if it were open to the district court to decide this question, it would not do so because the court saw the issue as one for legislative rather than judicial resolution. Plaintiffs perfected an appeal to the U.S. Court of Appeals for the 9th Circuit, and there were high hopes for success, especially as the 9th Circuit had already declared California Proposition 8 unconstitutional in *Perry v. Brown*, 671 F.3d 1052 (9th Cir., Feb. 7, 2012), motion for rehearing en banc denied, 681 F.3d 1065 (June 5, 2012). Those hopes became even stronger after the Supreme Court rule in June 2013 in *United States v. Windsor*, 133 S. Ct. 2675, striking down Section 3 of the Defense of Marriage Act in an opinion that eschewed ruling on the underlying right of same-sex couples to marry but nonetheless strongly signaling that this issue did present a substantial federal question that would most likely be resolved in favor of same-sex couples seeking that right if the Court’s reasons for striking down Section 3 carried over to the 14th Amendment question. (At the same time, the Supreme Court vacated the 9th Circuit’s opinion in *Perry* on the ground that petitioners lacked standing to appeal the district court’s decision, *Hollingsworth v. Perry*, 133 S.Ct. 2652, thus having the effect of allowing the district court’s Order to go into effect, reviving the right of same-sex couples to marry in California.) Responding to *Windsor*, the federal executive branch extended recognition to married same-sex couples for all purposes of federal
law, although the question whether particular couples might quality for particular benefits or rights might turn on whether their state of domicile recognized their marriage. This state of affairs immediately raised the specter of inequality for civil union partners, since federal agencies made clear that their recognition of lawfully contracted same-sex marriages would not extend to such alternative state-created categories as civil unions or domestic partnerships. Thus, counsel for the Hawaii appellants would have a strong argument that circumstances since the district court’s decision had changed sufficiently to merit a remand, or even a direct recognition by the court of appeals as a matter of law that civil unions were unequal to marriage due to the disparity of federal rights involved, and that the *Windsor* ruling had rendered *Baker v. Nelson* virtually irrelevant. Governor Abercrombie referred to this state of affairs when he announced the introduction of his bill in Hawaii.

In Illinois, the cases of *Darby v. Orr* and *Lazar v. Orr* were consolidated in Cook County Circuit Court before Judge Sophie Hall, who heard arguments on the defendants’ motion to dismiss on August 6. On September 27, Judge Hall denied the motions to dismiss, issuing an opinion that signaled the likelihood that she would be ruling for the plaintiffs when it came time to decide motions for summary judgment. [On that same date, the trial judge in the pending state court marriage equality case in New Jersey, Mary Jacobson of Mercer County Superior Court, ruled on cross-motions for summary judgment, finding that plaintiffs had established that New Jersey civil unions failed to afford equal protection as required by the state constitution, and ordering that the state allow same-sex couples to marry beginning on October 21. *Garden State Equality v. Dow*, 2013 WL 5397372. After both Judge Jacobson and the New Jersey Supreme Court denied the state’s motion to stay the Order pending appeal, the state withdrew its appeal, as the Supreme Court indicated that the state was unlikely to prevail on the merits.] The likelihood of a ruling adverse to the state by Judge Hall loomed, especially in light of the New Jersey developments, whose reasoning would easily carry over to the arguments the Illinois plaintiffs were making under the Illinois constitution. Although *Windsor*, a federal constitutional case, was not directly applicable, its reasoning would likely influence the outcome, as it seems to have done in the New Jersey state constitutional litigation. On November 7, Judge Hall agreed to a defense motion, uncontested by the plaintiffs, to stay further action on the lawsuits in light of legislative developments, with the prospect that the cases could be dismissed as moot after Gov. Quinn signed the bill into law, but then on November 14, Judge Hall responded favorably to a motion providing domestic partnership rather than marriage for same-sex couples. Plaintiffs, represented by Lambda Legal, perfected their 9th Circuit appeal and the argument will be held in 2014. Nevada adopted a state constitutional amendment in 2002 banning same-sex marriage, so the legislature cannot now respond to developments by simply passing a marriage equality law, and it is unlikely that a move to repeal the amendment, even if successful, would be accomplished prior to a decision by the 9th Circuit. Consequently, *Sevcik* is as of now the furthest along towards bringing the question whether same-sex couples have an equal right to marry under the 14th Amendment to the Supreme Court.

In both Hawaii and Illinois, a key issue in the legislative consideration of the marriage bills was the

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by plaintiffs to stay the proceedings until June 2, 2014, at which time they would move to dismiss the case if the Illinois marriage equality law actually goes into effect as expected on June 1. In light of the passage of the Hawaii bill, the pending appeal to the 9th Circuit will be abandoned as moot when the law goes into effect on December 2, but this would not take the marriage equality issue away from the 9th Circuit, which is simultaneously considering an appeal from a district court ruling rejecting a 14th Amendment challenge to Nevada’s refusal to allow same-sex couples to marry, *Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev., Nov. 26, 2012). In *Sevcik*, District Judge Robert C. Jones found *Baker v. Nelson* controlling, but also undertook a rational basis review and concluded that Nevada had shown a rational basis for potential scope of so-called “religious exemptions,” under which the legislatures sought to preserve the right of religious bodies with objections to same-sex marriage to avoid dealing with them or having to recognize them. Leaving aside the virtual certainty that no U.S. court, federal or state, would entertain the notion that it could order a religious institution to perform a marriage for a same-sex couple without violating the 1st Amendment right of the religious institution (and its clergy) to free exercise of religion, the question arose concerning ancillary facilities and activities owned and/or operated by, or associated with religious institutions. Some legislators even sought to guarantee the right of private employers, for example, to refuse to recognize same-sex marriages, and for private for-profit businesses
whose owners had religiously-based objections to refuse to provide goods or services for same-sex marriages or to recognize their employees’ same-sex marriages. These concerns reacted to particular incidents around the country involving wedding photographers, bakers, catering halls, bed & breakfasts and the like, some of which did not even involve same-sex marriages, under which public accommodation laws covering sexual orientation had been invoked to find refusals of such goods or services to be unlawful. The Illinois and Connecticut legislators have embraced religious exemptions of varying scope, but so far no legislative body has gone so far as to shelter a for-profit commercial enterprise from the obligation to comply with public accommodations laws. The same debate about the scope of religious exemptions has surrounded U.S. Senate consideration of the Employment Non-Discrimination Act, resulting in a broad religious exemption drafted to attract the votes of the handful of Republican senators necessary to bring that bill to a vote under the Senate rules, which allow a minority (41 senators) to block floor consideration of a measure.


6th Circuit Denies ADA Cause of Action for HIV-Positive Man Who Claims His Meds Set off a False Positive Drug Test

T he U.S. Court of Appeals for the Sixth Circuit affirmed a district court decision denying the discriminatory discharge claim filed by an HIV-positive male employee allegedly fired by his employer after discovery of his illness. Bailey v. Real Time Staffing Servs., Inc., 2013 WL 5811647 (October 29, 2013).

Defendant Real Time, a temp agency, employed plaintiff Gaylus Bailey for several years. The company required its employees to submit to random drug tests. Mr. Bailey ended up failing his drug test, but attempted to provide his supervisor with a note from his doctor that explained the failure by the prescription of certain drugs. The note asserted that Bailey’s prescription medication might cause him to generate a positive test result. This note, however, did not specifically state that the medication was for HIV infection. Following company policy, Bailey had to receive a follow-up from a medical review officer, but he allegedly never received such a call. Bailey and the company agree that he tried to contact an officer, but that he spoke to a “receptionist” (or “representative,” according to the company).

This is where the case gets interesting -- and confusing. Mr. Bailey and Real Time differ on the facts of whether Bailey spoke to an officer, and what that officer said. There is also a dispute as to whether Bailey’s supervisor actually looked at the doctor’s note that allegedly explained the drug test failure. After Bailey was fired for the failure of the drug test, he filed suit against Real Time for violating the Americans with Disabilities Act. However, because there is no concrete proof that the company knew of Bailey’s HIV-positive status, nor the specific need for his medication, he was unable to prevail on this claim in the district court and the company succeeded on their motion for summary judgment.

The court found that a jury could differ as to whether or not Real Time’s discharge of Bailey could constitute discrimination by assuming a failed drug test would result in impaired work skills. By the traditional standard in evaluating such cases, the burden generally falls on the plaintiff to prove that he or she was protected by the ADA, the defendant knew of the protection, and the defendant violated the.

The court adhered to the strict facts: that Real Time did not and could not know of the failed test that Bailey was HIV-positive.

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Parul Nanavati

Nanavati studies at N.Y. Law School (’15).
Finding that the Board of Immigration appeals erred in finding that a gay asylum applicant from Russia had failed to show that he had been subjected to persecution by non-governmental actors whom the Russian government was unable or unwilling to control, a panel of the U.S. Court of Appeals for the 9th Circuit granted the petition for review and remanded the case so that the Board of Immigration Appeals can determine whether the government has met its burden of showing a change in conditions for gay people in Russia that would overcome the presumption that the applicant has a well-founded fear of persecution if required to return there. Doe v. Holder, 2013 WL 6182985, 2013 U.S. App. LEXIS 23855 (November 27, 2013). In light of recent news reports about the severe harassment to which gays in Russia are being subjected, recent anti-gay legislation, and the failure of Russian law enforcement to provide effective protection for GLBT groups there, we suspect the government will not be able to meet this burden.

Before addressing the merits of the appeal, Circuit Judge Arthur L. Alarcon observed that generally plaintiffs are not allowed to proceed anonymously in federal court, but that the courts will allow a “John Doe” filing “in exceptional cases where necessary to protect a person from harassment, injury, ridicule or personal embarrassment.” The court held that this was such an “unusual case” and referred to the Petitioner throughout the opinion as “John Doe.”

An Immigration Judge expressly found that Doe’s testimony about his experiences growing up in Russia was credible. Doe testified that while attending East Siberian Technological University in his hometown, Ulan-Ude, for two years, he joined a club for gay students, but when some of his classmates saw him socializing with club members, the word spread that he was gay and “almost ‘everybody [he] knew’ – classmates, persons from Doe’s wrestling club, students from his former school – began mocking him.” Doe described two violent attacks he suffered from classmates. After the first, during which he was beaten and suffered injuries to an eye and body bruises, he went to the police, but the police officer on duty said he did not want to receive the crime report, that the “case is not so serious,” and asked why Doe, a man, had not defended himself. Basically, the police didn’t want to hear about it.

Doe suffered a second attack, much more severe, in April 2003, being beaten in a restaurant by other customers while he was sitting with his boyfriend. Both Doe and his boyfriend were beaten, Doe so severely that he lost consciousness, only awakening in the ambulance, and he suffered internal brain hemorrhaging and a concussion, being hospitalized for three weeks. His father reported the attack to the police, who sent an officer to interview him in the hospital, but Doe believed that the police took no further action in the case, even though he gave the officer the names of some of his attackers, who were known to him from school. Doe later received a “Confirmation Paper” from the police, indicating that his father’s application that the assailants be prosecuted “was rejected on the basis of Criminal Code of the Russian Federation, Regulation 24, Chapter 1, Paragraph 2.” The “Confirmation Paper” did not include the text of this regulation, and neither Doe nor the government placed it in evidence in the immigration hearing. Doe says that after he was released from the hospital, he saw some of his attackers, who resumed harassing him. He soon moved to Moscow, where he lived for four months until he came to the U.S. on a student visa. He says he encountered discrimination in Moscow because of his ethnicity, Buryat. He believes he was singled out because members of his ethnic minority do not look like ethnic Russians and are treated by the police as suspect foreigners.

Doe enrolled in the American Language Communications Center in New York, but eventually stopped attending classes, and received a notice from Homeland Security to appear because his non-attendance violated the terms of his nonimmigrant status. At that point, Doe applied for asylum, withholding of removal and protection under the Convention Against Torture. Although the Immigration Judge found his testimony credible, and that he had suffered physical injury and

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9th Circuit Revives Asylum Claim of Gay Man From Russia

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The court held that this was such an “unusual case” and referred to the Petitioner throughout the opinion as “John Doe.”
I.J. held, ‘The record does not support the conclusion that the government was unable or unwilling to protect the respondent.’" The IJ also noted that Doe was able to relocate to Moscow to escape his local persecutors. That he suffered discrimination due to his ethnicity in Moscow was not deemed relevant, since it was not due to his sexual orientation.

Doe filed an appeal to the BIA on November 23, 2007, arguing that the IJ erred concerning the attitude of the police and the issue of relocation within the country to avoid persecution, but the BIA agreed with the IJ that Doe failed to prove he was eligible for asylum or withholding of removal. (Doe didn’t pursue the CAT claim, which the IJ had also rejected.) According to the BIA, wrote Alarcon, Doe’s “claim is based on isolated hate crimes which, while deplorable, do not establish his eligibility for asylum or withholding of removal.” BIA concluded that Doe had “not shown that there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government.” According to the BIA, Doe had failed to show that the police to whom he reported the attacks he suffered had failed to undertake adequate investigations, that he had failed to "explain" the Russian law cited in the Compliance Paper, and that the burden was on him of “establishing foreign law on which he relied.” The BIA concluded that Doe failed to establish his entitlement to asylum, either on grounds of homosexuality or ethnicity. One must remember that this decision emanated from the generally anti-gay BIA that functioned under the Bush Administration. Whatever may have been the case when the BIA’s decision was written several years ago, these assertions sound ludicrous in light of recent news reports from Russia. Doe petitioned the 9th Circuit to review this ruling on July 13, 2009.

“Whatever may have been the case when the BIA’s decision was written several years ago, these assertions sound ludicrous in light of recent news reports from Russia.”

The court said that the BIA erred when it regarded the discrimination Doe encountered in Moscow on account of his ethnicity as, in effect, a separate asylum claim. “This was error,” wrote the court. “Doe raised these issues to support his contention that he could not reasonably relocate to Moscow, not as a separate ground for asylum.” The court pointed out that the issue regarding relocation was not whether Doe suffered asylum-worthy persecution in Moscow, but rather whether it was “reasonable” for him to relocate to a part of the country where he “would face other serious harm in the place of the suggested relocation.”

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While deplorable, do not establish his eligibility for asylum or withholding of removal.” BIA concluded that Doe had “not shown that there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government.” According to the BIA, Doe had failed to show that the police to whom he reported the attacks he suffered had failed to undertake adequate investigations, that he had failed to “explain” the Russian law cited in the Compliance Paper, and that the burden was on him of “establishing foreign law on which he relied.” The BIA concluded that Doe failed to establish his entitlement to asylum, either on grounds of homosexuality or ethnicity. One must remember that this decision emanated from the generally anti-gay BIA that functioned under the Bush Administration. Whatever may have been the case when the BIA’s decision was written several years ago, these assertions sound ludicrous in light of recent news reports from Russia. Doe petitioned the 9th Circuit to review this ruling on July 13, 2009.

“We are persuaded, after reviewing this record, that the BIA erred in concluding that Doe failed to demonstrate that the Russian government was unable or unwilling to control the persons he identified as having persecuted him on account of his homosexuality,” wrote Judge Alarcon. “The Government failed to present any evidence to rebut Doe’s undisputed testimony that he suffered serious assaults at the hands of individuals on account of his homosexuality or to show that the Russian government was able and willing to control nongovernmental actors who attack homosexuals. Because the evidence demonstrated that Doe was subjected to past persecution on account of his homosexuality and that the Russian government was unable or unwilling to control his persecutors, the BIA should have presumed that Doe has a well-founded fear of future persecution. It should then have required the Government to meet its burden to show by a preponderance of the evidence that ‘there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution’ or ‘the applicant could avoid future persecution by relocating to another part of the applicant’s country.’ Because of these errors, we remand this matter to the BIA for further evidentiary proceedings to determine whether the Government can meet this burden.”

The court said that the BIA erred when it regarded the discrimination Doe encountered in Moscow on account of his ethnicity as, in effect, a separate asylum claim. “This was error,” wrote the court. “Doe raised these issues to support his contention that he could not reasonably relocate to Moscow, not as a separate ground for asylum.” The court pointed out that the issue regarding relocation was not whether Doe suffered asylum-worthy persecution in Moscow, but rather whether it was “reasonable” for him to relocate to a part of the country where he “would face other serious harm in the place of the suggested relocation.”

This case now presents an interesting test for the Obama Administration, as it puts the government in the position of having to take a stand in a judicial forum on the question whether the Russian government is now complicit in the severely oppressive situation confronting gay people in Russia today, or whether it is buying into Russian President Putin’s incredible statements that Russia does not discriminate against gays at the same time that he signs into law various anti-gay measures.
The 9th Circuit Judicial Council is an administrative body that deals with grievances from employees of the federal courts. These employees participate in the federal employee benefits plans overseen by OPM. In 2009, 9th Circuit judges sitting in this capacity ruled on two grievances that federal court employees in California who had married their same-sex partners in 2008 prior to the passage of Proposition 8 were entitled to enroll their partners as spouses under the federal plan, but OPM instructed the insurance plan not to enroll them, citing Section 3 of the Defense of Marriage Act (DOMA). One of those cases was resolved by the clerk of the employing court reimbursing the employee for the cost of his husband’s insurance; the other resulted in a federal lawsuit brought by Lambda Legal on behalf of Karen Golinski, in which a federal district judge ruled that DOMA Section 3 was unconstitutional prior to the U.S. Supreme Court’s June 26, 2013, decision to the same effect in *U.S. v. Windsor*. After the Windsor ruling, the government pending appeal of Golinski’s decision to the 9th Circuit was dismissed based on OPM’s change of policy to recognize same-sex marriages. OPM announced in July that it would recognize same-sex marriages for purposes of federal employee benefits plans, regardless where the employees and their spouses resided, so long as the place where they married recognized same-sex marriages. However, taking a strict view of the Windsor ruling, OPM announced that it could not recognize domestic partnerships or civil unions.

The federal government’s continuing failure to recognize state-approved New Jersey civil unions was the main point of contention in the New Jersey marriage equality litigation, persuading N.J. Superior Court Judge Mary Jacobson to rule in September in *Garden State Equality v. Dow* that same-sex couples in New Jersey were entitled to marry, resulting in marriage equality in New Jersey when Governor Chris Christie’s attempt to get the decision stayed was unanimously rejected by the New Jersey Supreme Court. Christie had argued that the plaintiffs in that case should have been suing the federal government to recognize their civil unions, rather than suing New Jersey. This argument did not cut any ice with the New Jersey courts.

The Oregon ruling responds to a grievance filed in 2009 by a former law clerk. Fonberg’s appeal to the Executive Committee came before three judges: Chief Circuit Judge Alex Kozinski, Circuit Judge Richard R. Clifton, and Chief District Judge Ralph Beistline of the U.S. District Court in Alaska.
Bemoaning Lack of Legislative Guidance, Indiana Appeals Court Rules Lesbian Co-Parent May Seek Visitation with Former Partner’s Biological Child

On October 31, 2013, the Indiana Court of Appeals reversed a trial court order and held in A.C. v. N.J., 2013 WL 583310, that a former same-sex domestic partner of a woman who gave birth to a child during the course of their relationship may seek visitation. Writing for the court, Judge Ezra Friedlander pointedly noted with regret the failure of the legislature to address this frequently recurring question.

During the course of their same-sex domestic partnership, N.J. and A.C. decided to have a child together. N.J. was artificially inseminated with donor semen and gave birth to C.J. When C.J. was two years old, N.J. and A.C. ended their relationship. A.C. regularly visited the child for several months, until N.J. stopped all contact between them. A.C. then filed a petition seeking joint custody and visitation, which the trial court denied. She appealed, arguing that: [1] the trial court erred in declining to enforce the parties’ agreement that A.C. would be a parent to C.J.; [2] that the trial court erred in denying A.C.’s request for joint custody; and [3] the trial court erred in holding that A.C. lacked standing to seek visitation.

When the parents’ relationship ended, Benham unilaterally terminated King’s visitation and rejected support payments. King thereafter filed a petition seeking “to be recognized as A.B.’s legal parent or, at a minimum, continued visitation with A.B.” On appeal, the Court of Appeals concluded that “under these circumstances, Benham and King should both be considered A.B.’s legal parents” (In re A.B., 818 N.E.2d 126 [2004]).

In King v. S.B., the Indiana Supreme Court vacated the appellate court’s decision, but still reversed the trial court’s dismissal of King’s petition, albeit on narrower grounds. Judge Friedlander reasoned that because the Supreme Court held that that King’s petition survived a motion to dismiss...
Illinois Lesbian Couple Wins Order Directing Clerk to Issue Marriage License

U.S. District Judge Thomas M. Durkin signed a temporary restraining order and permanent injunction directing Cook County Clerk David Orr to issue a marriage license to Vernita Gray and Patricia Ewert. Gray v. Orr, Case No. 1:13-cv-8449 (U.S. Dist. Ct., N.D. Ill., Nov. 25, 2013). The marriage equality bill signed into law on November 20 by Governor Patrick Quinn does not go into effect until June 1, 2014, but that may be too late for Gray and Ewert, who have been a couple for five years and desperately want to marry, because Gray is suffering from advanced breast cancer and may not make it that long. The women filed suit on November 22, contending that the existing Illinois law banning same-sex marriages deprives them of due process and equal protection in violation of the 14th Amendment, echoing the existing marriage equality lawsuits on file with the Cook County Circuit Court. Those cases, in which motions to dismiss were previously denied, are being held in abeyance pending the June 1 effective date of the new marriage equality law. Plaintiffs filed their motion for immediate relief on Friday, Nov. 22, and the court accommodated them with a nailing on the motion on Monday, November 25. In their motion papers, the plaintiffs explained why they could not wait until June 1. “Unfortunately, Vernita may pass away in the near future. Unless this Court acts, Vernita and Pat will be permanently denied the benefits, both tangible and dignitary, of legal marriage. For example, unless Plaintiffs are allowed to legally marry, they may face discrimination in hospital settings, an estate tax burden, and other harms, including challenges establishing eligibility for social security benefits as a surviving spouse. Given Vernita’s extensive medical expenses, the additional cost of being denied access to legal marriage is particularly burdensome.”

The complaint pointed out that no adequate remedy in money damages exists for the deprivation of the status of marriage, and that no harm would be done to the state of Illinois by granting them immediate relief. Indeed, the Illinois state government has now decided as a matter of public policy that same-sex couples should be entitled to marry. The effective date of the marriage law was dictated by the timing of the votes in the two houses of the legislature. Since the Senate bill was passed last May, it could not be enacted by the House during the fall “veto session” without a super-majority unless the effective date was no earlier than June 1. The bill won a majority, but not a super-majority. Illinois constitutional requirements would be preempted by federal constitutional requirements, however. In effect, the plaintiffs argued, they have a federal constitutional right to marry, and any state rule that makes that impossible — even for just seven months — would be

The women were wed at their home in Chicago in a private ceremony on November 27, thus becoming the first couple to legally wed in Illinois.
inflicting an irreparable injury on them due to Vernita’s medical condition.

Judge Durkin was persuaded by this argument and signed the Order presented by counsel for the plaintiffs, amending it however to be effective until December 9, 2013. Although Durkin did not issue a written explanation of his Order, merely signing the one-page Order proffered by counsel, his agreement to sign the Order implicitly signaled his finding that plaintiffs were likely to prevail on the merits of their claim to a federal constitutional right under the 14th Amendment to marry.

Cook County Clerk David Orr promptly indicated that his office would issue a license as soon as they received a duly executed application. Orr, who is a named defendant in the pending state court lawsuits, is not defending the marriage ban on the merits; neither is the Attorney General, Lisa Madigan, who agrees that same-sex couples have a right to marry. Defense of the existing marriage ban in the state court lawsuit was left to county clerks from outside the Chicago area, who intervened as defendants represented by a Catholic litigation group, the Thomas More Society.

A large legal team assembled to represent the plaintiffs, including groups of attorneys from Kirkland & Ellis LLP and Miller Shakman & Beem LLP, staff attorneys from Lambda Legal’s Illinois office, and attorneys for the Roger Baldwin Foundation of ACLU, Inc., in Chicago.

Lambda Legal announced that the women were wed at their home in Chicago in a private ceremony on November 27, thus becoming the first couple to be legally wed in Chicago. News reports about this case have spurred serious consideration of a bill to advance the effective date of the marriage equality law, which would have to be introduced and passed in the new session of the legislature set to convene in January. Governor Quinn has announced his support for efforts to speed up implementation. Meanwhile, the case provide a precedent for other couples with facts suggesting a compelling need to marry earlier than June 1.

### Senate Approves Inclusive Version of Employment Non-Discrimination Act (ENDA)

The United States Senate voted 64-32 on November 7 to approve S. 815, the Employment Non-Discrimination Act (ENDA), a bill that would ban intentional discrimination because of actual or perceived sexual orientation or gender identity by employers that are subject to the non-discrimination requirements of Title VII of the Civil Rights Act of 1964 (i.e., those with 15 or more employees). Voting in the majority were 54 Democrats and ten Republicans. Not voting were Senators Bob Casey (Dem.) and Tom Coburn (Rep.), who were absent from the Senate for family and health-related reasons, and John Barrasso and Jeff Sessions (both Republicans) who were not officially absent but did not register a vote. This is the first time that either house of Congress has approved an employment discrimination bill that would address both sexual orientation and gender identity. In 2007, the House approved a version of ENDA that covered only sexual orientation claims. The only previous time that a version of ENDA came up for a vote in the Senate, in 1996, the sexual-orientation-only measure fell two votes short of passage.

Approval of the measure followed on passage of an amendment proposed by Senator Rob Portman, an Ohio Republican, broadly exempting from coverage any employer that is “exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964.” Thus, corporations, associations, educational institutions or societies that are allowed to discriminate based on religion will also be allowed to discriminate based on sexual orientation or gender identity. The Portman Amendment also provides that employers who are entitled to discriminate based on sexual orientation or gender identity as a result of this amendment may not suffer any adverse federal consequences for doing so, even if their action would be forbidden under a state or local anti-discrimination law. Some LGBT rights groups were outspoken in asserting that the Portman Amendment’s religious exemption language was unduly broad, but generally supporters of the overall bill were willing to accept it in order to get the necessary votes to close debate on the bill, especially as it seemed unlikely that this version of the bill will be enacted because of firm opposition by the Republican leadership in the House of Representatives. The Senate rejected a second amendment, offered by Senator Pat Toomey, a Pennsylvania Republican, which would have in effect given an exemption to any employer with religious objections, thus largely gutting the bill. Despite the defeat of his amendment, Senator Toomey was one of the ten Republican Senators who voted to approve S. 815.

House Speaker John Boehner stated that he did not intend to bring the bill to the floor of the House for a vote because he considered it “unnecessary” and likely to lead to excessive litigation placing a particular burden on small businesses. Boehner was wrong in this. As to the former objection, the lack of a federal law

### This is the first time that either house of Congress has approved an employment discrimination bill addressing both sexual orientation and gender identity.
banning sexual orientation discrimination means that employees in the 39 states that do not ban such discrimination have no statutory redress for such discrimination, and the Supreme Court has yet to affirm the Equal Employment Opportunity Commission’s position (embraced by a few lower federal courts) that Title VII’s ban on sexual discrimination protects against discrimination because of gender identity. As to the later, experience in the states and localities that do ban such discrimination, in some cases stretching back decades, shows that such enactments do not lead to a flood of litigation, and the impact on “small businesses” of passing ENDA would be slight, since the overwhelming number of small businesses in the United States employ fewer than 15 people and thus would be exempt from the federal law.

House and Senate Democrats were studying ways to get S. 815 before the House for a vote, but none seemed immediately likely given the opposition of the Republican leadership and the paltry number of House Republicans who are co-sponsors of the House version of the bill. Some critics of the Portman Amendment expressed hope that in the next session of Congress meeting beginning in January 2015 a fresh start can be made on a version of ENDA that has a narrower religious exemption.

ENDA is a modest measure compared to Title VII and other federal anti-discrimination laws. It does not authorize disparate impact claims and rules out preferences (i.e., affirmative action goals or quotas). However, unlike prior versions of ENDA, it does expressly not incorporate limitations on discrimination claims that would have been precluded by Section 3 of DOMA (which was struck down as unconstitutional in U.S. v. Windsor), and it authorizes so-called “mixed motive” cases, in which a plaintiff can prevail by showing that sexual orientation or gender identity was a motivating factor for an employment practice, even though other factors may also have motivated the practice. As in the case of Title VII, in cases where an employer can show that factors other than sexual orientation or gender identity were motivating factors, the plaintiff’s remedy may be limited to declaratory relief and attorney’s fees and costs.

Florida Supreme Court Rules 4-3 in Favor of Lesbian Co-Parent Egg Donor’s Right to Seek Custody

Ruling on a question of first impression for Florida, the state’s Supreme Court split 4-3 in D.M.T. v. T.M.H., 2013 Fla. LEXIS 2422, 2013 WL 5942728 (Nov. 7, 2013), finding that a lesbian co-parent who had donated an egg that was fertilized in vitro and implanted in her same-sex partner, could seek custody of the resulting child whom she had parented for the first two years of the child’s life before the couple’s relationship ended. The court approved a ruling by the 5th District Court of Appeal that a Florida statute that would by its terms block this result would be unconstitutional as applied to this situation, although the court disagreed with the 5th District’s conclusion that the statute didn’t even apply to the case because the co-parent did not intend to “give away” her egg as a “donor.” The dissent argued that the constitutional issues were not properly before the court and that the co-parent had waived her rights by signing a form consent agreement at the time the in vitro insemination procedure was performed.

The case achieved a fair degree of notoriety, as the birth mother absconded with the child to Australia and had to be tracked down by detectives in order to serve her with the co-parent’s complaint to initiate the lawsuit.

According to the opinion for the court by Justice Barbara J. Pariente, the parties were “involved in a committed relationship from 1995 until 2006,” living together, acquiring real estate together, and maintaining joint financial accounts. They decided to have a baby, and after determining that D.M.T. could not produce an egg, they resorted to in vitro fertilization, using an egg harvested from T.M.H. to inseminate from a sperm donor, to be gestated by D.M.T. They raised their daughter together for two years until the relationship broke down and they separated in May 2006, after which the child lived with D.M.T. under a time-sharing agreement with T.M.H. After the relationship of the women deteriorated further, D.M.T. disappeared with the child, and was subsequently traced by detectives to Australia.

T.M.H., described by the court as “the biological mother,” filed a petition to establish her parental rights and seek custody. D.M.T. described as “the birth mother,” moved for summary judgment, relying on a Florida statute that provides that an egg or sperm donor relinquishes all parental rights, “other than the commissioning couple or a father who has executed a preplanned adoption agreement.” “Commissioning couple” is defined as the intended mother and father of a child. The trial court agreed with D.M.T. that the statute compelled granting her summary judgment, but commented, “I do not agree with the current state of the law, but I must uphold it. And, if you appeal this, I hope I’m wrong.”

T.M.H. appealed, and the 5th District Court of Appeal reversed, finding first that the statute did not even apply, because the court did not consider T.M.H. to be a “donor.” Finding that the parties had intended to raise the child together, the court of appeal concluded that T.M.H. was not “giving away” her egg. And, alternatively, if the statute were to apply, the court of appeal ruled that this would violate T.M.H.’s constitutional rights, as the biological and intended parent of the child.

Thistime D.M.T.appealed. The Florida Supreme Court majority disagreed with the 5th District’s holding that T.M.H. was not a “donor,” but otherwise affirmed the court’s ruling on constitutional grounds. The court found that the right to procreate is a “fundamental right” under the Florida and U.S. Constitutions.

“Therefore,” wrote Justice Pariente, “the burden falls on the birth mother to demonstrate that application of the assisted reproductive technology statute to deprive the biological mother of her fundamental right to be a parent furthers a compelling governmental interest through the least intrusive means. This showing has not been made.”

The court recognized that the statute’s
The purpose was to protect “couples seeking to use assisted reproductive technology to conceive a child from parental rights claims brought by typical third-party providers of the genetic material used in assisted reproductive technology, as well as the State’s corresponding interest in furthering that objective. This case, however, does not implicate those concerns. Quite simply, based on the factual situation before us, we do not discern even a legitimate State interest in applying [the statute] to deny T.M.H. her right to be a parent to our daughter.” The court emphasized that T.M.H.’s rights in this case depended also on the parental role she assumed upon the birth of her daughter, thus distinguishing this from a case where an egg or sperm donor who does not form a relationship with a child suddenly surfaces years later trying to assert parental status.

The court also ruled on an alternative argument of equal protection. “Sexual orientation has not been determined to constitute a protected class and therefore sexual orientation does not provide an independent basis for using heightened scrutiny to review State action that results in unequal treatment of homosexuals,” wrote Pariente, explaining why the court would apply “a rational basis analysis” to T.M.H.’s equality claim. “The specific question we confront is whether the classification between heterosexual and same-sex couples drawn by the [statute] bears some rational relationship to a legitimate state purpose.” D.M.T. relied in part on the Florida Marriage Amendment, which forbids same-sex couples from marrying or having their marriage recognized, to support her argument against T.M.H.’s claim, but the court held that the amendment was irrelevant, since the “commissioning couple” definition in the statute did not require that the intended father and mother be married to each other, unlike a companion statute on genetic material which limited that procedure to use on behalf of married couples. The court also rejected D.M.T.’s claim that “recognizing T.M.H.’s parental rights in this case would undermine the State interest in providing certainty to couples using assisted reproductive technology to become parents because it would increase litigation regarding the intentions of individuals providing genetic material.” The court pointed out that the statute clearly contemplates litigation about whether an unmarried different-sex couple might be considered a “commissioning couple” under the statute, which would require a factual determination of intent.

“We conclude,” wrote Pariente, “that the State does not have a legitimate interest in precluding same-sex couples from being given the same opportunity as heterosexual couples to demonstrate that intent. Consistent with equal protection, a same-sex couple must be afforded the equivalent chance as a heterosexual couple to establish their intentions in suing assisted reproductive technology to conceive a child.” Additionally, the court noted a ruling by the 3rd District Court of Appeal in Fla. Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (2010), which had declared unconstitutional the state’s statutory ban “against a homosexual adopting a child” as “lacking a rational basis,” mentioning with apparent agreement that court’s finding “that gay people and heterosexuals make equally good parents.” Then-Governor Charlie Crist had decided not to appeal the X.X.G. decision and instead to comply with the court’s order, so the Supreme Court had never issued a definitive ruling on the constitutionality of the statute. This pronouncement by a majority of the court appears to approve of that ruling, at least by implication.

The court rejected D.M.T.’s argument that the standard consent form that T.M.H. signed at the clinic for the in vitro procedure would serve to waive her rights, asserting that “courts have considered similar standard informed consents used in reproductive technology have held that waiver provisions like the one referenced by the Fifth District are inapplicable in circumstances like those in this case. This is because it is uncontested that the biological mother was not an anonymous donor, but rather, that the parties were in a committed relationship where reproductive technology was used – with one woman providing her egg and the other partner bearing the child – so that both women became the child’s parents.

Having determined that T.M.H. is a legal parent of the child, the Supreme Court sent the case back to the trial court “to determine, based on the best interests of the child, issues such as parental time-sharing and child support.”

The dissenting opinion, written by Chief Justice Ricky Polston, contested just about every point of the majority decision, arguing that the constitutional issues had not been asserted at the trial level and thus were not preserved for consideration on appeal, that D.M.T. contested T.M.H.’s allegation that the women had intended to raise the child together, and that the statute clearly applied to block T.M.H.’s claim. The political line-up of the justices is interesting. Of the four in the majority, two were appointed by Democratic Governor Lawton Chiles and two by Republican Governor Charlie Crist; of the three dissenters, one was appointed by Chiles and two by Crist.

Many amicus briefs were filed with court, mainly in support of T.M.H., including briefs from the ACLU LGBT Rights Project and the ACLU of Florida, Lambda Legal, and the National Center for Lesbian Rights. Michael B. Jones of Orlando, Florida, represented T.M.H. Christopher V. Carlyle and Shannon McLin Carlyle of The Villages, Florida, and Robert A. Segal of Melbourne, Florida, represented D.M.T.

T.M.H.’s rights depended on the parental role she assumed upon the birth of her daughter.
Arkansas Supreme Court Reverses Visitation Restriction on Gay Dad

A sharply divided Arkansas Supreme Court voted 4-3 to reverse the circuit court’s requirement that a gay dad’s same-sex partner not be present when he has overnight visitation with his youngest son. Finding that, contrary to the view of the circuit judge, Arkansas does not have a “blanket rule” requiring such a restriction, the Supreme Court sent the case back to the circuit court for a determination whether allowing the partner to be present would be in the best interest of the boy. Moix v. Seventeenth Division Libby Moix, 2013 Ark. 478, 2013 Ark. LEXIS 569, 2013 WL 6118520 (Nov. 21, 2013). The ACLU represents John Moix in his appeal of the circuit court’s ruling.

John and Libby Moix were divorced in 2004. As part of their settlement agreement, they shared joint custody of their three sons, who were to live with their mother and have liberal visitation with their father, a pharmacist. The agreement, incorporated in the divorce decree, contained the usual language that neither party was to have overnight guests of the opposite sex during overnight visitation of the children. But soon after the divorce, John acquired a same-sex partner, Chad Cornelius, a nurse, who began to live with him. This led Libby to seek a modification of the court order, as she claimed that it was harmful for the children to be exposed to their father’s “illicit relationship” with Chad.

After hearing testimony from the parties and several other witnesses, the circuit judge concluded that John should get increased visitation with his son. John presented several witnesses who testified about his character, Chad’s character, and the relationship of the two men and their children. Chad’s ex-wife also testified in support of the application to remove the restriction, praising him as a wonderful father. Chad’s 16-year-old son has formed a close friendly relationship with R.M., which is adversely affected by the restriction as well. After concluding that there had been a material change in circumstances, the circuit court concluded that it was R.M.’s best interest to have more time with John, including one overnight a week.

According to the Supreme Court’s opinion by Justice Cliff Hoofman, “The court noted that appellant and Chad were in a long-term committed relationship, that they had resided together since at least 2007, and that Chad posed ‘no threat to the health, safety, or welfare’ of R.M. Other than the prohibition on unmarried cohabitation with a romantic partner in the presence of a minor child, the circuit court found no other factors present to mitigate against overnight visitation in this case.” The circuit court had also rejected John’s argument that the non-cohabitation requirement violated the federal and state constitutions.

John appealed this order to the Supreme Court, arguing that the restriction violated his constitutional rights, and alternatively that the circuit court had misconstrued Arkansas law. Justice Hoofman, observing that the court avoids constitutional rulings if it can resolve a case on other grounds, wrote that the majority of the Supreme Court agreed with John that the circuit court had misconstrued Arkansas law.

Hoofman reviewed several prior Arkansas decisions showing that the courts had departed from a strict observance of a no-cohabitation rule. He referred to a 1999 decision, Campbell v. Campbell, 336 Ark. 379, 985 S.W.2d 724 (1999), in which “this court made it clear that the purpose of the non-cohabitation provisions are to promote a stable environment for the children and not merely to monitor a parent’s sexual conduct. We have also repeatedly held, however, that the primary consideration in domestic relations cases is the welfare and best interest of the children and that all other considerations are secondary. Therefore, we have emphasize in more

Several prior court decisions departed from a strict observance of a no-cohabitation rule.
recent cases that the policy against romantic cohabitation in the presence of children must be considered under the circumstances of each particular case and in light of the best interest of the children.” Thus, the court agreed with John that “the public policy against romantic cohabitation is not a ‘blanket ban,’ as it may not override the primary consideration for the circuit court in such cases, which is determining what is in the best interest of the children involved.”

In this case, the circuit court’s factual findings suggested that the only barrier to allowing Chad to be present during visitation was the court’s perception that a public policy rule required it. Thus, wrote Hoofman, the circuit court never made a finding on whether it was in R.M.’s best interest to impose the non-cohabitation requirement in this case, so the matter would have to be returned to the circuit court for such a finding. The court also rejected Libby’s argument that there had not been a material change in circumstances that would justify the court modifying its prior order, under which there was to be no overnight visitation.

The three dissenting judges all agreed that John had failed to show the necessary material change in circumstances to justify reopening the visitation order. They also disagreed with the majority’s conclusion that the circuit judge had failed to make a “best interest” determination. Justice Karen R. Baker quoted from the circuit judge’s opinion: “The circuit court stated, in speaking about the non-cohabitation provision, ‘The best interest dictates that that be the continued policy of this court, in my opinion. So that will be the order of the court.’ It is clear to me,” continued Baker, “that the circuit court did determine that the noncohabitation provision was in the best interest of the child.” In a separate dissent, Justice Courtney Hudson Goodson argued that the non-cohabitation ruling was already abandoned in prior cases, and agreed with the other dissenting opinion that the circuit judge had adequately addressed the best interest issue in concluding that the restriction should apply in this case.

Moix’s lawyers on this appeal include Holly Dickson of the Arkansas Civil Liberties Union and Leslie Cooper and James Esseks from the national ACLU LGBT Rights Project.

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**New York Appeals Court Allows Breach of Contract Claim on Alleged Joint/Venture Partnership Agreement of Lesbian Couple**

A panel of the New York Appellate Division, 2nd Department, in Brooklyn, ruled on November 13 in *Dee v. Rakower*, 2013 N.Y. App. LEXIS 7468, 2013 NY Slip Op 7443, that a lesbian can sue her former same-sex partner for breach of an alleged contract that they would share assets equally, including retirement contributions and earnings, after their relationship ended. While agreeing with the trial judge, Kings County Supreme Court Justice Courtney Hudson Goodson argued that the non-cohabitation provision was well-delineated, and had not been abandoned in prior cases, and agreed with the other dissenting opinion that the circuit judge had adequately addressed the best interest issue in concluding that the restriction should apply in this case.

Dee claimed that there was a mutual unwritten agreement about shared assets that recognized she would be making a non-economic contribution to the relationship by staying home to care for their children.

Yvonne Lewis, that plaintiff Laura Dee could not pursue an equitable claim on theories of constructive trust, unjust enrichment or action for an accounting, Justice Leonard B. Austin wrote for the court that Dee’s allegations provided a sufficient basis for a breach of contract claim. One member of the four-judge panel, Presiding Justice Mark C. Dillon, wrote a dissenting opinion asserting that Dee had failed to allege that the parties had any agreement about what would happen if their relationship ended.

Laura Dee and Dena Rakower “lived together in a committed, same-sex relationship for nearly 18 years,” according to Justice Austin’s opinion. They raised two children together. Each of them was the biological mother of one of the children and the adopted mother of the other. In 1996 they purchased a house as “joint tenants with rights of survivorship.” After their first child was born, Dee alleges that they decided, in light of the cost of child care, that she would give up her full-time job and work part-time so that she could “be home with the child (later, children) and perform other non-financial services for the benefit of the family and for the parties’ partnership and/or joint venture.” Rakower would continue working full-time.

Dee claimed that there was a mutual unwritten agreement about shared assets. That is, they recognized that Dee would be making a non-economic contribution to the relationship by staying home to care for their children, and that Rakower “would be earning more income for, and [Dee] would be contributing more non-financial services to, the parties’ partnership/joint venture.” Consequently, Dee claims, the women “specifically agreed to share equally in all financial contributions made by each of them and that such contributions were for their mutual benefit.” As Justice

*continued on page 442*
New York Appellate Division Rebuffs Syracuse D.A. on Felony Charges in HIV Exposure Case

A unanimous five-judge panel of the New York Appellate Division, 4th Department, has rejected an argument by the office of Syracuse District Attorney William Fitzpatrick that an HIV-positive man should face felony charges carrying a mandatory minimum prison term for exposing another person to HIV by failing to disclose his infection before engaging in unprotected sex. The court approved a decision by Onondaga County Supreme Court Justice John J. Brunetti to reduce the charge to a misdemeanor in People v. Williams, 2013 N.Y. Slip. Op. 7636, 2013 N.Y. App. LEXIS 7558 (November 15, 2013).

According to the court’s opinion, Terrance Williams “engaged in unprotected sex with the victim on two to four occasions without disclosing his HIV positive status. Shortly after their sexual relationship ended, defendant told the victim that a former sexual partner had tested positive for HIV and urged the victim to be tested. The victim was diagnosed as HIV positive several months later.” The victim, whose sex is not mentioned in the opinion, then complained to law enforcement. Williams was indicted under N.Y. Penal Law Section 120.25, “reckless endangerment in the first degree,” a Class D felony with a potential prison sentence of 2-7 years. That provision states that a person is guilty of the offence when “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.”

Williams, represented by Kristen McDermott of the Frank H. Hiscock Legal Aid Society in Syracuse, moved to have the charges reduced, arguing that the facts would not support the felony charge. He had told the police that “he did not disclose his HIV positive status to the victim because he was afraid [the victim] would not want to be with” him, and that he “loved [the victim] so very much.” When he found out the victim was diagnosed, he wrote a letter apologizing “because he was ‘so upset’ and ‘felt terrible.’” Williams argued that these facts would not support a finding that he exhibited “depraved indifference to human life” or that his conduct created “a grave risk of death to another person.”

The victim’s doctor offered testimony that ended up supporting Williams’ motion. As summarized in the Appellate Division’s opinion, the doctor, “an infectious disease expert, testified that the ability to treat HIV has increased dramatically over the past 15 years, with over 20 different anti-viral medications available for treatment. The expert testified that although an HIV positive diagnosis may have been tantamount to a death sentence in the past, with treatment, the prognosis today is ‘outstanding,’ particularly when a patient promptly learns that he or she is infected and seeks treatment. Indeed, the expert testified that patients with HIV who take their medication, eat well, do not smoke, and reduce their alcohol intake can live a ‘very healthy, normal lifestyle,’ and he expected a similar prognosis for the victim.”

In light of this testimony, Justice Brunetti agreed with the defendant that he had been over-charged, and reduced the charge to “reckless endangerment in the second degree” under Penal Law section 120.20, which is a Class A misdemeanor with a maximum prison sentence of up to one year, although a trial judge has discretion to impose penalties other than incarceration (such as, for example, community service and/or supervised probation). The District Attorney appealed Justice Brunetti’s decision to reduce the charges, but the Appellate Division unanimously upheld Justice Brunetti.

“We conclude that, although defendant may have acted with indifference to the victim’s health, his conduct lacked the ‘wanton cruelty, brutality, or callousness’ required for a finding of depraved indifference toward a single victim,” wrote the court. “The fact that defendant encouraged the victim to be tested for HIV indicates that defendant ‘was trying, however weakly and ineffectively,’ to prevent any grave risk that might result from his conduct.” Thus, he could not be found to have been totally indifferent to the health of the victim, a necessary finding for “depraved indifference.” Furthermore, the court found that the doctor’s testimony, which was not contradicted by any evidence from the prosecution, “failed to establish that defendant’s reckless conduct posed a grave or ‘very substantial’ risk of death to the victim.”

This opinion stands in stark contrast to rulings from other jurisdictions that have upheld lengthy prison sentences on similar facts, usually citing outdated medical sources about the mortality prognosis from HIV infection. Those opinions tend to come from jurisdictions whose legislatures reacted to the AIDS epidemic by passing specific laws criminalizing knowing exposure to HIV and mandating severe sentences. (See, as an example, Musser v. Mapes, 854 F.Supp.2d 652 (S.D. Iowa 2012), where the court denied a petition for habeas corpus from a man who was sentenced to 50 years in prison under a criminal HIV exposure statute, and State v. Debaun, 2013 Fla. App. LEXIS 17238 (Fla. 3rd Dist. Ct. App., Oct. 30, 2013), where the court held that a gay man could be prosecuted under a felony statute for failing to disclose his HIV status prior to having oral sex with a partner). New York, by contrast, has dealt with HIV transmission under its general penal code provisions, leaving the courts with flexibility to take account of new medical information and the facts of individual cases. If Williams is a first offender, he may end up not having to serve any prison time in this case, although the prosecutor’s pursuit of a felony charge on appeal doesn’t suggest that a lenient plea-bargain is in the offing. ■
Ohio Federal Court Keeps Marriage Recognition Case Alive

The U.S. District Court for the Southern District of Ohio kept alive a suit challenging Ohio's same-sex marriage ban and seeking to force the Ohio Department of Vital Statistics to accept death certificates listing decedents as “married” if the decedent was legally wed to a same-sex partner in another state. After spouses of the first two plaintiffs died and the court issued a temporary injunction requiring their death certificates to list them as “married,” the defendants sought to dismiss the action on the basis that the remaining plaintiff, the funeral director who handled both death certificates, did not have standing to pursue the claim. Obergefell v. Wymyslo, 2013 U.S. Dist. LEXIS 156934, 2013 WL 5934007 (Nov. 1, 2013).

On July 19, 2013, John Arthur, a terminally ill man, and his husband, James Obergefell, who were legally married in Maryland, filed suit against Ohio’s prohibition on gay marriages. Specifically, the couple sought emergency relief from the court instructing the Ohio Department of Vital Statistics to accept a death certificate identifying the couple as “married.”

Soon after filing, the couple amended their complaint to include David Michener and his recently deceased husband, William Ives, who had unexpectedly passed away. Ives’ remains were awaiting cremation and the Michener sought to have their marriage recognized on Ives’ death certificate.

In the cases of both Arthur and Ives, District Judge Timothy S. Black ordered that their death certificates reflect their marriage, citing Ohio’s long history of recognizing out-of-state marriages legally entered into in the state where they were performed, even if such marriage would not be legal in Ohio. This injunction is only temporary, however, and the claim continued to allow the court to make a final, permanent ruling.

The complaint was again amended in September, shortly before Arthur’s death, to add Robert Grunn, a Cincinnati funeral director, whose responsibilities include originating death certificates. Grunn must collect personal information from the next of kin of the deceased, including marital status at the time of death and the name of the decedent’s spouse, and input the data into an electronic system maintained by the Ohio Department of Health. He then provides certified copies to the family of the decedent, who use the certificate (and the information it contains) to claim life insurance and other benefits, and administer wills.

State Defendant Theodore Wymyslo, the Ohio Department of Health, now seeks to force the Ohio Department of Vital Statistics to recognize legal out-of-state gay marriages permanent, it reasoned, Grunn would no longer fear prosecution for recording such marriages on death certificates.

Grunn also satisfies the requirements of Third Party Standing. Though an individual may not usually bring a claim to vindicate a third party’s constitutional rights, Grunn has a “close relationship to the members of that community is seeking to vindicate the rights of a specific population from a community of which Mr. Grunn is himself a part,” and the members of that community who have and will continue to retain his services in the future. Further, such members of that community are wholly reliant on him to fill out and file death certificates. Indeed, the court notes, somewhat darkly, that the services of a funeral director are one that each and every one of us will “inescapably require one day.”

Grunn also shows that the possessors of the right face hindrance to their ability to protect their own interests. Judge Black explains that while Arthur knew of his impending death and could plan accordingly, many of Grunn’s
other clients will not be so lucky. The court looks no farther than the second Plaintiff, Michener, to illustrate this point. Michener, they state, was lucky that a case already existed that he could join upon his husband’s sudden death. Were that not the case, he would have had to retain a lawyer, have documents prepared, seek a temporary restraining order and be granted that restraining order all within the time between his husband’s death and his cremation. This, according to the court, is a huge burden to place on grieving spouses.

Defendant finally argues that the claim is not ripe, and therefore must be dismissed. However, the court quickly disposes of this by noting that the harm will likely come to pass. Obergefell stated that he will be referring married same-sex couples to Mr. Grunn, and as an active member of the gay community (and in fact, operating out of the former site of a well-known gay bar) Grunn would very likely have more similar clients even without Obergefell’s referral. Additionally, the factual record is sufficiently developed, and if judicial review were denied, it would result in hardship to the next same-sex married couple in Obergefell and Michener’s positions, as they would have to scramble to litigate in order to have a death certificate reflect their marriage. The court notes hardship to Grunn as well, as the threat of large fines and jail time could coerce him to leave same-sex marriages legally performed out-of-state off of death certificates.

After declining to even entertain Defendant’s recommendation that it should use its discretion to decline to hear the claim, as allowed under the Declaratory Judgment Act, the court denies Defendant’s motion to dismiss and sets a goal for final resolution in December, 2013.

It is worth noting that throughout the opinion, Judge Black writes forcefully about the pain Ohio’s same-sex marriage ban causes, particularly to the spouses of the recently deceased. It seems reasonable to infer, from the temporary injunctions granted and his sometimes passionate written opinion, that Black may tend to side with the Plaintiffs come December.

– Stephen Woods

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**Federal District Court Rejects Challenge to New Jersey Ban on Conversion Therapy by Licensed Counselor**

A Federal judge upheld a New Jersey law prohibiting licensed counselors from treating minors with “conversion therapy” to change their sexual orientation, saying that the law does not violate the therapists’ freedom of speech or religion, in *King v. Christie*, U.S. Dist. LEXIS 160035 (November 8, 2013). U.S. District Judge Freda L. Wolfson dismissed a lawsuit brought by two New Jersey therapists who argued that Governor Chris Christie overstepped his bounds by signing New Jersey Assembly Bill A3371, which prohibits the use of sexual orientation change efforts (SOCE), also known as conversion therapy, for anyone under the age of 18. Judge Wolfson found that the law regulates professional conduct not the expression of speech or religion.

The law, signed by Christie in August, prevents any licensed therapist, counselor or social worker from using SOCE with children under the age of 18. The plaintiffs, including Tara King and Ronald Newman, licensed therapists affected by the law, as well as the National Association for Research and Therapy of Homosexuality (NARTH) and the American Association of Christian Counselors AACC, argue that New Jersey’s newly enacted ban on conversion therapy for minors violates a licensed therapist’s obligation to respect the rights of clients to make decisions.

The therapist raised several constitutional claims, but Judge Wolfson focused on the First Amendment challenges, as they were the most serious. Judge Wolfson was firm in her decision that the statute plainly regulated conduct and not speech. She found that the statute does not restrict either free speech or religious expression, and that was after the New Jersey statute survived a rational basis scrutiny. New Jersey Assembly Bill A3371 states that licensed therapists, counselors or social workers “shall not engage in sexual orientation change efforts,” and defines “sexual orientation change efforts” as “the practice of seeking to change a person’s sexual orientation.” Judge Wolfson incorporated a thorough analysis of the *Pickup v. Brown* case from the Ninth Circuit, upholding a similar California statute. She noted the difference between her opinion and that of another federal judge’s opinion in *Wollschlaeger v. Farmer* declaring unconstitutional a Florida law that prohibited physicians from asking patients about gun ownership. Judge Wolfson distinguished the cases, noting that unlike the Florida law, the New Jersey law does not seek to regulate the conveying of information, only the application of a particular method of therapy to minors.

Judge Wolfson also attacks plaintiffs’ argument that regulating counseling implicates the First Amendment and should be subject to heightened scrutiny. That argument is not a rational one especially when nothing in the New Jersey law prevents licensed therapists from expressing their opinions on the appropriateness of SOCE, either in public or private settings, according to Wolfson. States have generally enacted laws regulating professionals, including those providing mental health services. Judge Wolfson also rejected the argument that there was sufficient expressive conduct to merit an analysis under the intermediate scrutiny standard. As stated above, New Jersey Assembly Bill A3371 survived a rational basis analysis. The plaintiffs attempted to argue for intermediate or heightened scrutiny to impose a more difficult standard.

With regard to the freedom of religion argument, Judge Wolfson concluded that the statute is neutral as to religion, applying generally, and rejected the argument that the statute’s
exceptions create a disproportionate effect on those motivated by religious beliefs. The statute makes no reference to religion, but plaintiffs argue that it primarily affects religious individuals. Again, the judge concluded that rational basis applied and again for the same reasons, New Jersey Assembly Bill A3371 passes muster.

In other matters, the judge found that the plaintiffs did not have sufficient Article III standing to raise the injuries to their minor clients and their parents. On the other hand, the judge granted intervenor status to Garden State Equality, a gay rights organization that had lobbied for the bill. Therapists in New Jersey who want to continue practicing SOCE on minors risk losing their license and must deny families wanting the right to all of the therapeutic options to help minors reduce or eliminate their unwanted same-sex attractions, behaviors or identity. Anti-LGBT groups support the practice of SOCE regardless of the fact that many leading health organizations have determined such therapy was ineffective and harmful.

When signing the bill into law, Governor Christie wrote: “The American Psychological Association [APA] has found that efforts to change sexual orientation can pose critical health risks including, but not limited to, depression, substance abuse, social withdrawal, decreased self-esteem and suicidal thoughts. . . . I believe that exposing children to these health risks without clear evidence of benefits that outweigh these serious risks is not appropriate.”

The practice of SOCE has a negative impact on minors, and is no longer deemed an acceptable practice by the APA. It has been over 40 years since homosexuality was removed by the APA from the Diagnostic and Statistical Manual of Mental Disorders (DSM), and yet so few states have taken legal steps to remove the practice of SOCE in the name of counseling or therapy. This decision was a step in the correct direction. – Tara Scavo

Tara Scavo is an attorney in Wash., D.C.

Federal Judge Allows Transgender Inmate in Wisconsin to Proceed on Claims that Officers Failed to Protect Her Against Harm from Another Inmate

The pro se pleadings of a transgender prisoner assaulted by another inmate stated claims over half way up the chain of command at a maximum security institution. In exhaustive detail, United States Magistrate Judge Stephen L. Crocker sustained actions against a corrections officer, a cell block sergeant, a security captain, and the Unit Supervisor in charge of inmate housing in Konitzer v. Hamblin, 2013 U.S. Dist. LEXIS 138748, 2013 WL 5429935 (W. D. Wis., September 27, 2013).

Inmate John Balsewicz assaulted plaintiff Scott A. Konitzer, a/k/a Donna Dawn Konitzer, while they were both in general population. He jumped on her, knocked her down, punched her repeatedly, and slammed her face into the floor, for which she required medical attention. Defendants placed the two inmates in temporary segregated lock-up; they ultimately transferred Balsewicz to a different prison.

The court applied the Eighth Amendment to the United States Constitution, which requires Corrections to “take reasonable measures to guarantee the safety of inmates.” Farmer v. Brennan, 511 U.S. 825, 832 (1994). Farmer is the paradigmatic Supreme Court case involving transgender inmates and safety. To prevail, a prisoner must prove not only that a Corrections defendant was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, but also that the official drew that inference. Mere negligence (or what the defendant should have known) is not enough. Where, as here, the victim and assailant are readily identifiable, the custodial defendant must know of a “clearly particularized risk,” which can be drawn from complaints by the victim inmate.

Judge Crocker resolved disputed facts in the inmate’s favor on summary judgment. The court addressed the claims against each of seven named defendants separately on the issues of knowledge, liability, qualified immunity, and state law.

Corrections Office Joseph Fraundorf was working in Housing Unit 8’s “control bubble” at the time of the assault, and he had a full view of it. Konitzer claimed that Fraundorf deliberately failed to open the unit doors (which he controlled from the “bubble”) in a timely manner to allow responders to stop the attack. Judge Crocker found that the “averments of intentional delay” were sufficient to raise a dispute of material fact preventing summary judgment. By contrast, the court granted summary judgment to Correction Officer Randall Becker, who was absent when Konitzer was assaulted. Konitzer told Becker that she was “uncomfortable” when Balsewicz “was hanging around outside her cell.” She also told Becker that she did not want Balsewicz washing her personal undergarments as a laundry worker. Konitzer never expressed fear of assault to Becker. The court found that Becker responded reasonably to Konitzer’s discomfort by reassigning Balsewicz to another tier to avoid his loitering outside her cell. Without more, Konitzer’s statements to Becker were insufficient to alert Becker to a risk of serious danger and were far less specific than statements made to other defendants.

The court sustained claims against Sergeant Tina Martin, the only other officer in the Housing Unit 8 dayroom when the assault occurred. Although she did not know of Balsewicz’ dangerous propensities or prior violence, Konitzer alleged that Sergeant Martin was aware
that Balsewicz threatened her on the previous day. Martin admitted that Konitzer approached her complaining that Balsewicz was “fixated on washing Konitzer’s female undergarments” and said of Balsewicz: “that little fag won’t leave me alone.” According to Martin, Balsewicz overheard the “fag” comment, and she warned him to “leave Konitzer alone.” The court allowed a “deliberate indifference” claim against Martin to proceed, finding that a reasonable jury could conclude that Martin created a serious risk of harm by telling Balsewicz that Konitzer called him a “fag,” knowing he had previously threatened Konitzer.

The court also sustained claims against Security Captain Chad Keller, who was the institution’s Prison Rape Elimination Act [PREA] investigator. [The PREA has no implied cause of action.] Konitzer alleged that she informed Keller about Balsewicz’ threats and the potential for a “violent outcome if she wasn’t moved away from Balsewicz.” Konitzer also testified in deposition that Keller knew that Balsewicz “was following her around and loitering outside her cell.” The court found these allegations sufficient to place into dispute Keller’s knowledge of the threat.

During Housing Unit 8 conferences, Konitzer repeatedly told Correctional Unit Supervisor Janis Mink (who was responsible in general for inmate living conditions) that she was afraid of Balsewicz and that his aggressiveness toward her was “escalating.” Mink was aware that Konitzer washed her undergarments in her cell to avoid problems with Balsewicz, who worked in the prison laundry. These allegations were sufficient to raise disputed facts regarding a defendant with institution-wide responsibilities.

Defendant Janel Nickel is the Wisconsin Department of Correction’s Security Director. The undisputed facts show that at no time prior to the attack did Konitzer or any security staff at Konitzer’s prison inform her that Konitzer feared for her safety. Nickel had previously authorized a “do not double cell” classification for Konitzer; after the attack, Nickel directed that Konitzer and Balsewicz be kept separate. Konitzer failed to submit sufficient admissible evidence to find Nickel deliberately indifferent to Konitzer’s safety.

Wisconsin’s former Secretary of Correction, Gary Hamblin, apparently kept in the case initially for injunctive relief, also won summary judgment. He had no day-to-day operational duties at DOC institutions, and he had no knowledge or personal involvement in any matter related to Konitzer, who never wrote him. Balsewicz’ transfer mooted any claims for injunctive relief.

The court then turned to the defense of qualified immunity as to the four defendants remaining for federal trial. Qualified immunity precludes damages unless a defendant violated a constitutional right that was clearly established. See Pearson v. Callahan, 555 U.S. 223 (2009). For a constitutional right to be clearly established, its contours “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Hope v. Pelzer, 536 U.S. 730, 739 (2002).

The court found that the constitutional right to protection from harm enunciated in Farmer was known “long before” the assault in November of 2010. Therefore, “[i]f a jury were to find that any of these defendants was aware of specific threats being made against Konitzer but refused to take any steps to protect Konitzer from those threats, then that defendant would not be entitled to qualified immunity.”

Konitzer also sued for negligence under Wisconsin state law. The court dismissed claims against two of the seven defendants (Secretary Hamblin and Officer Fraundorf) because Konitzer did not file a notice of claim against them as required by state law. Konitzer’s federal claims against Fraundorf remain, however, because state notice of claim rules do not apply to actions under 42 U.S.C. § 1983.

The court analyzed state negligence and immunity law and its application in situations of “recklessness” and “conscious disregard” of known danger at length, finding that a jury could find defendants Martin, Keller and Mink liable under state law for failure take action after learning of Balsewicz’ threats and (in the case of Martin) for telling Balsewicz that Konitzer called him a “fag.” The court granted summary judgment on the state law claims to defendants Nickel and Becker essentially “for the same reasons discussed in conjunction with the federal claims.”

Thus, remaining for trial were the Eighth Amendment and state law claims against the Sergeant Martin, the Captain Keller, and Supervisor Mink and the Eighth Amendment claims against Officer Fraundorf. The court concluded that Konitzer should have trial counsel, and it stayed further proceedings until it located a lawyer to represent him. – William J. Rold

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

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European Courts Issue Important Gay Rights Decisions on November 7

European courts issued three significant decisions affecting the rights of LGBT people in Europe on November 7, 2013. In Minister for Immigration and Asylum v. X, Y & Z (Joined Cases C-199/12 to C-201/12), the European Court of Justice in Luxembourg, which is the highest court on questions of European Union law, ruled favorably on the right of lesbian and gay people to seek asylum in Europe based on fear of persecution of gay people in their home countries. In Vallianatos v. Greece (Applications Nos. 29381/09 and 32684/09), a Grand Chamber of the European Court of Human Rights in Strasbourg, which has the final word on interpretations of the European Convention on Human Rights, ruled that Greece had violated the Convention by adopting a civil union law that excluded same-sex couples. In E.B. v. Austria, Applications Nos. 31913/07, 37357/07, 48098/07, 48777/07 and 48779/07, a section of the Human Rights Court preliminarily ruled that Austria had violated the Convention by refusing to delete records of criminal convictions of men who had been charged with engaging in sex with teenage boys under a law that had subsequently been declared invalid and replaced with a new law adjusting the age of consent and circumstances governing such acts.

The case from the European Court of Justice was construing, in part, a Geneva Convention on refugees to which the United States is also a party, as are many other countries outside of Europe. The Dutch government had, somewhat surprisingly in light of the status achieved by gay people under Dutch law, rejected asylum claims from gay people from Sierra Leone, Uganda and Senegal, all African nations in which homosexual acts carry significant penal sanctions and there is pervasive social disapproval of homosexuality. Internal appeals resulted in a request from the Dutch appellate courts for a ruling by the European Court of Justice on the circumstances under which gay people from outside of Europe can seek refugee status in Europe under the Geneva Convention and European laws.

The Court’s opinion embraced ideas that will be familiar to those acquainted with the developing case law on these questions in the United States. As a threshold matter, the Court concluded that gay people “must be regarded as forming a particular social group,” a necessary finding in order to apply the refugee protections. If members of a particular group are subject to persecution because of such membership in a particular country, they may be entitled to a grant of asylum by a country that is bound by the Geneva Conventions and relevant European law. The fact that homosexual acts are a crime is not dispositive of this question, but “a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution,” the Court said. Further, “When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.” In other words, if an “out” gay person would likely be targeted for persecution in the country of origin, he or she may qualify for asylum.

These were apparently rulings of first impression for the Court, and are binding throughout the European Union. Thus, as a practical matter, the ruling signals that LGBT people from countries in Africa, the Middle East, the Americas and Asia that may impose heavy criminal penalties for homosexual acts are likely to prevail on claims for refugee status if they can make their way to a European Union country, and their case will be strengthened if they can show that they had already been targeted for persecution in their home country.

The European Court of Human Rights’ decision in the challenge to the Greek civil union law turned heavily on the progress that LGBT people have made in achieving legal recognition for their relationships in countries that are signatory to the Convention on Human Rights, because the Court takes note of such trends in deciding whether the Convention’s broadly worded protection for family life and requirements for equal treatment have been violated. The plaintiffs relied on a 2010 decision by the Court in Schalk and Kopf v. Austria, (No. 30141/04, ECHR 2010), in which the Court had acknowledged that a cohabiting same-sex couple living in a “de facto partnership” came within the scope of family life protected by the Convention. Thus, the government of Greece was in the position of having to justify a deliberate decision it made when establishing its new civil union status in 2008 for excluding same-sex couples.

The idea of civil unions was embraced because of the increasing phenomenon of different sex couples living together without marrying, and frequently having children within the context of such relationships. The government decided that it would be useful to create a status less formal and structured than marriage that would be available to such couples, partly to protect the interests of their children, but also to protect the interest of surviving partners to inherit and to address other property interests. At the time the new law was being debated, there was considerable discussion about the decision to omit same-sex couples, which was opposed by the National Human Rights Commission and the Scientific Council of Parliament, but the Minister of Justice stated that “society today was not yet ready to accept cohabitation between same-sex couples.” The legislature proceeded to adopt the measure as proposed by the government, despite warnings that it might be held to violate Greece’s
involved protecting children, the Court noted that extending civil unions to same-sex couples would afford the former the only opportunity available to them under Greek law of formalizing their relationship by conferring on it a legal status recognized by the State. The Court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognized by the State.”

As to Greece’s argument that its motivation in adopting civil unions involved protecting children, the Court pointed out that same-sex couples also raise children who need the same protection. “The Government’s arguments focus on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in questions between same-sex and different-sex couples who are not parents,” it also observed. The Court also pointed out that the explanatory report issued by the legislature “offers no insight into the legislature’s decision to limit civil unions to different-sex couples.”

Perhaps most significantly, the Greek law’s exclusion of same-sex couples made it a significant outlier from the emerging trend in Europe towards legal recognition for same-sex couples. The Court observed that nine member states allow same-sex marriages, and seventeen member states “authorize some form of civil partnership for same-sex couples. As to the specific issue raised by the present case,” continued the Court, “the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorize some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples.” The Court also noted resolutions by the European Parliament calling on member states to extend legal recognition to same-sex couples.

“The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention,” the Court wrote. “Nevertheless, in the view of the foregoing, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of [the civil union law],” and thus found a violation of the Convention, and ordered the government to pay damages to the plaintiffs for the deprivation of their rights, rejecting the Greek government’s argument that a declaration of rights would be “sufficient redress for the non-pecuniary damage sustained by the applicants.” The plaintiffs were awarded 5,000 Euros each as compensation, and Greece was also taxed with the Plaintiffs’ litigation costs.

In E.B. v. Austria, the Human Rights Court considered the refusal by Austrian authorities to “delete the criminal penalties would apply to sexual acts with consenting adolescents within the age bracket of 14 to 18.” The Constitutional Court of Austria found the relevant criminal law provision to be unconstitutional in 2002, largely on grounds that the provision in question applied only to men having sex with boys, there being no parallel application to girls. Subsequently, Austria repealed the provision in question, adopting a new law revising the age of consent downward and adjusting the circumstances under which criminal penalties would apply to sexual acts involving teenagers, turning on issues such as the maturity of the teen, among other factors. However, the new law did...

The Greek law’s exclusion of same-sex couples made it a significant outlier from the emerging trend in Europe towards legal recognition for same-sex couples.
not provide for adjusting the status of persons who had been convicted under the old law, and Austrian authorities rejected attempts by the plaintiffs to have their convictions reconsidered or their records corrected.

The Court found that “the storing by a public authority of information relating to an individual’s private life amounts to an interference within the meaning of Article 8, and that the protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention.” Noting that criminal laws get revised from time to time, the court observed that in the normal event of such revisions, there would be no obligation to adjust or expunge criminal records just because of such legislative changes. “The situation is different, however, as regards convictions under Article 209 of the Criminal Code,” said the Court, because the legislature had repealed and replaced the provision after the Constitutional Court found it to be unconstitutional. Thus, the new law was adopted “not as part of a general process to adapt the Criminal Code to respond to the needs of a changing society, but to eliminate a provision that was in contradiction to the Federal Constitution.”

“Since keeping an Article 209 conviction on someone’s criminal record may have particularly serious consequences for the person concerned,” wrote the Court, “the legislator, when amending the relevant legal provision in order to bring it into conformity with modern standards of equality between men and women, should have provided for appropriate measures, such as introducing exceptions to the general rule. The Government, however, have not provided any explanation as to the purpose of leaving unamended the provision on maintaining convictions on the criminal record,” so the Court concluded that Article 8 was violated. The Court awarded the applicants damages of 5,000 Euros each, and also awarded litigation costs. Because this is a ruling by one section of the Court, it is subject to appeal by the Austrian government.

5th Circuit Says Gay Airline Passengers Can Maintain Tort Suit for Vandalism of Their Checked Baggage

The U.S. 5th Circuit Court of Appeals reversed and remanded a grant of summary judgment against a gay couple suing United Continental Holdings for emotional distress and mental anguish resulting from mishandling of their bag, in Bridgeman v. United Cont’l Holdings, 2013 U.S. App. LEXIS 22373 (November 4, 2013).

The Plaintiffs were flying home on the airline from a vacation abroad. They arrived in Houston, reclaimed their luggage, and then rechecked it for the final domestic leg of their flight. As explained by the court, when they arrived at the baggage claim at their final destination they discovered “to their surprise and horror, that a sex toy had been removed from one of their bags, covered in a greasy foul-smelling substance, and taped atop the bag. After observing the bag and being extremely embarrassed by the surprised and laughing faces of onlookers, Plaintiffs call two friends who assisted them out of the airport and to their home.”

Plaintiffs brought suit against United Continental Holdings in Texas state court, asserting claims of intentional infliction of emotional distress, invasion of privacy, and negligence, claiming that “the bag at all times, from when they checked the bag in Houston to the time it was sent out onto the carousel at Norfolk, was in the custody of United and that, during this time, one or more of United’s employees had searched their bag, removed the toy, defiled it, and then taped it to the top of the bag. Plaintiffs alleged that these acts were directed towards them because they are homosexuals and male.”

United Continental Holdings removed the case to the U.S. District Court and moved for summary judgment, arguing that the Plaintiffs’ claims were preempted by the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), which preempts state law causes of action “relating to the international carriage of persons, baggage, and cargo,” but “only to the extent they fall within its substantive scope.”

The district court, finding the action preempted, granted summary judgment to United, and the Plaintiffs appealed to the 5th Circuit. The panel issued a per curium decision, focused on the two relevant provisions of the Montreal Convention: Article 17(1) relating to liability of carriers for injuries to passengers and Article 17(2) relating to damage to baggage.

In its analysis of Article 17(1), the panel noted that it must determine whether the alleged misconduct took place “on board the aircraft or in the course of any of the operations of embarking or disembarking,” and ruled that “any connection between the alleged misconduct – the display of Plaintiffs’ bag in the baggage-claim area- and the ‘operations of embarking or disembarking’ is tenuous at best.” Accordingly, the panel ruled the plaintiffs’ claims were not preempted by Article 17(1).

Analyzing Article 17(2), the panel stated that since “it is clear that their bag was not destroyed or lost,” the plaintiffs were not seeking a remedy for “damage to checked baggage” and therefore their claims for emotional anguish were not preempted by Article 17(2), further stating that “we decline to shoehorn Plaintiffs’ claims into the substantive scope of Article 17(2) merely because a bag is central to their factual basis.”

After concluding that the Montreal Convention did not preempt Plaintiffs’ state law claims so as to prevent them from bringing them in the Federal Court, the panel reversed the District Court’s grant of summary judgment and remanded the case so Plaintiffs could resume their requests for relief. The panel expressed no view as to the merits of the underlying torts claims. – Bryan C. Johnson
The Supreme Court of the United Kingdom ruled today that a lower court, with the support of the U.K. Equality and Human Rights Commission (EHRC), correctly found that Mr. and Mrs. Bull, operators of a hotel, had violated UK non-discrimination law by refusing to honor a reservation for a room with a double bed made by a gay couple who are registered as civil partners, the UK equivalent status to marriage for same-sex partners now in effect. Bull v. Hall, [2013] UKSC 73 (November 27, 2013). Although the Court was divided 3-2 on some of the reasoning for the decision, it was unanimous as to the outcome, finding that the U.K.’s legitimate interest in protecting gay people from discrimination justified the burden this ruling placed on the religious liberty of the Bulls, who were claiming that they should be entitled to exclude unmarried persons from the accommodation in question.

The issue that divided the Court was whether this was a case of “direct discrimination” or “indirect discrimination.” The equivalent terms in U.S. law would be “disparate treatment” or “disparate impact.” As in US law, this makes a difference for purposes of analyzing the case, since disparate treatment regarding public accommodations would almost always be unlawful, which maintaining a policy that was facially neutral as to the characteristic in question but had a disparate impact against persons who have that characteristic could be defended by showing a legitimate justification for using that characteristic.

In this case, the Bulls posted on the website for their hotel in Cornwall the statement: “Here at Chymorvah we have few rules, but please note, that out of a deep regard for marriage we prefer to let double accommodation to heterosexual married couples only — thank you!” Mr. Preddy, who phoned to make the reservation of a double room for himself and his civil partner, Mr. Hall, was unaware of this statement. Mrs. Bull, who answered the phone when Preddy called, was out of sorts and did not make any inquiry about whether Preddy was married to the person who would be sharing the room with him. Preddy did not identify himself as part of a same-sex couple, having no apparent reason to do so. When Preddy and Hall showed up on the date of the reservation, they were met by Mr. Quinn, a cousin of the Bulls who also worked at the hotel, and he “explained that we were Christians and did not believe in civil partnerships and that marriage is between a man and a woman and therefore we could not honor their booking.” In the excitement of the moment, Quinn did not think to offer them a room with two single beds, and Preddy and Hall, naturally upset at this turn of the events, quickly left the hotel and found alternative accommodations. The Bulls re-credited the deposit they had paid to their account.

Preddy and Hall filed a complaint after having sent a letter to the Bulls charging them with discrimination. The Bulls responded that they had not discriminated because of sexual orientation, that the regulations must take account of their religious beliefs. They also offered, as a proposed settlement, to reimburse Preddy and Hall for any additional expense they incurred by getting alternate lodgings plus “a modest sum for the inconvenience,” but this proffer was rejected and plaintiffs pushed their complaint forward, winning before the Commission and

### The U.K.’s legitimate interest in protecting gay people from discrimination justified the burden this ruling placed on the religious liberty of the Bulls.

...disqualify the plaintiffs from getting the desired room was their sexual orientation. She observed that under current British law, married different-sex couples and civilly partnered same-sex couples are to be treated as equal for all purposes. She rejected the Bull’s argument that the grounds of denial of service were that plaintiffs were not married, since in U.K. law they were supposed to be treated as married, thus the difference between them and a married couple would turn on their sexual orientation. That being the case, the denial of service would be unlawful unless some supervening authority protecting religious belief obtained.

English law does protect religious liberty through the country’s participation in the European Convention on Human Rights as...
expressed in the UK Human Rights Act, which protects freedom of religious belief and practice. However, that protection is not absolute. Just as in the U.S., where 1st Amendment protection for religious practice and belief is not absolute, European law makes the protection subject to “such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others.” The Court found that the ban on sexual orientation discrimination qualified as a limitation prescribed by law that is so necessary.

Wrote Lady Hale, “Sexual orientation is a core component of a person’s identity which requires fulfillment through relationships with others of the same orientation.” She then quoted this eloquent passage by South Africa Constitutional Court Justice Albie Sachs from a 1999 gay rights case: “While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined.”

Lady Hale continued: “Heterosexuals have known this about themselves and been able to fulfill themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognized. Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires ‘very weighty reasons’ to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.” The reference to “Strasbourg” is to the European Court of Human Rights.

Lords Kerr and Toulson agreed, in brief separate opinions, with Lord Hale’s analysis of the case. Lords Neuberger and Hughes, while agreeing with the ultimate decision, would have found that this was a case of indirect discrimination, but that the Bulls had not satisfied the requirement to justify such discrimination by reference to a non-discriminatory reason for their rule.

In her opinion, Lady Hale considered whether, if this were considered indirect discrimination, the Bulls had shown that “it can reasonably be justified by reference to matters other than [the plaintiffs’] sexual orientation,” and found that they had failed to do so. Their argument was that they could justify their policy “by reference to a deeply held belief that sexual intercourse outside marriage is sinful.” But, asked Lady Hale, “Can that belief be a ‘matter other than [their] sexual orientation’? I am prepared to accept that it can, not least because it covers all kinds of unmarried couple. But it would be hard to find that a belief that sexual intercourse between civil partners was sinful was a ‘matter other than [their] sexual orientation’, because by definition such sexual intercourse has to be between persons of the same sex. Thus, even in the wording of the regulation itself, it is difficult to see how discriminating in this was against a same sex couple in a civil partnership could ever be justified. But it goes further than that. Parliament has created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. They are also worthy of the same respect and esteem. The rights and obligations entailed in both marriage and civil partnership exist both to recognize and to encourage stable, committed, long-term relationships. It is very much in the public interest that intimate relationships be conducted in this way. Now that, at long last, same sex couples can enter into a mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way.”

But, more importantly, Lady Hale noted that allowing the defense proposed by the Bulls would “create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law,” she continued. “But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that.”

This would, in her view, undermine the purpose of Parliament in outlawing sexual orientation discrimination. She noted that Parliament had adopted “a carefully tailored exemption for religious organizations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation. This strongly suggests that the purpose of the Regulations was to go no further than this in catering for religious objections.” She pointed out that the Bulls were free to advocate their point of view and to exhibit it by the way they decorate their premises and provide bibles and gospel tracts in the rooms. They could also “continue to deny double-bedded rooms to same sex and unmarried couples, provided that they also deny them to married couples”!

She also noted that the wording of the Equality Act 2010, which went into effect after the events in this case took place, differs on the issue of justification for indirect discrimination, providing that “a provision, criterion or practice is indirectly discriminatory if the person who applies it ‘cannot show it to be a proportionate means of achieving a legitimate aim.” But, she concludes, “it is unlikely in this context to lead to a different result.”

The other judges who concurred in the result also stated agreement with Lady Hale’s analysis of the indirect discrimination theory and its application to this case.
NATIONAL GUARD BENEFITS – Despite an order from the Defense Department on September 3 that state national guard units process enrollment of the same-sex spouses of their members for identification cards entitling them to military base access, benefits and shopping privileges, some state national guards in jurisdictions with constitutional or statutory bans against same-sex marriage balked, requiring that guard members travel to federal facilities, sometimes many hours away from where they live or are stationed, in order to enroll their spouses. By mid-November, the number of states that continued to hold out had reduced to Texas, Georgia, Louisiana, Mississippi, Oklahoma and West Virginia, with some indication that West Virginia officials were wavering after Defense Secretary Chuck Hagel made a speech condemning the refusal of states to comply with DoD directives. Since the DoD budget provides most of the funding for state national guard units (which are subject to being called for service by the President in domestic or foreign emergencies), the state national guard units have usually complied with federal requirements without protest. Of more than thirty states that forbid same-sex marriage, all but these half-dozen holdouts had moved to comply with the DoD directive. New York Times, Nov. 10. * * * In Oklahoma, the Governor ordered that the state National Guard installations cease processing all spousal benefits applications, regardless of gender, so that the state could not be accused of discriminating against same-sex couples. All such applications would have to be processed at a federal installation, which meant some Guard members would have more than a four-hour round-trip drive to get their applications processed. Within days, the Texas National Guard appeared to have followed suit, although, faced with possible litigation on behalf of one couple by Lambda Legal, Texas officials caved and allowed the couple in question to register at a state National Guard facility late in November, and news reports clarified that in fact it seemed Texas was going to allow married same-sex couples to register for benefits at all the Texas National Guard facilities. Ultimately, it appeared, by the end of November all but three state national guards had agreed to comply with federal policy, although it was unclear whether this was due to the Pentagon’s agreement to provide federal employees to process the enrollments at state facilities.

REVOLT OF THE MILITARY CHAPLAINS – Although the Defense Department announced over the summer that it would recognize the same-sex marriages of military personnel for benefits purposes, ArmyTimes.com (Nov. 21) reported that there has been a problem about allowing married same-sex couples participate in a marriage enrichment retreat program run by the Army’s Chaplain Corps. Which is dominated by Southern Baptist ministers who are under orders from their religious authority to avoid participating in any program that allows married same-sex couples to participate. The American Military Partner Association, which represents Shakera Leigh Halford, who was denied participation in the program at Fort Irwin, California, on this basis, posed the question: “What is the Defense Department going to do to secure the rights of LGBT soldiers when it conflicts with the chaplain endorsing agencies?”

CALIFORNIA – In a case illustrating the complications that may arise from the use of a known sperm donor, the California 3rd District Court of Appeal has issued a writ of mandate compelling that Superior Court of El Dorado County to vacate an order declaring Valarie B. the “presumed parent” of three children she was raising during her now-ended relationship with their biological mother, F.W., as a prior judgment establishing that J.B., the sperm donor, was the father of the children, takes priority. J.B. v The Superior Court of El Dorado County, 2013 Cal. App. Unpub. LEXIS 8343, 2013 WL 6092880 (Nov. 20, 2013) (unpublished opinion). The women had been in what the court describes as “an intermittent relationship . . . for almost 20 years and Valarie B. participated in raising the minors. That relationship finally ended around 2007 or 2008. The minors knew petitioner as their father, but he was not as involved in raising them.” J.B. appeared at the San Mateo County Department of Child Support Services in 2001, requesting that they open a child support case and have the children genetically tested to establish his paternity. F.W. did not comply with the testing order, but while the children were visiting with J.B. one weekend he took them to the department to have the tests performed, and subsequently J.B. obtained an order from the San Joaquin County Superior Court that he was the father. The judgment did not require him to pay child support at that time, but in 2008, after an uncontested hearing, the court decreed that he would have to pay child support of $1,199 a month; a subsequent order modified the amount to $553 a month. It appears that Valarie instituted a dependency proceeding in the El Dorado County Superior Court in 2012, obtaining a finding that she was a “presumed parent” of the children (due to her prior relationship with their mother and role in raising them). J.B. then filed his petition in the Court of Appeal for a writ of mandate, challenging that ruling. The Court of Appeal agreed with J.B. that the prior judgment establishing his paternity precluded the later judgment that Valarie was a “presumed parent.” “A child support order is a judgment of paternity entitled to res judicata effect,” said the court, pointing out that there is a specific statutory route that Valarie should have pursued if she wanted to set aside or
vacate the paternity judgment. Unless the judgment of paternity is set aside, said the court, it conclusively rebuts the “presumed parent” assertion by Valarie. The court rejected the argument that its construction of the relevant statutes would “tread on the equal protection rights of same-sex couples. A non-biological parent of a child has the same rights and complications in asserting his/her relationship with the child over that of a biological parent, regardless of whether that individual is in a same-sex or opposite-sex relationship with the other parent,” said the court.

COLORADO – On October 30 a same-sex couple in Colorado filed suit against the Adams County Clerk in the Adams County District Court, seeking declaratory and injunctive relief mandating that the clerk issue them a marriage license. Brinkman v. Long, Case No. 2013 CV 032572. The plaintiffs, Rebecca Brinkman and Margaret Burd, allege that the Colorado marriage amendment violates the 14th Amendment of the U.S. Constitution, and that civil unions provided for same-sex couples under Colorado law fail to afford same-sex couples equal rights to married couples. The complaint relies heavily on the U.S. Supreme Court’s decision in U.S. v. Windsor. The plaintiffs are represented by Ralph Ogden and M. Anne Wilcox of Wilcox & Ogden, a Denver firm, and Prof. Thomas Russell of Denver.

DELAWARE – In a case of first impression, [Redacted] v. [Redacted], 2013 Del. Fam. Ct. LEXIS 28 (Nov. 22, 2013), Judge Paula T. Ryan of the Sussex County branch of the Delaware Family Court, held that the rules governing marital property applied to a case involving a same-sex civil union couple who were divorcing shortly after they had married. The court did not explain why it had decided to redact the names of the parties from the opinion submitted to Lexis for publication. The parties lived together in a committed relationship for about 13 years, and purchased the real property in question to be their joint residence shortly before they registered as civil union partners, having previously owned another home jointly. They closed on the purchase of the property on May 25, 2012, and registered their civil union on August 12, 2012. As sometimes happens, however, the formalization of a long-term relationship can surface underlying tensions, and just weeks later, on September 27, 2012, the parties separated and one of them moved out of the residence, moving back a month later but occupying a separate bedroom until about January 27, 2013, subsequently filing a divorce petition on January 31, 2013. The civil union was dissolved by a final decree on May 6, 2013, the court retaining jurisdiction over ancillary matters, including the question whether the residence should be considered marital property. The party who moved out claimed it was marital property, subject to the court’s jurisdiction for making a division of assets. The party who did not move out maintained that it was not marital property, as it was purchased prior to the formalization of their civil union. The first party responded that it was purchased “in the contemplation” of the civil union, thus falling within the definition of marital property developed by the Delaware courts. Judge Ryan held that the analysis developed by the courts for determining whether property purchased prior to a marriage could be considered marital property should be applied equally to civil unions, and that “based on the unique facts and circumstances of this case, the Court finds that the property is marital in nature,” so the court “has jurisdiction to address the ancillary matter of property division stemming from the dissolution of the parties’ civil union.” Makes sense to us. This is just a transitional matter, in any event, since Delaware subsequently legislated to allow same-sex marriages effective July 1, 2013, in a statute that also converted existing civil unions to marriages.

IDAHO – Four same-sex couples in Idaho filed suit in U.S. District Court in Boise on November 8 challenging the state’s refusal to allow same-sex couples to marry or to recognize marriages of same-sex couples formed in other jurisdictions. The couples all live in Boise. Three of the four couples are raising children together. Two of the couples were legally wed in other states and are seeking recognition of their marriages in Idaho. The case is styled Latta v. Otter. Counsel for the plaintiffs include Boise attorneys Deborah A. Ferguson and Carig Harrison Durham, and the National Center for Lesbian Rights, with Shannon P. Minter and Christopher F. Stoll of counsel. The complaint relies on the 14th Amendment due process and equal protection clauses, and channels arguments from U.S. v. Windsor.

KENTUCKY – A divorce proceeding may be the vehicle for getting the courts to strike down Kentucky’s ban on same-sex marriage. On October 25, attorney Louis Waterman filed suit in Jefferson County Family Court seeking a divorce for his client, Alysha Romero, who was married to Rebeca Sue Romero in Massachusetts. Romero v. Romero. Because Massachusetts requires one year of residency in the state in order to file for a divorce there, the Romeros, or at least one of them, would have to move to Massachusetts for a year in order to get a divorce if the Kentucky courts won’t allow it. Attorney Waterman admitted the likelihood that the Family Court would dismiss the petition for lack of jurisdiction, but he planned to appeal in a challenge to the state’s same-sex marriage ban. Reporting on the case, the Louisville Courier-Journal
(Nov. 3) noted that among the pragmatic consequences if the Kentucky courts lack jurisdiction is that the Romeros will have to file joint-federal tax returns even though they are no longer living together as a couple. In this way, the Windsor case and the subsequent announcement by the Internal Revenue Service that same-sex marriages will be recognized for federal tax purposes regardless where the couple is living has upped the stakes for couples who go to a marriage equality state to be married and then return to live in a state that refuses to recognize same-sex marriages. The “wedlock” issue has become more expensive.

LOUISIANA – On November 26, U.S. District Judge Martin C. Feldman dismissed a lawsuit that two same-sex couples filed against Louisiana Attorney General James D. Caldwell (the only named defendant), in which they challenged the state’s ban on same-sex marriage and its refusal to recognize same-sex marriages formed in other states, and sought declaratory and injunctive relief. Robicheaux v. Caldwell, 2013 U.S. Dist. LEXIS 168800 (E.D. La.). The two couples were married in other jurisdictions and reside in Louisiana, and seek to have their marriages recognized by the state. Caldwell moved to dismiss on two grounds: improper venue and lack of jurisdiction. Judge Feldman found that the attorney general, sued in his official capacity, enjoys 11th amendment immunity from this lawsuit, so the court lacked jurisdiction. The court found that plaintiffs failed to allege facts showing that Caldwell has a particular duty to enforce the challenged state constitutional and statutory provisions, and could not rely on the generalized characterization of the attorney general as being the “official responsible for enforcement of the laws of Louisiana.” The court rejected the argument that Caldwell’s defense of these provisions in a pending state court action show that he is amenable to suit in federal court, or that his office’s issuance of an advisory opinion on the question whether the state could issue a revised birth certificate for a Louisiana-born child who was adopted by a same-sex couple in another state showing both adoptive parents on the certificate indicated an active involvement in enforcing the state’s gay marriage ban. The court also rejected the argument that the 11th amendment was inapplicable because the plaintiffs sought solely injunctive relief.

MARYLAND – In Muir v. Applied Integrated Technologies, Inc., 2013 U.S. Dist. LEXIS 167680 (D. Md., Nov. 26, 2013), District Judge Deborah K. Chasanow dealt with pretrial motions in a case where a transgender former employee of the defendant is suing for sex discrimination under Title VII, having allegedly lost her job as a consequence of her beginning the process of male-to-female gender transition. Leanna Muir was actually working two part-time jobs, both of which required security clearances from the Defense Department. She had the necessary clearances. Relates the judge, “Until spring of 2011, Plaintiff presented as a traditional male. Over time, however, Plaintiff determined that the male designation did not conform to her gender identity. In or around February 2011, Plaintiff was diagnosed with gender identity disorder, a conflict between one’s birth-assigned sex and one’s gender identity. In February 2011, Plaintiff began medical treatment for gender reassignment and has been under the care of medical and mental health professionals consistent with the accepted standards of care for persons with gender identity disorder. In or around spring of 2011, Plaintiff began to present and live as a female. She began cross-gender hormone therapy on June 23, 2011 but discontinued therapy on January 15, 2013 because of a lack of full-time employment.” Her problems at AIT began when co-workers complained about her wearing colored nail polish to work, which led to a meeting with company officials at which she first informed them about her gender transition. The company’s security manager informed her that she would need to supply a letter from a mental health practitioner attesting to her fitness to work, and a personal statement from he explaining the thought process that led her to “become transgender.” Muir allegedly refused to supply the second document, leading to her suspension and eventual discharge. There are differences of view as to how these events occurred, and what should be attributed to the company or the Defense Department. Muir asserts that her security clearance was never suspended or listed, although such suspension is purported the reason her job with AIT was terminated. In this opinion, the court rejected Muir’s “motion to strike” parts of an affidavit submitted by a company official, holding that the court does not “strike” affidavits, but instead considers arguments concerning the validity and admissibility of their contents. The court rejected the employer’s motion to dismiss the case, which was premised on the lack of court jurisdiction to review security clearance decisions. “Plaintiff appears to accept that if her termination with DIA was in fact based on DONCAF’s decision that her security clearance was no longer valid, her claim stemming from that adverse employment action would end,” wrote Judge Chasanow. “But Plaintiff contends that the security clearance issue is just a smokescreen to hide the fact that she was terminated by Defendant – under no orders of the DIA – because of sex discrimination.” The court found plaintiff’s arguments, at least at this stage of the case, “more convincing” than the company’s argument that this was a security clearance dispute, finding that the company had not
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submitted sufficient evidence to support that argument. The court also found premature the defendant’s motion for summary judgment, as discovery had not yet taken place and Muir’s counsel had itemized various discovery requests relevant to the merits of the case. “Plaintiff’s affidavit identifies discovery needs relevant to the central issue of this case,” wrote Chasanow, “whether Defendant was terminated because of a failure to maintain a security clearance, or whether this reason was merely a pretext by Defendant, hiding the real reason: impermissible discrimination on the basis of the Plaintiff’s sex.” The court appears to accept, without any direct discussion, that a termination of somebody who was transitioning could give rise to a sex discrimination claim under Title VII and the sex discrimination ban in Maryland state law.

MISSOURI – Governor Jay Nixon, a supporter of same-sex marriage, ordered on November 14 that Missouri tax authorities follow the federal lead and allow married same-sex couples living in Missouri to file their taxes using the same marital status indicated on their federal tax return, even though Missouri law otherwise forbids the performance or recognition of same-sex marriages. Nixon’s Executive Order 13-14 to this effect immediately came under fire by Republican leaders in the state legislature. The EO presents the case as a straightforward interpretation of Missouri tax law, explaining that “the tax code of Missouri is coupled to the federal tax code, and Missouri tax filers are required to utilize information from their federal tax return when completing their Missouri state income tax return.” The Order then quotes specific provisions of Missouri tax law that mandate that “a husband and wife who file a joint federal income tax return shall file a combined [state] return” and that any term used in the state income tax law “shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes.” To Nixon, it was clear that this meant that the phrase “husband and wife” as used in the Missouri tax code must include any married couple who are recognized as such by the federal Internal Revenue Service. Thus IRS Revenue Ruling 2013-17 would be binding on Missouri as a matter of state law!

NEW MEXICO – As the New Mexico Supreme Court ponders how it will respond to the marriage equality question recently argued before it, the state’s Insurance Superintendent, John Franchini, issued an order on November 6 to insurance companies that provide marital discounts that they should extend such discounts to married same-sex couples. Franchini told the Albuquerque Journal (Nov. 7) that such discounts can be found in health care plans, homeowner policies, and auto insurance policies. Franchini said he decided to issue the order after receiving complaints from two same-sex couples who were married in other states but lived in New Mexico, and who had been denied marital insurance discounts. “From a constitutional standpoint,” said Franchini, “we realized these couples had the same rights to the discounts as any other married couples.”

PENNSYLVANIA – In Whitewood v. Corbett, the pending marriage equality lawsuit brought in federal district court in the Middle District of Pennsylvania by the ACLU, U.S. District Judge John E. Jones III met with counsel on November 22 to set a discovery and trial schedule. Lawyers for the state asked that the trial take place in August 2014. Plaintiffs sought a March 31 trial date. The judge split the difference and instructed the lawyers to clear two weeks in June off their calendars for a bench trial in the case, beginning June 9. Jones said that starting the trial on March 31 was “simply too ambitious,” but the he saw no need to “push this out to August.” Discovery will be launched when each side files their expert disclosures so that depositions can begin. The Legal Intelligencer, November 22; Associated Press, November 22. Jones granted a motion to dismiss Governor Tom Corbett as defendant in the case, which is now styled Whitewood v. Wolf, No. 1:13-cv-1861 (M.D. Pennsylvania), with the lead defendant being Pennsylvania Secretary of Health Michael Wolf. Refusing to dismiss the case in an Order issued on November 15, Judge Jones rejected the state’s argument that the Supreme Court’s Baker v. Nelson decision from 1972, 409 U.S. 810, precludes the litigation, finding that intervening developments have marked a “sea change” in the law since then, and that these “doctrinal developments in the areas of due process and equal protection . . . eviscerate any utility or controlling effect that Defendants posit Baker v. Nelson may have relative to the case at bar.” (In Baker, the Supreme Court had dismissed an appeal of a marriage equality claim from the Minnesota Supreme Court, asserting that the case did not present a “substantial federal question.”) The State has asked Judge Jones to certify an interlocutory appeal to the 3rd Circuit on the question of Baker’s precedential effect. Another marriage equality case is pending before the Eastern District in Philadelphia, filed by couples married out-of-state seeking recognition in Pennsylvania, in which the court has not yet ruled on the state’s argument that Baker precludes the litigation. The Legal Intelligencer, Nov. 26.

SOUTH CAROLINA – U.S. District Judge Joseph Anderson announced that he was recusing himself in Bradacs v. Haley, Civil Action No. 3:13-cv-02341-JFA (D.S.C., Columbia Division), the
pending challenge to South Carolina’s refusal to allow or recognize same-sex marriages. Anderson said that as a member of the executive board of the Indian Waters Council of the Boy Scouts of America he has participated in the recent debate about admitting openly gay boys as members and openly gay adults as Scout leaders. Anderson pointed out that one of the plaintiffs in the case is a Scout leader who had brought her same-sex partner to a Scout meeting, which led some parents to protest. Anderson, as a board member, voted to remove the woman as a Scout leader. Anderson explained that although he thought he could be a fair judge of the marriage case, “the test for recusal is could somebody have reasonably questioned whether you were impartial going into the case, and I felt that was the reason I needed to step aside.” The case has been reassigned to District Judge Michelle Childs, a 2010 appointed of President Obama. The case was originally filed in August by Katherine Bradacs, a South Carolina Highway Patrol trooper, and Tracie Goodwin, a former officer in the Richland County Sheriff’s Department. Bradacs and Goodwin were married in 2012 in Washington, D.C., and are seeking to have their marriage recognized in South Carolina. They are represented by Columbia lawyers Carrie A. Warner, of Warner, Payne & Black LLP, and John S. Nichols, of Bluestein, Nichols, Thompson & Delgado LLC. *Columbia State*, Nov. 15.

**TENNESSEE** – Plaintiffs’ counsel filed a motion for a preliminary injunction in *Tanco v. Haslam*, Case No. 3:13-ev-01159, pending before U.S. District Judge Aleta A. Trauger in the U.S. District Court for the Middle District of Tennessee. The plaintiffs are four same-sex couples who married in other states and now live in Tennessee, where recognition of their marriages is blocked by statute and constitutional amendment. They claim that the failure of the state to give their marriages the same status and recognition as out-of-state marriages of different-sex couples violates the due process and equal protection clauses and the right to travel under the U.S. Constitution. In their motion for preliminary relief, they contend that they are likely to win on the merits, are suffering continuing harm from the failure of the state to recognize their marriages, and that the balance of equities and the public interest favor preliminary relief, inasmuch as granting such relief will not impose any real injury on the state. Their motion papers quote liberally from the U.S. Supreme Court’s decision in *U.S. v. Windsor*, pointing out the close analogy between the issue decided by the court in *Windsor* and the issue confronting the court in this case: whether the state of Tennessee has any legitimate justification to treat their marriages differently from other marriages that have been validly formed under the law of another state. Counsel for plaintiffs include Tennessee attorneys Abby R. Rubenfeld (Nashville, first legal director of Lambda Legal during the 1980s), Maureen T. Holland (Memphis), William L. Harbison and other attorneys from Sherrard & Roe PLC (Nashville), Regina M. Lambert (Knoxville), and attorneys from the National Center for Lesbian Rights: Shannon P. Minter, Christopher F. Stoll, and Asaf Orr (San Francisco, admitted pro hac vice).

**TEXAS** – Two same-sex couples have filed suit and made a motion for preliminary injunction in *De Leon v. Perry*, Civil Action No. 5:13-cv-982-OLG (W.D. Texas), pending before U.S. District Judge Orlando L. Garcia in San Antonio. They assert that Texas’s statutory and constitutional ban on same-sex marriage violates the U.S. Constitution’s 14th Amendment guarantees of due process and equal protection, and request that the court issue a preliminary injunction against the state government’s enforcement of these provisions. In addition to Governor Rick Perry, they are suing Attorney General Greg Abbott, Bexas County Clerk Gerard Rickhoff, and Texas Health Commissioner David Lakey. The Plaintiffs are represented by attorneys from the San Antonio office of Akin Gump Strauss Hauer & Feld LLP. The motion for preliminary relief was filed on November 22.

**WEST VIRGINIA** – Attorney General Patrick Morrisey announced that his office will step in to defend county clerks sued by Lambda Legal in *McGee v. Cole*, now pending in the U.S. District Court for the Southern District of West Virginia. The complaint filed in the case names as defendants two county clerks whose offices refused to issue marriage licenses to the plaintiffs, three same-sex couples, but did not name any state officials as defendants. The complaint asserts that the denial of marriage licenses to these same-sex couples violates the 14th Amendment. Counsel in the case include local counsel from the Tinney Law Firm in Charleston, staff attorneys from Lambda Legal, and cooperating attorneys from Jenner & Block LLP, including Paul Smith from J&B’s Washington office, who argued *Lawrence v. Texas* in the U.S. Supreme Court. *Washington Post*, Nov. 22. According to one source, there are more than forty separate lawsuits seeking marriage equality now on file in more than twenty states. At the rate things are going, it appears that there will soon be lawsuits on file in every state that currently does not allow same-sex couples to marry, and every state that refuses to recognize foreign same-sex marriages. However, many of these cases are unlikely to be decided on the merits in appellate rulings, since it seems likely that the U.S. Supreme Court will end up deciding one of the federal cases within the next few years.

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SUPREME COURT – On November 26 the Supreme Court announced a grant of certiorari in Sebelius v. Hobby Lobby Stores, No. 13-354, and Conestoga Wood Specialties v. Sebelius, No. 13-356, presenting the question whether for-profit closely-held corporations whose owners have religiously-based objections to certain methods of contraception enjoy a 1st Amendment Free Exercise of Religion right to avoid complying with the Affordable Care Act requirement that employer-provided health insurance cover those contraceptive methods. In the decisions below, the 10th and 3rd Circuits disagreed about whether for-profit business corporations have any right to free exercise of religion under the 1st Amendment. Other circuit and district courts have weighed in on both sides of the issue, and have in some cases conceptualized the cases differently, for example finding no corporate free exercise rights but finding that the burden placed on the business by the ACA impaired the 1st Amendment free exercise rights of the shareholders as individuals. The question is of great significance for LGBT rights, since a ruling by the court in favor of plaintiffs in Hobby Lobby and petitioners in Conestoga may generate a significant gap in coverage under sexual orientation and gender identity discrimination laws if employers assert religious grounds for refusing to comply with them.

SOCIAL SECURITY DISABILITY CASES - The court rejected an appeal of denial of Social Security disability benefits for an HIV-positive plaintiff in Gipson v. Colvin, 2013 U.S. Dist. LEXIS 158794 (S.D. Tex., Nov. 6, 2013), as U.S. Magistrate Judge Frances H. Stacy concluded that the record supported the administrative determination that the plaintiff’s residual capacity to work despite his various medical issues disqualified him for benefits.* * * In Palmer v. Colvin, 2013 U.S. Dist. LEXIS 166393 (D. Ariz., Nov. 22, 2013), U.S. District Judge G. Murray Snow affirmed the Social Security Administration’s decision that the plaintiff, who is living with HIV, is not disabled within the meaning of the law. Contrary to Palmer’s arguments on appeal, the court found that the ALJ had given adequate weight to the treating physician’s testimony, and that record evidence supported the conclusion that Palmer was not so disabled that he could not perform gainful employment.

3RD CIRCUIT COURT OF APPEALS – A 3rd Circuit panel ruled on November 13 that a transgender plaintiff had failed to show that her employer’s reasons for selection her for layoff as part of a reduction in force were pretextual, thus affirming the district court’s grant of summary judgment to the defendant company. Stacy v. LSI Corporation, 2013 U.S. App. LEXIS 22885. Originally employed by Agere Systems as an engineer under the name Jim Stacy, the plaintiff went through gender transition while employed, and the company seemed to handle the situation with no problems. Agere Systems’ non-discrimination policy included sexual orientation and gender identity. In 2006, after she had been on medical leave, Stacy was reassigned to a new group, reporting to a new supervisor. She complained that she was unfairly compensated, but investigation of her complaint showed that she had received “the exact same performance rating” in the relevant years and had received a salary increase putting her in the top ten percent of employees in her job category. In 2007, Agere Systems merged with LSI Corp., which did not include gender identity in its non-discrimination policy. Reacting to the ensuring recession, LSI decided to effectuate a reduction in force, and the group to which Stacy was assigned was targeted for a force reduction.

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SUPREME COURT – Elane Photography, LLC, found to have violated the New Mexico public accommodations law by refusing to provide photographic services for a lesbian couple’s same-sex commitment ceremony, has filed a Petition with the United States Supreme Court, seeking review of the New Mexico Supreme Court’s disposition of 1st Amendment arguments raised in its state court appeal. Elane Photography LLC v. Willock, No. 13-585 (Petition filed Nov. 8, 2013), decision below, 309 P.3d 53 (N.M. 2013). Unlike the corporate free exercise of religion litigation sparked by the requirement under the Affordable Care Act that employers providing health insurance for their employees include coverage of a broad range of prescription contraceptives for women, Elane Photography mounted a freedom of speech defense, arguing that the state could not, consistent with the 1st Amendment freedom of speech, penalize a commercial photographer for refusing to engage in an activity that has an expressive component. Thus, even if Elane’s proprietors, Elaine and Jonathan Huguenin, base their objections to same-sex unions on their religious beliefs, they are avoiding the issue of whether for-profit business corporations enjoy free exercise of religion rights by focusing on the case on the expressive nature of the service they provide. Supreme Court precedents now firmly establish that corporations enjoy freedom of speech rights when they engage in expressive activities. Elaine’s counsel of record on the Petition is Jordan W. Lorence of Alliance Defending Freedom (formerly known as the Alliance Defense Fund), which is prominent in litigating against LGBT rights and same-sex marriage.
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The manager was told to eliminate several positions and evaluated the incumbent employees against a set of skills factors. Stacy was ranked at the bottom of her group in this analysis, and released. She was told that she “was being freed from her negative history with [the supervisor] and the corporation.” She sued under Title VII and the Pennsylvania Human Relations Act, as well as the Allentown Human Relations Act, the only one of these statutes that expressly includes “gender identity” as prohibited grounds for discrimination (although the EEOC now takes the position that the Title VII ban on sex discrimination applies to gender identity discrimination claims). The district court granted summary judgment to the company, and was upheld by the court of appeals. Judge Fisher, writing for the panel, noted that the company did not dispute that Stacy had met the initial pleading burden of alleging a prima facie case, and contended that it had rebutted that case by showing that Stacy was selected for layoff in a force reduction based on a skills analysis. Thus, Stacy’s burden was to show pretext, and the court of appeals agreed with the district court that she failed to meet the burden. Stacy failed to present evidence that the skills evaluation was faulty, or that she was selected for dismissal before the skills evaluation was undertaken. The court found the company’s argument convincing. “Here, the record reveals that Defendants were engaging in a series of layoffs due to the declining economy and, as a result, had already laid off more than three thousand employees prior to Stacy’s termination. The record also indicates that Stacy supported a product line in which Defendants decided to no longer invest and it was only at that point that Stacy’s group was selected” for the force reduction. “Stacy’s argument in support of her pretext claim appears to consist of nothing more than baseless allegations. We find on discriminatory connection between the merger, the alleged changes in policy, and her termination.”

5TH CIRCUIT COURT OF APPEALS

A 5th Circuit panel rejected a petition to review an order of the Board of Immigration Appeals that denied an asylum petition from a gay man from El Salvador. Alvarado-Rivas v. Holder, 2013 U.S. App. LEXIS 23697 (Nov. 25, 2013). The Immigration Judge had concluded that the petitioner was not a credible witness based on various inconsistencies in his testimony and submitted evidence, and was affirmed by the BIA. Wrote the court, per curiam: “Alvarado-Rivas’s statements throughout the record are replete with inconsistencies. During his credible fear interview, he omitted any mention of a violent rape at gunpoint that he later alleged in his asylum application. The omission was consistent with his pattern of embellishing his claims of persecution as the case proceeded with allegations that incidents were motivated by his sexual orientation. Also particularly glaring were inconsistencies among his various explanations for telling authorities initially that he was not afraid to return to El Salvador. In light of such a record, Alvarado –Rivas fails to meet his burden of showing that the evidence compels a finding that he was credible.” The court rejected petitioner’s argument that he should be given an opportunity to respond to the IJ’s specific findings of inconsistencies, and was not willing to countenance an argument that the IJ’s decision was motivated by bias. Petitioner had argued that his IJ in this case “has one of the lowest ‘grant rates’ among IJs in the country” for asylum claims. Responded the court: “Because the IJ’s adverse credibility determination was supported by substantial evidence, we find no merit in this argument. We similarly reject any suggestion that the adverse credibility determination was unreliable because the judge was hostile.”

9TH CIRCUIT COURT OF APPEALS

A panel of the circuit denied a petition to review the Board of Immigration’s affirmance of an Immigration Judge’s rejection of an asylum claim by a gay man from Guatemala in Rosal v. Holder, 2013 U.S. App. LEXIS 23669 (Nov. 25, 2013) (not officially published). Although the IJ found that the petitioner had credibly established past persecution because of his sexual orientation, the court found that the IJ had applied the proper standard on the question whether the petitioner could escape future persecution by relocating within his home country. “The record does not compel a conclusion contrary to that reached by the BIA but rather includes substantial evidence that Rosal would be able to live in Guatemala City without a ‘well-founded fear of persecution.’ There is a small, but active gay community and there have been recent steps by the government of Guatemala to recognize and protect the rights of homosexuals. Substantial evidence supports the BIA’s determination that Rosal’s status as an adult, single male and developed structure of Guatemala City made internal relocation reasonable, despite Rosal’s family ties to Quetzaltenango and lack of connections in Guatemala City.”

CALIFORNIA

U.S. District Judge Edward M. Chen ruled on November 5 that judicial estoppel precludes an employment discrimination plaintiff from suing his former employer when he had failed to list his potential claim against the employer in a bankruptcy pleading that he had filed prior to his discrimination suit. Carr v. Beverly Health Care & Rehabilitation Services, Inc., 2013 U.S. Dist. LEXIS 158479 (N.D. Cal.). Carr worked for the defendant as a licensed vocational nurse, and was discharged on June 13, 2011. One month after he was discharged, he filed a bankruptcy petition under chapter 7 in the Northern District of California.
The bankruptcy petition requires an itemized listing of personal property of the petitioner, including “other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims.” Carr did not list his potential claims against his former employer, which included a sexual orientation hostile environment claim, claims of failure to comply with federal and state wage and hour laws, and a retaliation claim stemming from his alleged complaints about patient abuse and health code violations. Carr asserts that he did not decide to file the instant lawsuit until after he had received his discharge in bankruptcy, as a result of a conversation with his current trial counsel, a different person than the lawyer who represented him in the bankruptcy proceeding, and that prior to that conversation he was not aware that he had potential legal claims against the defendant. Chen rejected Carr’s reliance on an unpublished decision by another judge of the Northern District of California, Moreno v. Autozone, 2007 U.S. Dist. LEXIS 29432 (N.D. Cal. 2007), as not being precedential, and points out that the 9th Circuit had recently held that federal courts had a “basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action.” Ah Quin, 2013 U.S. App. LEXIS 15076. “Here, there is no dispute that, at the very least, Mr. Carr knew of the facts underlying his harassment and wrongful termination/retaliation claims by the time of his termination, and, for Mr. Carr to claim that he did not know that these facts gave rise to a possible cause of action strains credulity and is entirely implausible,” wrote Judge Chen, who concluded: “The dismissal is with prejudice as, even when the Court take’s Mr. Carr’s declaration in account, there is no plausible basis for finding that judicial estoppel should not apply.”

LOUISIANA – Setting aside a purported surrogacy agreement as “clearly not drafted by an attorney” and lacking “any legal efficacy,” the Louisiana Court of Appeals affirmed a ruling by Judge Jay Bowen McCallum of the Third Judicial District Court for Union Parish, Louisiana, awarding joint custody to the unrelated biological parents of twin girls, H.L.M. and I.R.M., with the mother designated as domiciliary parent and the father getting about 45% of the time with the children. Ramsey v. Morales, 2013 WL 6091613 (La. App., 2nd Cir., Nov. 20, 2013). Leeann Ramsey, then 18, and her “significant other,” Kayla Bennett, were living with Edgar Morales, an undocumented alien, and his wife Rebecca. Edgar and Rebecca asked Leeann and Kayla “if they would have a baby for them.” Edgar, ten years older than Leeann, “began a sexual relationship with her that resulted in Leeann becoming pregnant with twins.” Leeann signed a written agreement before the twins were born, providing that she was having the baby for the Moraleses with whom the baby would live, that the Morales would make all decisions about the child and that Leeann could see the baby at any time by giving notice. The twins were born in October 2009. Leeann, who participated in taking care of the twins, filed a petition for custody in August, 2011, after moving out and returning to her parents’ home. The trial court found the “hotly contested” case difficult. The agreement was given no legal weight, the court instead deciding by reviewing all the factors that courts consider in custody contests between biological parents, and ultimately determined that the best interest of the twins was to live with Leeann while Edgar had liberal visitation rights under a joint custody designation. Judge Drew, writing for the court of appeals, briefly summarized the court’s conclusion: “These parents are flawed, as are we all. Doubtless each litigant regrets certain actions taken in the past. Our duty in this appeal is to decide whether it was manifestly erroneous or clearly wrong to designate Leeann as the domiciliary parent. We cannot make that finding on these consolidated records. The trial court found this case to be close. We agree, and it is probable that had the court ruled the other way, we would be constrained to affirm that judgment. As it is, we affirm the judgment below.” The appended trial court decision mentions that Ramsey was in a lesbian relationship with another woman at one time, but “is no longer in a lesbian relationship and no longer desires one.” The trial judge seemingly placed no weight on this factor, being primarily swayed by the conclusion that being domiciled with Ramsey and her parents presented a more stable environment for the twins than being with the Moraleses.

MARYLAND – In Doe v. Bd. of Education, 2013 U.S. Dist. LEXIS 163479 (D. Md., Nov. 18, 2013), U.S. District Judge Alexander Williams, Jr., granted summary judgment in favor of defendant school district in a case involving allegations that school officials violated the rights of a student by deliberate indifference to his (and his parents’) allegations that he was being subjected to sexual harassment by another male student. This case involves two fourth-graders, one of whom allegedly became sexually attracted to the other (the plaintiff), and initiated sexual activity with him in the boys’ restroom, as well as texting him sexually-oriented messages and calling him “gay” on one occasion. The plaintiff allegedly suffered emotional distress in response to these activities, some of which he or his parents eventually reported to teachers and administrators, but it did not appear that his performance of school work or participation in school activities directly suffered, although ultimately his parents decided to withdraw him from the school. The school took
actions in response to every incident that was brought to the attention of school officials, and plaintiffs don’t dispute the actions were taken, only whether they were reasonable responses in light of the school’s obligation under Title IX to protect their son from sexual harassment. Judge Williams concluded that no jury could find the school’s actions unreasonable, and that the school could not be faulted for failing to react to some incidents that were not reported until after the parents withdrew their son from the school.

MICHIGAN – The Associated Press (Nov. 8) reported that Andrew Shirvell, the former Assistant Attorney General who was discharged by former Attorney General Mike Cox in 2010 after he became embroiled in controversy over his harassment of the openly gay student body president at the University of Michigan, Chris Armstrong, has filed a wrongful termination suit against Cox and his successor, Bill Schuette, and several other officials in the A.G.’s office. In 2012, a state jury awarded Armstrong $4.5 million in his tort suit against Shirvell. The brief A.P. article does not specify what legal theory Shirvell is pursuing, but reports that he is seeking reinstatement and monetary damages. Dream on!

NEW JERSEY – The parents of a teenager who they allege suffers from “unwanted gender identity disorder and unwanted same-sex attractions” filed suit in the U.S. District Court in Camden, seeking a declaration that New Jersey’s recently-upheld law banning performance of sexual orientation change efforts (SOCE) by licensed therapists violates their 1st Amendment rights and the rights of their son. This is a “John Doe” lawsuit, filed on November 1. An Associated Press (Nov. 4) report about the case said that the plaintiffs expected the federal court to rule by December 2 on their motion for a preliminary injunction so that they could go ahead with getting therapy for their 15-year-old son. Their attorney, Demetrios Stratis, who was identified as having been involved in the other case that failed (see above), contends that the legislature was relying on inaccurate information when it concluded that SOCE can be harmful. The complaint alleges that the John Doe teenager “has a sincerely held religious belief and conviction that homosexuality is wrong and immoral, and he wanted to address that value conflict because his unwanted same-sex attractions and gender confusion are contrary to the fundamental religious values that he holds.” The complaint alleges that the boy is so depressed about his situation that he constantly thinks about committing suicide.

NEW JERSEY – The Transgender Legal Defense & Education Fund (TLDEF) announced a settlement in its lawsuit against Camden Treatment Associates, Inc. on behalf of El’Jai Devoureau, a transgender man who was hired for the job or urine monitor for male clients. Devoureau alleged that on his first day of work, he was discharged when the employer determined that he had transitioned from female to male. This, despite a New Jersey law banning employment discrimination because of gender identity. Gibson Dunn & Crutcher LLP served as co-counsel with TLDEF on the case. The terms of the settlement were not announced beyond Camden’s acknowledgment the Devoureau is male and that it has adjusted its internal policies to comply with the state law requirements of non-discrimination. Devoureau v. Camden Treatment Association LLC. The TLDEF press release announcing the settlement, received during November, did not indicate in which court the lawsuit was filed or the date of the settlement.

NEW YORK – A panel of the U.S. Court of Appeals for the 2nd Circuit affirmed an order by Judge Denny Chin concerning forfeiture of assets directed at properties owned by Richard Peterson, a gay men who pled guilty to federal felony counts of wire fraud and engaging in the business of insurance after having been convicted of a felony involving dishonesty or breach of trust. U.S. v. Crew, 2013 WL 5861508, 2013 U.S. App. LEXIS 22237 (Nov. 1, 2013). The wrinkle that makes this interesting for Law Notes is that Peterson and Gregory Crew registered their same-sex California domestic partnership in March 2005, several months before Peterson pled guilty in July 2005, and Crew claimed entitlement to compensation for his ownership share in the two properties: their shared residence in San Francisco and a vacation home in the Cayman Islands, both acquired during their relationship but prior to the registration of their partnership. Crew asserted that his community property interest arose immediately upon registration of the domestic partnership. Judge Chin had ruled that Crew was entitled to some compensation for his interest in the San Francisco shared residence held as community property, but not for the Cayman Islands property, which had been acquired individually by Peterson through a separate corporation. The 2nd Circuit affirmed Judge Chin’s findings that “Peterson and Crew had implicitly agreed to share the San Francisco property as community property, and so Crew was entitled to retain one half of the value of that property (after deducting $156,857.04 in improvements funded by Peterson’s criminal proceeds. But the district court also found that Peterson and Crew did not implicitly agree to share the Grand Cayman property.” The court said that these findings “are plausible in light of the record as a whole.”

NEW YORK – U.S. Magistrate Judge Therese Wiley Dancks recommended
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dismissal of a 42 USC 1983 action by Shaun Lanoce against his former criminal defense attorney, Frank Mellace, and the Oneida County District Attorney, Scott McNamara, and the Oneida County Court. Lanoce v. Mellace, 2013 U.S. Dist. LEXIS 158772 (N.D.N.Y., Nov. 6, 2013). Lanoce claims his constitutional rights were violated when Mellace told him to plead guilty to criminal charges (which are not specified in Judge Dancks' opinion). Lanoce alleged that Mellace referred to him “with anti-gay epithets and did not approve of homosexual relationships,” and “threatened me with loads of time if I didn’t take a plea” and “told me if I picked a jury trial the D.A. and the people from that area didn’t like fags!!” Lanoce asserted that Mellace did not explain anything to him and “only made a point of making me accept a plea or else promising me 25 years.” Judge Dancks concluded that attorney Mellace, who is a private practitioner, was not amenable to suit under 42 USC 1983, which only concerns state action, that the district attorney enjoys absolute immunity for suit for his prosecutorial actions, and that the Oneida County Court is not a “person” for purposes of 42 USC 1983, which authorizes suits for violations of constitutional rights by persons acting under color of law. Having disposed of all of Lanoce’s federal claims, Dancks recommended dismissing his supplementary state law claims for malicious prosecution and slander.

NEW YORK – U.S. District Judge Jack Weinstein (E.D.N.Y.) agreed to change the sentence imposed on an undocumented Honduran immigrant with HIV/AIDS to help him avoid deportation, according to a report published in the New York Law Journal on November 21. Mario Chevez-Carranza was originally ordered deported in 2003 after he pled no contest to a misdemeanor sexual assault charge in Michigan, but evidently did not leave the country, because he was arrested again in New York in 2012, after which he was sentenced to time served and three years’ supervised release by Judge Weinstein after he entered a guilty plea to a charge of illegal entry. His lawyer with the Federal Defender's of New York asked for a resentencing to avoid deportation, arguing that Carranza would die if deported to Honduras because he would lack access to appropriate medical treatment, and prosecutors from the U.S. Attorney’s Office in Brooklyn eventually agreed to support the request, so Weinstein resentenced him to time served with twelve months supervised release. Carranza will live in a halfway house, leaving only for medical appointments and meetings with his legal counsel, and will attempt to overturn the Michigan conviction on the ground that he was not provided a Spanish interpreter during his plea negotiation there. United States v. Carranza, NO. 12-cr-286 (E.D.N.Y., resentencing on Nov. 18, 2013).

NORTH CAROLINA – In In the Matter of M.M., 2013 WL 5913809, 2013 N.C. App. LEXIS 1143 (N.C. App., Nov. 5, 2013), the court of appeals found that Cumberland County District Judge John W. Dickson had improperly used the mother’s bisexuality as a factor to deny custody and limit visitation without making any factual finding as to how her bisexuality had affected her daughter. The trial court had awarded custody to the child’s paternal grandparents in Michigan, citing various factors including past domestic violence by father against mother and alleged, but unproven, charges that various individuals had sexually abused the child, and ceded further jurisdiction to the Michigan courts. The court of appeals found that ceding jurisdiction was not supported by factual findings, and also had problems with the trial court’s decision-making in other respects. The decision is complicated; indeed, unduly so because of the many deficiencies the court identifies in the trial court’s handling of the case, but of particular interest to Law Notes readers because of its discussion of the bisexuality issue. “The trial court made no findings as to any particular sexual activity which respondent-mother has engaged in which has affected the juvenile in any way,” wrote Judge Donna S. Stroud for the unanimous court of appeals panel. “Further, it is not self-evident that respondent-mother’s sexual orientation has an adverse effect on the welfare of the child. Thus, even assuming the trial court’s findings that respondent-mother is bisexual and that people who surround her ‘engage in a similar lifestyle’ are supported by the evidence, the mere characterization of this lifestyle as ‘abnormal’ and ‘not conducive [sic] to child rearing’ falls far short of the findings required to link these circumstances to the child’s welfare. There were no findings that these ‘lifestyle’ choices were having any negative impact on Margo or how they related to the parents’ abilities to care for her. Thus, even if these facts are still true of the parents today, these conditions were not those that led to the juvenile’s removal or which DSS or the trial court ever sought to modify and failure to remedy them cannot be a basis to take custody away from the juvenile’s biological parents.” The court cited two North Carolina Supreme Court decisions that clearly reject any kind of rule against leaving children in the custody of a biological parent who is gay: Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998), and Shipman v. Shipman, 586 S.E.2d 250 (S.C. 2003).

NORTH CAROLINA – U.S. Magistrate Judge L. Patrick Auld rejected William Corey Dawkins’ attempt to expand his equal protection sexual orientation discrimination case against the public school principal who had decided not to renew his employment contract.
into a case that would also bring in as defendants three members of the Richmond County Board of Education as well as the Board itself, in Dawkins v. Porter, 2013 U.S. Dist. LEXIS 164304 (N.D. Ohio, Nov. 19, 2013). Plaintiffs Steven Ondo and Jonathan Simcox, gay men who live in an apartment in Cleveland allege that they “unintentionally bothered a neighbor, off-duty Cleveland police officer Matthew Maclaren, who chose to resolve the matter by physically assaulting plaintiffs;” wrote Judge Gaughan. Cleveland police arrested them for disorderly conduct that night, but the charges were dropped and they were released from jail three days later. Unbeknownst to them, Maclaren and his buddies in the Police Department were not through with them, getting warrants for their arrest on charges of felony assault of a police officer. Rather than notifying them in advance to surrender to the police, members of a “Sweep Team” making arrest rounds in the early morning hours of April 8, 2011, showed up at their apartment at 6:45 am, announcing themselves with “loud banging and yelling,” rousted out the plaintiffs who were clad only in their underwear, punched, handcuffed and arrested them, refusing their requests to let them get dressed before being taken to the police station. “The officers instead stated that plaintiffs were ‘faggots’ and ‘don’t get to wear pants in jail,’” and forced them to stand on their front lawn in their underwear while being verbally abused with anti-gay epithets by the officers. They were booked into jail and were not given pants to wear for some time; when they were released the next day, the jailhouse pants were reclaimed and they had to walk home in their underwear. At trial, they were found not guilty of all charges, and brought this 42 USC 1983 suit against named police officers and the city of Cleveland. In dismissing charges against the city and many (but not all) of the defendant officers, Judge Gaughan accepted the argument that subjecting the plaintiffs to verbal abuse was insufficient to ground a federal civil rights claim, and that only the uniformed SWAT officers that were participating in the “Sweep” could be sued for the other conduct that the complaint specifically attributed to the SWAT officers. All the other officers that came along, but as to whom specific actionable conduct was not alleged, were entitled to dismissal of the claims against them.

**TEXAS** – The Texas Supreme Court heard oral argument on November 5 in *H.B. v. J.B.* and *Naylor v. Daly*, cases in which same-sex couples married outside the state but living inside the state sought divorces. The main issue in the case is whether the Family Court has jurisdiction to entertain a divorce petition involving a same-sex couple, in light of the state’s constitutional and statutory bans on recognition of same-sex marriages. Attorney General Greg Abbott has intervened in the cases, and specifically appealed a Family Court decision granting a divorce to Angelique Naylor and Sabrina Daly. The question of Abbott’s standing to be in the cases is also before the court. Counsel from the attorney general’s office characterized this as an “easy case” in light of the clear state law banning recognition of same-sex marriages, but several justices indicated by their questioning that they did not necessarily find the case so easy. *Legal Monitor Worldwide*, Nov. 12, 2013, 2013 WLNR 28467012; *Dallas Morning News*, Nov. 6.

**VIRGINIA** – On May 7, 2011, Benjamin Fuller and David Krivonak were “socializing around a bonfire on the beach behind the house where they were staying” with friends at a private home on Gwynn’s Island in Mathews County, Virginia. Some people came over from a neighboring house to join them, ascertained that the two men were gay, called other friends on their cellphone, and then commenced to harass the men. When the others summoned by phone arrived, the harassment escalated with anti-gay comments and a physical
attack. According to the complaint, as summarized by the court, “Minutes later, [the defendants] acting together, physically attacked Plaintiffs by punching, kicking, and pushing them, pinning them to the ground, striking Fuller with a stone or other hard object and holding his head under water, and choking Krivonak.” During the attack, some of the defendants “laughed, shouted, and verbally encouraged and incited Defendants to continue to attack ‘the faggots.’” Afterwards, when plaintiffs told defendants they would report them to the police, “Defendants jeered at and taunted Plaintiffs, saying ‘Go ahead, see what the cops down here do with a couple of faggots like you.’” Plaintiffs did report the incident to the police, and assert that later that morning, somebody (Defendants?) “set fire to and destroyed a kayak located on the lawn behind the house where Plaintiffs were staying.” Plaintiffs claim to have suffered severe physical injuries and emotional distress, and alleged pecuniary injuries including medical expenses and lost wages, as well as emotional and dignitary injuries. They filed a diversity suit in federal court against the defendants, claiming battery, assault, intentional infliction of emotional distress, and conspiracy to commit assault and battery. In a decision issued on November 20, U.S. District Judge Raymond A. Jackson granted a motion to dismiss the intentional infliction of emotional distress claim by that had been filed by two of the defendants, finding, somewhat incredibly, that the plaintiffs’ complaint was not factually specific enough to support this claim as to the severity of the distress they suffered. However, Judge Jackson declined to dismiss the conspiracy claim, finding that the complaint “plausibly alleges that some of the Defendants used their cell phones to encourage other Defendants to ‘join them on the beach for the purpose of further harassment of the Plaintiffs,’ and that the other Defendants arrived shortly thereafter with prior knowledge of Plaintiffs that they could not have otherwise obtained, and that the assault and battery occurred ‘minutes later.” The motions to dismiss filed by defendants did not go to the first two counts of the complaint for assault and battery, so the case continues as to the three remaining counts. Fuller v. Aliff, 2013 U.S. Dist. LEXIS 165958, 2013 WL 6115853 (E.D. Va., Nov. 20, 2013).

WASHINGTON – The Washington Supreme Court ruled in Franklin v. Johnston, 2013 Wash. LEXIS 942 (November 27, 2013), that a lesbian co-parent’s status as a foster parent to her partner’s child did not disqualify her from seeking a determination that she is a “de facto parent” of the child. The opinion for the court by Justice Steven C. Gonzalez says that Mary Franklin and Jackie Johnston “broke up and reconciled many times.” Johnston had a continuing drug problem that contributed to the gaps in their intermittent relationship. At one point when they were separate, Johnston found herself pregnant and turned to Franklin for help. They decided to parent the expected child together. The child was born in 2005; Franklin served as a co-parent, but the relationship between the women continued to be intermittent, interrupted by periods of Johnston’s drug issues. At one point, Franklin sought assistance from Child Protective Services, and CPS removed the child from Johnston’s home. “Three days later, at the shelter care hearing, Johnson requested A.F.J. [the child] be returned to Franklin’s care. A.F.J. was returned to Franklin, on condition that she pursue a foster parent license.” Johnston suffered further relapses and “spent time in many different inpatient and outpatient treatment programs, and in the King County Jail,” and in 2007 her partner’s child was returned to Franklin, on condition that she pursue a foster parent license. Franklin then petitioned to have her partnership recognized as a foster care relationship, but the court affirmed the lower court’s decision not to recognize their partnership as a foster care relationship. Justice Steven C. Gonzalez writes that there was a statutory gap that would justify the court to resort to an equitable doctrine in order to determine the parental status of an individual. Justice Gonzalez asserted that showing a statutory gap was not a prerequisite, and also noted that the petition was filed before Washington had established domestic partnership, so at the time the women did not have a mechanism for establishing a formal legal relationship. Gonzalez noted that the de facto parent doctrine requires a showing that the alleged de facto parent formed their relationship with the child with the consent of the child’s legal parent, which was true of this case, and had undertaken parental responsibility without expectation of compensation, which was also true in this case. The court concluded that Franklin had established that she is A.F.J.’s “de facto parent.” “While we recognize that a de facto parentage relationship will not arise out of a foster care relationship,” wrote Gonzalez, “foster parent status itself is no bar.” The court affirmed the lower court’s finding in favor of Franklin’s de facto parentage petition. Two members of the court dissented.

WASHINGTON – In another ruling that did not directly involve any gay people but that develops doctrine in a way that may prove useful in future litigation, the Washington Supreme Court approved a flexible application of its “de facto parent” doctrine in the...
case of a man who sought to establish parental rights concerning his stepson from a prior marriage. *Holt v. Holt*, 2013 Wash. LEXIS 944 (Nov. 27, 2013). B.M.H.’s biological father died before he was born. Mr. Holt, the biological mother’s former boyfriend and father of her other son, remained involved and was supportive of her, being present at B.M.H.’s birth and actually cutting the umbilical cord. Mr. Holt subsequently married the biological mother, but that marriage only lasted a few years. Mr. Holt formed an attachment to the child, who regarded Mr. Holt as his father and also formed a fraternal bond with the other son of Mr. and Mrs. Holt. After the divorce, Mr. Holt had visitation rights with his biological son, and although the order did not cover B.M.H., the two boys usually visited with Mr. Holt together. Mrs. Holt then went through a series of boyfriends and short marriages, at times trying to cut back on Mr. Holt’s visitation with B.M.H. Eventually the older boy moved in with Mr. Holt, who had since remarried. Then Mrs. Holt announced that she was moving fifty miles away to be with a new boyfriend, and Mr. Holt went to court seeking an order recognizing his parental status with B.M.H. B.M.H. reportedly did not want to move away from his brother and the man he regarded as his father, and did not want to leave his school. The Supreme Court found this case without precedent or direct statutory authority, but concluded that Mr. Holt could not seek “third party custody” but could seek a determination that he was a “de facto parent.” Third-party custody would require a determination that Mrs. Holt was an unfit parent, which Mr. Holt was not contending. Justice Steven C. Gonzalez wrote for the court that the equitable de facto parent doctrine could be adapted to this case, asserting, “We are presented with a scenario that was not contemplated by the legislature and that merits an equitable remedy – where an individual forms a parent-child relationship after entering the child’s life at birth following the death of the child’s biological father but where the parents were married for less than two years. Because there is no statutory avenue for Mr. Holt to petition for parentage, the de facto parentage doctrine fills this gap and provides for meaningful adjudication of whether Mr. Holt has undertaken a permanent role as B.M.H.’s parent. The de facto parentage test protects Ms. Holt’s constitutional rights by requiring that she consented to the parent-child relationship.” Gonzalez continued, “De facto parentage is a flexible equitable remedy that complements legislative enactments where parent-child relationships arise in ways that are not contemplated in the statutory scheme.” Although the availability of same-sex marriage in Washington State may diminish the need for alternative approaches to dealing with non-traditional families, it does not eliminate that need entirely, as this case well shows, and the court’s willingness to embrace a flexible equitable doctrine of de facto parentage may prove very useful in the LGBT family context.

**WEST VIRGINIA** – U.S. District Judge Thomas E. Johnston found that disputed material factual issues precluded a grant of summary judgment on a disability discrimination claim brought by an HIV-positive person under the West Virginia Human Rights Act in *Wilson v. Sedgwick Claims Management Services, Inc.*, 2013 WL 6080106, 2013 U.S. Dist. LEXIS 164329 (S.D.W.Va., Nov. 19, 2013). The plaintiff, an at-will employee who began with Sedgwick in November 2007 and had a good work record, including several salary increases and bonuses, good job evaluations and additional responsibilities, began to experience health problems in 2010, getting time off for various doctor’s appointments. By May 2011, his health deteriorated enough so that he against for leave so he could “find out exactly what was going on with him,” and the last full day he worked at Sedgwick was May 26, 2011. There followed extensive correspondence between Wilson, Wilson’s supervisor, and various other company officials concerning paperwork to document FMLA leave and later ADA leave. Because of uncertain, at first as to his diagnosis and then as to his course of treatment when he was diagnosed HIV-positive, Wilson never complied with the company’s request to give them a firm date when he expected to return to work. He notified the company on June 23 that he was HIV+, and some of his medical records were submitted to document his condition, and he also completed a company form requesting an accommodation in terms of intermittent leave for doctor’s appointments and some leeway in working hours. However, his FMLA leave request was denied, purportedly for failing to provide a return-to-work date, and he was terminated effective July 18, ostensibly for failing to provide a medical certification for leave and continued absence from work. Wilson sued under the state disability, presumably hoping to keep his case out of federal court, but the company removed it, presumably on diversity grounds, and moved for summary judgment. Judge Johnston provided a thorough review of the factual allegations and found that summary judgment was not appropriate on either of Wilson’s claims: wrongful discharge, and failure to make a reasonable accommodation. “The Court agrees with Wilson,” he wrote, “that this record presents a classic dispute of material facts” because a fact finder could, depending upon credibility determinations, either credit Wilson’s claim that he was treated differently from another employee who was suffering medical problems at around the same time unrelated to HIV, or could credit the company’s assertion that the information supplied by the other employee, but not Wilson, was sufficient to secure coverage under the Family & Medical Leave Act.
CIVIL / CRIMINAL LITIGATION

Johnston also agreed with Wilson that the question whether his request for an accommodation was reasonable under West Virginia law “is an issue of fact best resolved by the jury.”

CRIMINAL LITIGATION NOTES

IOWA – The Iowa Court of Appeals affirmed the conviction of Anthony Bertolone on charges of sexually assaulting his fraternity brother, J.D., while J.D. was asleep. State v. Bertolone, 2013 Iowa App. LEXIS 1228 (Nov. 20, 2013). J.D. and Bertolone occupied adjacent rooms in the fraternity house. Evidence suggested that Bertolone was obsessed with J.D., clinging to him in social situations, showering him with gifts and buying him booze and drugs, and that J.D. had a tendency to consume to excess. Bertolone claimed that the two men had a consensual sexual relationship, which J.D. denied. Things came to the attention of police when J.D. discovered that Bertolone’s laptop contained “eight gigabytes of data consisting of hundreds of photos and videos of Bertolone performing various sex acts on J.D. while J.D. was unconscious and unresponsive.” J.D. testified that the few times Bertolone “came on” to him sexually while he was not impaired, he had rejected those advances. In appealing his conviction, Bertolone claimed that he had been denied relevant evidence from J.D.’s medical records that could have been used to impugn J.D.’s credibility as a witness, but the Court of Appeals found that the overwhelming evidence from the computer files essentially made this irrelevant to the validity of the conviction. Presiding Judge Vogel wrote, “The massive number of videos and pictures, secretly taken by Bertolone, clearly show Bertolone sexually abusing an unconscious, unresponsive J.D. While Bertolone in his motion for new trial argued: ‘If J.D. was not honest about the existence of other medical or counseling data it is possible he was not being candid about the nature of the relationship,’ this in fact has no relation to whether Bertolone sexually abused J.D. Regardless of the nature of the relationship, sexual abuse in the third degree occurs when ‘the act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless.’ This definition includes the situation when the victim is unconscious. Though Bertolone’s defense was that the sexual contact was consensual, the testimony along with the graphic videos and photographs very clearly portray abuse, not consent. Thus, given the overwhelming evidence of Bertolone’s guilt, the newly discovered, post-abuse mental health records do not refute the evidence such that confidence in the verdict is undermined.” The court also indicated that the trial judge’s determination that Bertolone’s testimony about the consensual relationship was not credible was supported, “considering Bertolone had a strong defense motive to contend he and J.D. were in a consensual sexual relationship, in addition to the video and picture evidence that was contrary to his assertions.” The court was not buying Bertolone’s argument that their relationship “was like any other normal gay relationship/heterosexual relationship where one person would want to have sex. They would . . . start the act, and the other person would wake up later on, and you would finish the act.” The court pointed out that among the videos, “Bertolone is seen sexually abusing J.D. in a stealth-like manner, with the lights turned off and under the bed linens. These acts are performed while J.D. is clearly asleep or otherwise unconscious, given his snoring, closed eyes, and otherwise unresponsive behavior.”

OHIO – In the course of a decision upholding the conviction of a man for rape and gross sexual imposition, the Court of Appeals of Ohio rejected the defendant’s argument that the female victim should not have been called to testify that she was sexually attracted to women rather than to men. State v. Wayne, 2013-Ohio-5060, 2013 Ohio App. LEXIS 5248 (Ohio Ct. App., 2nd App. Dist., Nov. 15, 2013). Writing for the court, Judge Michael T. Hall observed, “The State apparently elicited this testimony to help negate any argument that the sexual activity was consensual,” but Wayne argued that it should have been excluded under Ohio’s rape-shield law, which precludes evidence of the victim’s sexual activity. Disagreeing, Hall wrote, “The statute says nothing about evidence of the victim’s attraction to members of a particular gender being inadmissible.” The court rejected Wayne’s reliance on People v. Murphy, 919 P.2d 191 (Colo. 1996), which held that Colorado’s rape
shield statute, “which generally bars evidence of a victim’s ‘sexual conduct,’ also precludes evidence of a victim’s ‘sexual orientation.’” “We decline to adopt the Colorado Supreme Court’s reasoning,” wrote Hall. “Reading ‘sexual conduct’ to mean ‘sexual orientation’ requires judicial rewriting of an unambiguous statute. Ohio law expressly defines sexual conduct. It means ‘vaginal intercourse between a male and a female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, or other object into the vaginal or anal opening of another,’” quoting from R.C. 2907.01(A).” Thus the victim’s testimony “that she is attracted to females is not evidence of ‘sexual conduct’ and the rape-shield law was inapplicable to her testimony.” In a concurring opinion, Judge Froelich pointed out the danger of allowing prosecutors to ask questions that verged on dealing with the victim’s sexual conduct, but concluded that in this case the defendant’s counsel did not object at trial and “the testimony presented was irrelevant” to the defendant’s conviction, so “there is no plain error” by the trial court.

TEXAS – Four women who were convicted in 1994 for allegedly molesting some girls in a satanic orgy ritual are out of prison as they seek vindication of their innocence claims in a Texas appeals court. The women – Elizabeth Ramirez, Cassandra Rivera, Kristie Mayhugh, and Anna Vasquez, all lesbians, maintained throughout the past two decades that they had been falsely accused, but their attempts to win release did not win traction until after a Canadian college instructor, Darrell Otto, began researching their case. He presented evidence to a Bexar County trial judge with the agreement of prosecutors; the judge, not named in any of the press reports we saw, agreed that the evidence of faulty witness testimony from the trial justified releasing three of the women on their own recognizance (the fourth was already out on parole) while a new appeal of their case is pending. Prosecutors would not agree to having the convictions vacated at this point in advance of an appellate proceeding. The release of the “San Antonio Four” is seen as a signifier of the changed attitudes towards gay people in Texas and nationwide. Huffington Post, Nov. 19.

CALIFORNIA – A jail inmate’s lawsuit seeking an HIV test because of his current “weakness” and history of sexual contact with an HIV-positive woman more than a year previously failed to plead sufficient facts. U. S. Magistrate Judge Dennis L. Beck dismissed Raymond Bob Trotter’s civil rights complaint upon initial screening under 28 U.S.C. § 1905A. Trotter v. Fresno County Jail, 2013 U.S. Dist. LEXIS 151889 (E.D. Cal., November 13, 2013). The pro se prisoner’s “conclusory” insistence that he needed an HIV test failed to state a claim against the jail doctor or to show a pattern or omission by the jail that violated his rights, concluded Judge Beck. The court granted leave to file an amended complaint within thirty days. This is another application of the general notion that prisoners, unlike the “worried well” among those not incarcerated, cannot seek diagnostic testing on demand but must make a particularized showing of harm.

CALIFORNIA – A transgender inmate’s pro se account of months of beatings, harassment, discrimination, and abuse in California’s Donovan Correctional Facility survived judicial scrutiny under the Prison Litigation Reform Act in Murillo v. Rucker, 2013 U.S. Dist. LEXIS 149135; 2013 WL 5670952 (S.D. Cal., October 15, 2013). U. S. District Judge William Q. Hayes found that Murillo stated claims under 42 U.S.C. § 1983 against 16 of the 19 corrections officers named as defendants, several of whom taunted him with homophobic slurs. Others threatened to rape him with a baton. They prevented him from filing grievances and threatened him with retaliation if he reported them. They searched his cell daily, confiscating his property (including legal work), and tried to incite other inmates to attack him. Murillo states he cut his arm in order to see a psychiatrist. The abuse pattern continued during Murillo’s five-month confinement in administrative segregation – a common cell placement for transgender inmates, ostensibly for their “protection.” The court dismissed claims against two officers involving a non-consensual x-ray, finding the allegations insufficient to plead excessive force as “malicious” or “sadistic” under Hudson v. McMillian, 503 U.S. 1 (1992). (A third defendant officer was not properly served.) The defendants, represented by the California Attorney General’s Office, challenged Murillo’s complaint as a “kitchen sink” pleading that raised “numerous claims against numerous defendants,” in violation of Rule 8 of the F.R.C.P., requiring a “short and plain statement” of the claim. They also cited improper joinder of the claims under F.R.C.P 18 and 20. The court denied motions under all three rules, finding “the first 20 pages” of Murillo’s complaint were not “impermissibly” rambling or confusing. Rather, the court found: “Plaintiff adequately sets forth…his constitutional claims….that Plaintiff was harassed and retaliated against by a majority of the named Defendants for being a transgender inmate, as well as for filing complaints against some of the named Defendants… [and] that Plaintiff’s claims arise out of a systematic pattern of events.”
**CONNECTICUT** -- A prisoner’s desire to continue medication prescribed prior to incarceration is a frequent source of civil rights litigation. Senior U. S. District Judge Charles S. Haight denied prisoner Michael Lotz a preliminary injunction to continue narcotic pain medication in *Lotz v. Elderkin*, 2013 U.D. Dist. LEXIS 159348 (D. Conn., November 7, 2013). Seeking relief under 42 U.S.C. § 1983, Lotz sought pain medication (specifically, Percocet tablets and a Fentanyl patch) for chronic conditions, including pancreatitis, liver disease, backaches, and advanced HIV. He claimed irreparable injury because these were the only effective medications and everything else had been tried without success. Two prison doctors’ affidavits countered that the medicine they prescribed was adequate pain management. They maintained that an MRI showed a normal pancreas and that Lotz’ symptoms and behavior, including weight gain and response to liquid diet, were inconsistent with his claimed ailments. They averred that AIDS (as opposed to associated conditions) does not itself cause pain. They said that Lotz was receiving appropriate pain relief (apparently Tylenol # 3), and that his claim for the specified narcotics was “not medically founded” but was “driven by addiction rather than pain.” They stated that Lotz failed random urine tests for marijuana and cocaine, in support of their argument he has trying to get “high” even while on medication. Plaintiff offered no expert evidence, relying on his own affidavit and on past medical records (including “ambiguous” records from specialists at the University of Connecticut) that the court found inadequate to support his claim for an injunction or even for a hearing. This case illustrates the nearly insurmountable burden on a pro se prisoner to show irreparable injury or likelihood of success on the merits to obtain a preliminary injunction without expert medical evidentiary support to his claims.

**DELAWARE** – U.S. District Judge Sue L. Robinson dismissed gay inmate Timothy Fletcher’s 42 U.S.C. § 1983 case alleging failure to protect and denial of equal protection in *Fletcher v. Little*, 2013 U.S. Dist. LEXIS 164831 (D. Del., November 20, 2013). The judge never describes prison official Gladys Little’s job, except to say that she is the “sole remaining defendant.” Fletcher claims that Little knew he was at risk of assault and that she failed to protect him, resulting in his fighting to defend himself against rape, for which he was punished. Fletcher also claims that Little discriminated against him based on his sexual orientation. The court found that Fletcher satisfied the first prong of *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), by showing that Little knew he was at risk; but he failed under the second prong by not raising a jury question on whether Little acted reasonably in response to the risk. Little interviewed Fletcher and his alleged assailant separately prior to the incident, threatened them with isolation if they were disorderly, received mutual assurances that they would behave themselves, and checked on them afterwards. Leaving the two locked in the same cell was a “judgment call” that was not unreasonable under the circumstances. Fletcher tries to support his allegation that Little would have handled the matter differently “if he were a straight man” by recounting Little’s statement in response to whether Little acted reasonably in response to his complaints of harassment: “You are a gay man, these men have not been with a woman in a long time -- you should expect that -- man-up and stop coming to jail.” He also says that Little told him to avoid “hanging out” in the recreation yard’s “blind spots.” Judge Robinson found the equal protection claim “frivolous” under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1), because: (1) “homosexuals” are not a “protected class”; (2) Fletcher failed to plead “arbitrary and intentional discrimination” that was without rational basis; and (3) offensive and derogatory language about sexual orientation “does not give rise to a constitutional claim.” [Editor’s Note: Judge Robinson’s discussion seems unaware of *U.S. v. Windsor* and the circuit court cases on DOMA, which make clear that “homosexuals” may state valid equal protection claims requiring the state to justify discriminatory treatment based on sexual orientation.]

**ILLINOIS** -- The Eighth Amendment safety and health care claims of a gay Honduran inmate, of “slight stature,” who was convicted of predatory sexual assault of a child, survived a “Merit Opinion” by U. S. District Judge Sue E. Myerscough. *Ramirez v. Godinez*, 2013 U.S. Dist. LEXIS 156757, 2013 WL 5876715 (C.D. Ill., November 1, 2013). “Merit” review is a “screening” required by 28 U.S.C. § 1915A of all civil prisoner cases seeking redress from a government entity or officer before they are docketed (or as soon as feasible), in which the prisoner’s allegations are to be liberally construed and accepted as true. Here, Ramirez claimed: (1) his cellmates threatened him, beat him, and extorted money from him; (2) he needs protective custody; (3) he was punished for refusing to cell with an inmate who threatened him; and (4) denial of a Spanish translator deprives him of treatment for an unspecified serious mental health condition. The screening court found that Ramirez adequately stated claims of deliberate indifference to a substantial risk of serious harm and to a serious health care need. She directed that the current warden of the institution be substituted as a party defendant, since Ramirez seeks injunctive relief. The Order includes details for identifying “John Doe” defendants, serving process, filing answers and other papers, handling discovery and motions, and contacting the court in the future. The court denied a claim for an implied

NEW HAMPSHIRE – U.S. District Judge Steven J. McAuliffe entered judgment against a released gay jail inmate with post-traumatic stress disorder, who had suffered repeated assaults by another inmate. In Fox v. Superintendent, 2013 U.S.LEXIS 159637 (D. N.H., November 7, 2013), the court declined to adjudicate the plaintiff’s 42 U.S.C. § 1983 claim for damages against jail officials whom he claimed knew he was “uniquely vulnerable to attack,” because he had failed to exhaust his remedies under the Prisoner Litigation Reform Act [PLRA] by filing a grievance prior to instituting federal litigation. See 42 U.S.C. § 1997e(a). Atypically, the plaintiff did not contest summary judgment and failed to inform the court of his whereabouts after his release from jail. The court nevertheless reviewed the uncontested facts and determined that the plaintiff had failed to grieve his conditions of confinement, noting that the jail had a multi-tiered grievance system, that the plaintiff was told about it, and that the PLRA required exhaustion of these administrative remedies even if the relief sought (damages) was not available through a grievance. The court relied on a trilogy of Supreme Court cases requiring strict compliance with PLRA exhaustion – Booth v. Churner, 532 U.S. 731, 734 (2001); Porter v. Nussle, 534 U.S. 81, 93 (2002); and Woodward v. Ngo, 548 U.S. 81, 93 (2006) -- writing: “Claims of the sort advanced by Fox are precisely the type that must be properly exhausted through available prison administrative processes before they may be pursued in federal court.” Nothing in the record justified a “rare and exceptional” case for PLRA non-compliance (e.g., prevention from filing grievance, estoppel), so the defendants were entitled to judgment as a matter of law. Finally, the court departed from the usual practice of dismissing the constitutional claims without prejudice if there were still time to exhaust, because the record showed that the time for pursuing administrative remedies “lapsed long ago.” William J. Rold

LEGISLATIVE NOTES

FEDERAL – On November 21, President Barack Obama signed into law the HIV Organ Policy Equity Act (referred to as the HOPE Act), recently approved by Congress. The Act ends a ban on the donation of organs by HIV-positive people to HIV-positive recipients. “The potential for successful organ transplants between people living with HIV has become more of a possibility,” said the president in his signing statement. “The HOPE Act lifts the research ban, and, in time, it could lead to live-saving organ donations for people living with HIV while ensuring the safety of the organ transplant process and strengthening the national supply of organs for all who need them.” The ban was enacted in 1988 as part of the Organ Transplant Amendments Act. Pressure built up to repeal the ban as retroviral medications lengthened the lifespan of people living with HIV, generating a need for organ donations due to chronic conditions such as liver and kidney failure. The measure enjoyed bipartisan co-sponsorship in both houses of Congress. Washington Blade, Nov. 21.

FEDERAL – The U.S. Department of Labor, announcing its regulatory agenda on November 27, indicated that it would be proposing a new rule that would redefine “spouse” as used in regulations under the Family and Medical Leave Act to take account of the U.S. Supreme Court’s decision in U.S. v. Windsor and the subsequent decision by the Obama Administration to recognize legal same-sex marriages in every appropriate federal law context. The Department also announced that its Office of Federal Contract Compliance Programs would be proposing to update regulations setting forth federal contractors’ obligations not to discriminate on the basis of sex under Executive Order 11246. The existing Sex Discrimination Guidelines, published at 41 C.F.R. Part 60-20, have not been updated in more than 30 years. In its news release announcing the regulatory agenda, DOL commented: “Since that time, the nature and extent of women’s participation in the labor force and employer policies and practices have changed significantly. In addition, extensive changes in the law regarding sex-based employment discrimination have taken place. Title VII of the Civil Rights Act of 1964, which generally governs the law of sex-based employment discrimination, has been amended twice. OFCCP will issue a Notice of Proposed Rulemaking to create sex discrimination regulations that reflect the current state of the law in this area.” This is potentially big news, since the “current state of the law” includes the EEOC’s recent recognition that gender identity discrimination is a form of sex discrimination, consistent with rulings from a handful of federal courts, and that hostile environment harassment due to sex-stereotyping may...
violate the rights of LGBT employees who can show that they were targeted due to their failure to conform to gender stereotypes. Extending this Title VII case law to federal contractors through the OFCCP administrative enforcement process would bolster attempts to use federal law to protect the workplace rights of sexual minorities.

ALABAMA – Rep. Patricia Todd (D-Birmingham), the state’s only openly gay legislator, has filed a proposed constitutional amendment to repeal the state’s constitutional ban on same-sex marriage. Todd married her same-sex partner in Massachusetts on September 14. Although her marriage is not recognized by her employer for purposes of state law, it is recognized for some purposes by the federal government. Todd indicated that she did not expect the amendment to pass any time soon, but introduced the proposal in order to “start a conversation about the legal ramifications of the state ban.” Montgomery Advertiser, Nov. 6.

CALIFORNIA – The enactment of a law requiring the state’s school districts to accommodate the needs of transgender youth, A.B. 1266, has set off a firestorm in the state’s media, and led the “usual suspects” who were responsible for Proposition 8 to dust off their clipboards and get busy gathering signatures to put a repeal initiative on the ballot. The primary organizer of the referendum effort, called “Privacy for All Students,” is Frank Schubert, who managed the successful Proposition 8 campaign with scare advertisements suggesting that legalization of same-sex marriage would result in brainwashing California school children to become gay rights advocates (and even gay themselves). Taking up the usual trope of opponents of transgender rights measures, the initiative sponsors called it a Bathroom Bill, contending that it will expose school children to danger by allowing transgender students to self-identify their gender preference for restroom, locker room and sports purposes. The referendum organizers announced in mid-November that they had gathered more than 600,000 signatures, although some critics expressed doubts that a review by the Secretary of State would certify enough valid signatures to qualify the measure for the ballot. They need 504,760 valid signatures. Governor Brown signed the bill in September, and it goes into effect on January 1, 2014. Associated Press, Nov. 10; Sacramento Bee, Nov. 12.

FLORIDA – Sarasota County Commissioners unanimously approved a proposal to establish a county domestic partner registry on November 6. Registration is limited to adult partners residing in a permanent mutual address in the country. The ordinance affords a limited list of rights, including, of course, recognition as domestic partners by the county government. Charlotte Sun, Nov. 7.

IDAHO – Pocatello Mayor Brian Blad announced that the City Council would not take up a proposed anti-discrimination ordinance that would include sexual orientation and gender identity until after a May 20 public referendum. The council had voted 4-2 to approve the ordinance in a preliminary vote in June, after having stalled on it by a 3-3 vote in April. Candidates for the Council at the November elections had all said they would abide by the will of the voters if the ordinance came up for a vote after the referendum. Idaho State Journal, Nov. 8.

INDIANA – Amending the Indiana constitution requires two successive legislatures to approve identical language before sending it to the voters. The Indiana legislature approved an anti-gay marriage amendment once, and it may come up for a vote again when the next session convenes in January 2014. Meanwhile, many influential groups in the state have been weighing in opposing the amendment. On November 11, the Indianapolis City Council voted 22-6 to approve a resolution asking the legislature to reject the marriage amendment. Other vocal opponents have included Eli Lilly & Co., a major Indiana employer; the Indianapolis Chamber of Commerce; and Indiana University. Major employers and educational institutions in the state have argued that a constitutional marriage ban may impede recruitment and retention of qualified employees, especially when neighboring states (Illinois, Iowa, Minneapolis) have embraced marriage equality. Associated Press, Nov. 12. House Speaker Brian Bosma (R-Indianapolis) indicated that the measure was on the leadership’s agenda for the 2014 session, but not high on the list. “This is not the most important issue facing us by far,” he told the Courier-Journal (Louisville) (Nov. 19). “We have to deal with the issue with dignity and respect and bring this 12-year discussion to a conclusion.” If the measure passes through the legislature in the same form it passed in the prior session, it will be placed on the November 2014 general election ballot.

MICHIGAN – Meridian Township’s trustees voted 5-1 on November 7 to approve an ordinance banning sexual orientation discrimination in employment and other areas, supplementing prior legislation that dealt solely with housing discrimination. According to the Lansing State Journal (Nov. 17), passage of this measure made Meridian Township the 30th jurisdiction in the state to enact such legislation, but on November 6 the Detroit News had declared that Royal Oak’s approval of a ballot question on non-discrimination
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had made that community the 30th. We’ll let them battle it out for the honors. The Detroit News identified the Royal Oaks measure as “Metro Detroit’s most contested ballot issue.”

TENNESSEE – The Chattanooga City Council voted 5-3 on November 19 to approve a measure extending employee benefits to domestic partners of city workers, whether gay or straight. The measure went into immediate effect, with the expectation that employees will be able to begin enrolling their partners in the spring after the city has negotiated the necessary terms with its health insurer. Chattanooga Times, Nov. 19.

TEXAS – Houston Mayor Annise Parker announced on November 19 that the city would recognize same-sex marriages entered into in other states by municipal employees for purposes of employee benefits eligibility. The mayor’s decision was based on a city legal department interpretation of the recent U.S. v. Windsor decision and related cases from around the country, establishing the proposition that there is no rational basis for a governmental unit to withhold recognition from a same-sex marriage that has been formalized in another jurisdiction. lonestarq.com, Nov. 20.

VIRGINIA – The Virginia Beach School Board voted 11-0 on November 19 to adopt a resolution banning sexual orientation discrimination and anti-gay bullying in the schools. They had backed away from the idea of adding “sexual orientation” and “gender identity” to existing formal board anti-discrimination policies, upon legal advice that they could not do so consistent with state law, presumably relying on opinions by out-going Attorney General Ken Cuccinelli, a noted homophobe who was defeated in his bid to become governor. Virginia Pilot and Ledger-Star, Nov. 20. Perhaps they will return to this issue after the newly-elected governor, Terry McAuliffe, honors his pledge to issue an executive order banning sexual orientation and gender identity discrimination, and the newly-elected Democratic attorney general – perhaps – rescinds Cuccinelli’s A.G. opinion.

LAW & SOCIETY NOTES

CONGRESS – The LGBT Congressional Caucus grew by one when Rep. Michael Michaud (D-Maine) came out in op-ed columns simultaneously published in several Maine newspapers on November 4. Michaud, who polling places as the front-runner in the campaign for governor of Maine in 2014, said that he came out because there was a “whispering campaign” emerging about his sexual orientation. He said that he always had regarded that as a private matter, but that he decided to come out as gay officially in order to stifle that campaign and be in a position to point out the issue’s irrelevance to his qualifications to be governor of Maine. If elected, Michaud would be the first openly-gay candidate to be elected governor of a state. Because of his long service in the House of Representatives, he is now the most senior among the openly LGBT serving members of the House. Washington Post, Nov. 4.

COAST GUARD – The Coast Guard is the first military service to add sexual orientation to its equal opportunity policy. American Military Partners Association, an organization advocating for same-sex partners of military personnel, announced on October 31 that it had become aware of the new policy contained in a policy statement dated October 13, which added both sexual orientation and genetic information as prohibited grounds for discrimination in the service. None of the other service branches have an express non-discrimination policy on sexual orientation, and Stephen Peters, president of AMPA, called on Secretary of Defense Chuck Hagel to order all the uniformed services to adopt such policies. Although Congress voted in 2010 to repeal the Don’t Ask Don’t Tell policy and gay people began to service openly the following year, the legislation did not include an express ban on discrimination. Washington Blade, Oct. 31.

MAYORAL ELECTIONS – On November 5, openly lesbian incumbent Annise Parker was reelected to a third and final term as mayor of Houston, Texas, where term-limits will require her to step down in four years. In Seattle, Washington, openly-gay state Senator Ed Murray defeated the incumbent mayor by a substantial majority. In Atlantic City, New Jersey, an openly gay Republican, Don Guardian, defeated the incumbent mayor on a reform platform.

NEW YORK CITY COUNCIL – As was expected after the Democratic primary results in September, the general election on November 5 produced an expansion of the LGB caucus in the New York City Council, with the election of two
openly gay members from Manhattan, two from Queens, and one each from Brooklyn and the Bronx. Thus, Staten Island is the only one of New York City’s five boroughs without any openly lesbian or gay council member. Queens councilmembers Danny Dromm and James Van Bramer are so popular with their constituents that the Republicans didn’t bother to nominate candidates to oppose them. Carlos Menchaca defeated an incumbent in Brooklyn and cruised to a victory. Ritchie Torres in the Bronx, who will be the Council’s youngest member, achieved more than 90% of the vote in a contested election. Corey Johnson was elected in Manhattan to fill the seat being vacated by Council Speaker Christine Quinn, whose bid for the mayoral nomination fell short in the primary. Openly lesbian Manhattan council member Rosie Mendez was handily reelected. News reports suggested that the influx of new Democratic council members will move the entire council to the left, at a time when the public elected the most liberal of the mayoral contenders, Public Advocate Bill De Blasio, as mayor, and longstanding LGBT-community ally Manhattan Borough President Scott Stringer as Comptroller. The new Public Advocate, Letitia James, also has a strong record on LGBT issues from her time in the Council.

**EMPLOYEE BENEFITS** — According to a study published by the Human Rights Campaign Foundation, law firms have moved out in front of other types of corporate employers as leaders on benefits for LGBT employees and their families. In a survey of 140 law firms, including many of the largest U.S. firms, HRCF found that more than half got a perfect score on its LGBT employee benefits index, a “dramatic jump” from just five years ago, when less than a third of the surveyed firms scored 100%, according to a report in the Washington Post (Nov. 4). By contrast, about a third of the banking and financial companies, traditionally leaders in this area, scored 100%, with 19% in retail and 14% in the business consulting industry. HRCF started publishing its Corporate Equality Index in 2002, and expanded its survey to include law firms in 2006. * * * The University of Central Missouri will extend health care coverage to same-sex partners of its employees, following the lead of Missouri State University and Truman State University in adopting such polices in recent months. The University’s board of governors approved the change as part of approving a new health care plan provided by Blue Cross and Blue Shield of Kansas City that includes domestic partner coverage. Warrensburg Daily Star-Journal, Oct. 24.

**AMERICAN BAR ASSOCIATION** — The American Bar Association has long been on record in support of LGBT rights, dating to resolutions first passed during the 1970s and 1980s on decriminalization of sodomy and advocacy of non-discrimination measures. Thus, it seemed incongruous that ABA President James Silkenat had agreed to be the keynote speaker at a daylong conference in New York City hosted by a law firm that was devoted to encouraging American investment in Russian business enterprises, in light of the current LGBT rights crisis in Russia. LGBT organizational leaders, assisted by a grassroots effort through social networks on the internet, prompted Silkenat to withdraw from the program, issuing the following statement on November 7: “I remain committed to engaging with those in Russia who are working to put an end to human rights abuses in their country, and I will look for effective ways to oppose Russia’s policies and practices that oppress the LGBT community.” After Silkenat’s withdrawal, New York City asked to be removed from the list of co-sponsors of the conference, and the hosting law firm, Goodwin Procter, withdrew from the event as well.

**OREGON** — A group calling itself “Friends of Religious Freedom” has filed a proposed initiative with the Secretary of State to extend total immunity from liability to anybody who operates a marriage-related business and refuses to provide goods or services to same-sex couples. The text provides that no individual or business entity acting in a non-governmental capacity can be penalized by the state or any political subdivision or subjected to a civil action “for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partner ceremony or its arrangements.” A different group, Oregon United for Marriage, has filed with the Secretary of State a proposed Right to Marry and Religious Protection Initiative, which would amend the Oregon constitution to allow same-sex marriages while protecting clergy or religious institutions from having to participate in any ceremony to which they have religious objections. 116,284 valid voter signatures are necessary to get a measure on the ballot. As of late November, the proponents of the same-sex marriage amendment claimed to have collected over 115,000 signatures, while the religious freedom folks were awaiting authorization to begin petitioning. Their measure was inspired by news reports that the state Attorney General’s office was investigating a bakery that had refused to supply a wedding cake for a lesbian couple’s partnership ceremony. Nike, a major employer based in Oregon, has established a political action committee with seed-money donated by the corporation and by several of its executives to support the efforts of the pro-same-sex marriage initiative campaign. According to a Nov. 30 report
in the Statesman Journal in Salem, the Nike PAC has received $100,000 for the company and $180,000 from its executives. By comparison, by the end of November Oregon United for Marriage had raised nearly $213,000, and the opposing Oregon Family Council Issues PAC had raised less than $54,000, according to records on file with the Secretary of State. The Nike PAC is not planning to wage a separate campaign, but rather to make strategic donations in support of the efforts of Oregon United for Marriage.

TEXAS – Harris County (Houston) Sheriff Adrian Garcia has adopted a new policy to protect and provide equal treatment to gay, lesbian, bisexual and transgender inmates at the county jail, including allowing transgender inmates to be housed according to their gender identity rather than their biological sex. The office stated that it believed its new policy was the “most comprehensive” in the country, outlawing discrimination and harassment and outlining how inmates will be searched, booked, and housed. In line with its law enforcement ethos, Harris County has the third-largest county jail in the country, smaller only than Los Angeles and Cook County (Chicago). An Associated Press report on this development (published November 15) mentioned that other “major jails” had taken similar steps, in response to new “federal standards” to protect inmates from sexual abuse and assault.

UNITED METHODIST CHURCH – A jury in a Pennsylvania church trial found that Reverend Frank Schaefer, of Lebanon, Pennsylvania, violated church law by officiating at his gay son’s same-sex marriage ceremony in Massachusetts in 2007. Schaefer testified that he was trying to follow “God’s command to minister to all,” and that he had refused an offer to avoid the trial if he promised not to perform such ceremonies in the future. He pointed out that three of his four children are gay, so would not make such a commitment. Schaefer faces a potential penalty ranging from a reprimand to a loss of ministerial credentials in the church. Boston Globe, Nov. 19.

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AUSTRALIA – The upper house of the New South Wales Parliament voted 21-19 against a bill that would legalize same-sex marriages on November 14. The opposition of Premier Barry O’Farrell, who said that he would vote against the measure if it came up in the lower house, was deemed decisive. O’Farrell, a marriage equality supporter, agrees that marriage has been federalized by recent legislation and that New South Wales does not have the legislative authority to confer all the rights and benefits of marriage on same-sex couples. The courts are about to take up that question in connection with the recent marriage equality legislation by the Australian Capital Territory (ACT), which is set to go into effect in December unless halted by the courts. The High Court will hear arguments on the ACT legislation on December 3 and 4. The ACT government submitted a brief arguing that federal legislation did not occupy the field and left it to the individual states and territories to determine for themselves whether same-sex couples can marry. Sydney Morning Herald, Nov. 15; ABC Premium News, Nov. 4; Canberra Times, Nov. 26.

BOTSWANA – Law enforcement authorities have undertaken a campaign to rid the country of prostitutes, in order to “curb an influx of prostitutes and gays in the Southern African country,” according to a Nov. 5 report by Africa Review. The Health Ministry has launched a billboard campaign supplemented by newspaper ads, articles, posters, flyers, radio and TV advertisements all warning about the dangers of sexually-transmitted disease and sex work.

CAMEROON – PinkNews.co.uk (Nov. 27) reports that a man has been sentenced to nine years in prison under Cameroon’s laws against homosexual conduct, even though the penal code sets of a five year maximum sentence for this offense, due to a failure to reflect clarifying evidence about the age of his sexual partner. Cornelius Fonya, 35, was originally charged with having sex with a 14-year-old boy, but it was later proven that his sexual partner was actually 19 year old, above the age of adult consent in Cameroon.

CANADA – The Ontario Association of Chiefs of Police released a set of
guidelines on November 5 to help police officers provide appropriate service to the LGBT community. The document, which is intended to be subject to constant revision, advised on appropriate use of language, methods of recruiting LGBT people to join the police forces, and how to deal with various crimes that are particularly targeted on the LGBT community. The guidelines warn against heterosexism—the assumption that everybody is non-gay unless they declare otherwise, and discuss why LGBT people may be reluctant to report certain crimes. Ottawa Citizen, Nov. 6.

CANADA – The Vancouver Province (Nov. 27) reported that there is likely to be an “influx” of non-resident same-sex couples coming to British Columbia to get divorces since Vancouver changed its divorce law to waive the one-year residency requirement. B.C.’s action came in response to the “wedlock” problem faced by people from other jurisdictions who came to B.C. to marry after B.C.’s highest court issued its marriage equality ruling in 2003. Canada’s federal government legislated in favor of same-sex marriage in 2005 with the passage of the Civil Marriage Act. Civil marriage did not become available to same-sex couples elsewhere for several years, and there was a steady flow of same-sex couples from other countries (most notably the neighboring United States) over the following years. However, due to the one-year residency requirement for B.C. courts to entertain divorce actions, such couples could not terminate their marriages unless one of them actually moved to B.C. and established residency there, unless, of course, their domicile jurisdiction was willing to recognize their marriage for purposes of divorce. Since the overwhelming majority of U.S. states do not recognize same-sex marriages, the wedlock problem persists. The newspaper reported that a lesbian couple from Utah were among the first to take advantage of the new law waiving the residency requirement: Heidi Nedreberg of Salt Lake City and Brittany Buckelew of West Valley, both in Utah, married in Vancouver in 2006, and recently petitioned the B.C. court to waive the residency requirement so they could terminate their marriage. This has become a pressing issue for U.S. same-sex couples who married in Canada and have subsequently separated, as the U.S. Internal Revenue Service now requires that legally married same-sex couples file their income tax in married status, requiring cooperation between members of the couple in order to get their taxes on file and claim any refunds that might be due! IntelliNews.com, Nov. 24.

CROATIA – Croatia will conduct a referendum vote on December 1 on a proposed constitutional definition of marriage as the union of one man and one woman, as a result of a petition campaign that collected more than 750,000 signatures. Irish Times, Nov. 19.

CYPRUS – Interior Minister Socrates Hasikos said that the government planned to go forward with a proposal to establish civil partnerships that would be open to same-sex couples, which had been provisionally approved on February 14 by the prior government. A draft measure has been sent to the various ministries for their comments, due by December 6, and a revised draft will be posted on the Interior Ministry’s website for public comment after the ministry comments are incorporated into the draft. After a four-week comment period, the government will formulate a statutory proposal for review by the law office, and then for submission to the legislature. The goal is to have the measure before the House of Representatives by April. Cyprus Mail, Nov. 19.

IRELAND – The Irish cabinet plans to hold a referendum on same-sex marriage in 2015, accepting a recommendation from Minister for Justice Alan Shatter that it follow the advice of the Constitutional Referendum to take the next step from civil partnerships, which were introduced in Ireland in 2010. The government is generally supportive of the idea of extending legal recognition
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for same-sex couples to marriage, but a majority of the Cabinet felt that this was a matter that should be decided by the electorate. IrishTimes.com, Nov. 5.

MALTA – Immigration authorities have granted asylum to an 18-year-old gay man from Nigeria. The Refugee Appeals Board granted his appeal from an adverse ruling by the Commissioner for Refugees. The Board noted the recent ruling by the European Court of Justice on asylum for gays from African countries that impose severe penalties for homosexuality. Nigeria’s criminal code authorizes up to 14 years in prison for homosexual conduct. The Board found that Nigerian states apply Sharia law, under which consensual homosexual conduct among men is punishable by death by stoning or flogging. The Board criticized the method of interrogation used by the Commissioner to determine whether the applicant was credible. Malta Independent, Nov. 24.

SCOTLAND – The Equal Opportunities Committee of the Scottish Parliament approved the proposed Marriage and Civil Partnership Bill and sent it on for consideration by the full Parliament, where it received a 98-15 affirmative vote on first reading on November 20. It will be referred back to a legislative committee for further refinement prior to a final vote. The government hailed the vote as an “important step forward,” reported the Belfast Telegraph Online (Nov. 21), but critics of the bill said that it did not go far enough to recognize the rights of faith groups that opposed any attempt by the government to “change the definition of marriage.” The sheer magnitude of the affirmative vote was seen as a clear sign that the measure will be enacted when it comes up for a final vote, probably early in 2014. Under the terms of the legislation, which establishes civil marriage, religious bodies will have to “opt in” if they want to perform valid marriage ceremonies for same-sex couples.

SENEGAL – Police detained five women on suspicion of being lesbians at a birthday party being held at a restaurant on November 11. The restaurant in question has been identified in the local press as a meeting point for gay men and lesbians. Boston Globe, Nov. 13. The Voice of America (Nov. 20) subsequently reported that the court had acquitted four of the women for lack of evidence and that the fifth, a minor, was being tried separately in a juvenile court. Police claimed that the women had been observed kissing each other. Criminal penalties for homosexual conduct in Senegal range up to five years in prison and fines up to $3,000.

SINGAPORE – The High Court rejected an application by Lawrence Bernard Wee Kim San to have sexual orientation discrimination by private sector employers in Singapore declared unconstitutional, reported Straits Times on Nov. 27. Mr. Wee claimed he was harassed by his employer, Robinsons, due to his sexual orientation, forcing him to resign. He filed suit in December 2012, but was unsuccessful as Singapore does not legislatively outlaw sexual orientation discrimination. He filed an affidavit in August 2013 asking the High Court to declare that Article 12 of the Constitution, which guarantees equal protection of the law, required that the national law against discrimination include sexual orientation, but the Attorney General argued that the provision would only apply if the government violated the individual’s rights, and that Mr. Wee lacked standing to seek this declaration.

SOUTH KOREA – The Supreme Court overturned a decision by the Korea Media Rating Board which would have restricted exhibition of a 30-minute romantic comedy about a young gay couple, titled “Just Friends?”, to teenage audiences. The KMRB categorized the film as “teenagers restricted,” finding it to be “hazardous for teenagers due to body exposure as well as detailed and direct portrayals of sexual encounters.” The production company appealed, and the Supreme Court said, “It is difficult to discern direct or detailed portrayals of elements that are provocative or dangerously prone to mimicking, compared to other films rated teenagers restricted. Considering homosexuality as a hazard, and thereby making restrictions, imposes serious limitations on the human rights, rights to pursue happiness and other rights of sexual minorities.” Hollywood Reporter (Nov. 14).

TRINIDAD & TOBAGO – Caribbean Update (Dec. 1) reported that AIDS-Free World, described as “an international advocacy organization,” was filing a legal action against Trinidad & Tobago
over the country’s explicit prohibition on the entry of “homosexuals.” The news source did not indicate which forum will be adjudicating this claim.

UGANDA – Bernard Randall, 65, a British subject resident in Uganda, was facing prosecution and a possible jail term in a trial scheduled for December 4 for engaging in homosexual relations with a Ugandan man. Both men were charged with criminal conduct after images contained in private videos stolen from their home were published in a Ugandan newspaper. Randall told the British press that he may escape trial because of a refusal to Ugandan officials to extend his visa, which has expired, with the result that he will be deported before the trial date. The charge against Randall, “trafficking obscene material,” could subject him to a two year jail term. His partner, Albert Cheptoyek, 30, faces a “gross indecency” charge that could subject him to up to seven years in jail. The Guardian, Nov. 29.

UNITED KINGDOM – The Charity Commission ruled that Human Dignity Trust, a human rights organization that provides assistance to gay and lesbian persons in countries where homosexuality is outlawed, does not qualify as a charity on the ground that it does not provide a “public benefit.” HDT is appealing the Commission’s determination, which raises doubts about whether philanthropic organizations can engage in legal challenges and political action. HDT was established in London in 2011, partly to help fund legal action to overturn sodomy laws in foreign countries, noting that the overwhelming majority of British Commonwealth nations continue to have sodomy laws that were introduced by Britain during the colonial period and carried forward when the nations became self-governing. The Commission declared that HDT “is not established for exclusively charitable purposes for the public benefit” and did not “meet the public benefit requirement for a charity as its purpose is directed toward changing the law.” The Commission takes the view that law reform efforts are not, as such, “charitable” but rather political. Guardian, Nov. 18.

UNITED KINGDOM – A report by the House of Bishops Working Group on Human Sexuality stated that the Church of England, the nation’s established church, should end its ban on ministers of the church blessing same-sex relationships, reported The Guardian on Nov. 29. The report comes seven months after the church had reiterated its ban amidst the public debate over legislation allowing same-sex marriages. The legislation was passed and will go into effect by the summer of 2014. The report said that is was not advocating a change in the “church’s teaching on sexual conduct,” but, noting legal and social developments, said: “We believe that there can be circumstances where a priest, with the agreement of the relevant parochial church council, should be free to mark the formation of a permanent same-sex relationship in a public service but should be under no obligation to do so.” The report did not propose any specific liturgy to be used in such services, added that no member of the clergy should be required to offer such services, and said that this would not extend to “solemnizing same-sex marriages without major changes to the law.” So, it appears, the recommendation is to allow blessings without the religious ritual of marriage.

UNITED KINGDOM - An employment tribunal in Leeds awarded a lesbian forklift driver damages of 7500 pounds on her discrimination claim, finding that the employer created a hostile environment when a co-worker “repeatedly switched on the Babe Channel at work,” thus subjecting her to a flood of heterosexual pornography, and continually made remarks about her sexuality, reported the Daily Star (Nov. 30). The article concluded, “The Leeds tribunal partly upheld her complaint of discrimination against building materials supplier Knauf UK on the grounds of her sexual orientation and awarded damages for injury to feelings. They said having to watch the Babe show and suffer comments from [the co-worker] was ‘unwanted’ conduct.”

PROFESSIONAL NOTES

TLDEF – The Transgender Legal Defense and Education Fund is seeking a full-time staff attorney to work on discrimination issues based on gender identity and expression. For more information about TLDEF, visit their website at transgenderlegal.org. The complete job description for the staff attorney is on Idealist. “Applicants must have top litigation skills, determination, and a passion for working with and on behalf of transgender and gender non-conforming people.” Applications and inquiries can be directed to Noah E. Lewis, Staff Attorney, nlewis@transgenderlegal.org.

LAMBDA LEGAL – Lambda Legal has announced that it has open staff attorney positions in several of its offices. For more information, consult the organization’s website, lambdalegal.org.

VICTORIA NEILSON, the longtime Legal Director of Immigration Equality, left to take a position in the USCIS Office of the Chief Counsel in its Refugee Asylum Law Division, based in the Rosedale Asylum Office. Senior Staff Attorney AARON C. MORRIS became the Legal Director when Neilson left on November 13.
Austin describes Dee’s allegations, “the parties allegedly specifically discussed that [Rakower] would continue to accrue retirement savings while [Dee] would no longer be able to, and agreed that [Dee] would be entitled to one-half of [Rakower’s] retirement contributions and earnings for the period that [Dee] did not work at a job that provided her with a retirement plan.” The parties split up before New York enacted marriage equality, so they were never married and could not use the state’s Equitable Distribution Law as a basis to divided up assets upon termination of their relationship.

Dee filed suit after the split-up, claiming, among other things, that she was entitled to have an accounting of the amount of money to which she was entitled under this agreement, and to have Rakower pay it over to her, either on a theory that Rakower had a contractual duty to do so, or alternatively that Dee had an equitable claim to the money. Dee’s equitable claim pursued alternative theories: either that Rakower be treated as holding Dee’s share of the assets as a constructive trustee for Dee, or that Dee was entitled to the money on the theory that allowing Rakower to retain it under the circumstances would be unjust enrichment of Rakower.

Justice Lewis of Supreme Court in Brooklyn granted Rakower’s motion to dismiss these claims entirely, concluding that Dee’s factual allegations did not support any of these legal theories.

Reversing Justice Lewis on the contract claim, Justice Austin wrote, “These factual allegations adequately set forth the existence of a contract pursuant to which the plaintiff would quit working full-time, thereby ceasing to earn money toward her own retirement plan, and pursue part-time work enabling her to stay home to care for the parties’ children, in exchange for a one-half share in the defendant’s retirement accounts accrued during those years that the plaintiff refrained from working at a job which provided retirement benefits.” These allegations, if proven at trial, would sufficiently show that each party assumed an obligation to the other for their mutual benefit, the essence of a contractual agreement. Since Dee also alleged that Rakower breached their agreement by refusing her request for the money, the basic elements of a breach of contract claim were met. Rakower, of course, is denying these allegations, but that is not relevant when the issue is whether the court should dismiss the case before trial for failure by the plaintiff to allege the necessary facts to state a legal claim.

“The fact that the alleged agreement was made by an unmarried couple living together does not render it unenforceable,” Austin wrote, pointing to an important 1980 decision by the New York Court of Appeals, *Morone v. Morone*, 50 N.Y.2d 481, which established that such agreements between cohabiting unmarried couples could be enforceable as contracts, “provided only that illicit sexual relations were not part of the consideration of the contract.” Justice Austin found this case sufficiently similar to *Morone* to come within the scope of that precedent.

In his dissent, Justice Dillon argued that even if there was some oral agreement, it was not clear from Dee’s allegations that the parties had specifically agreed about what would happen if their relationship ended. Giving a close reading to Dee’s allegations, he saw only an agreement that within their relationship there would be a sharing of assets, with each party’s contributions, whether economic or non-economic, being for the joint benefit of both of them. Dillon argued that the court could not make a contract for the parties, only enforce whatever contract they actually made, and he did not think that Dee had alleged any specific agreement about what would happen if their relationship ended.

Austin’s responded that Dee’s allegations were sufficient, writing, “The plaintiff’s failure to specifically allege that there was a ‘meeting of the minds’ as to how the assets would be distributed upon the termination of the parties’ relationship does not compel the conclusion that the complaint fails to state a cause of action to recover damages for breach of contract. There is no requirement that a breach of contract cause of action include such an allegation in order to survive a motion to dismiss . . . where the complaint sets forth all of the elements necessary to plead a breach of contract cause of action.” Austin found that Dee’s allegations included “sufficient definiteness to the material terms of the alleged agreement between the parties to establish an enforceable contract.” That is, if a court ultimately found at trial that a contract was made, Dee’s allegations, together with evidence offered at trial, could provide the basis for a court to decide what to award as damages.

As to the constructive trust theory, Austin found that Rakower had correctly responded in this appeal that under the Employee Retirement Income Security Act, the money in her retirement account could not be subjected to a constructive trust. Even though she hadn’t made that argument to Justice Lewis, “it is a legal argument that appears on the face of the record and could not have been avoided had it been brought to the attention” of the trial judge. Austin also found that Dee had failed to allege that Rakower had been enriched at Dee’s expense, a necessary allegation for an unjust enrichment case. He also found that Dee’s allegations fell short of those necessary for an equitable action for an accounting.

Thus the equitable claims are out of the case, but the breach of contract claim is revived for trial. Dee also asserted other claims against Rakower, not specified in the appellate court’s opinion, so the case now resumes in Supreme Court in Brooklyn, including the contracts claim.

Michele Kahn represents Dee and David P. Rubinstein represents Rakower in this litigation.


16. Hameroff, Rebecca, I Do. Is That Okay With You?: A Look at How Most States Are Circumventing the Full Faith and Credit Clause and Equal Protection Clause to Not Recognize Legal Same-Sex Marriages From Other States and Its Effect on Society, 8 Fla. A & M U. L. Rev. 133 (Fall 2012).


21. Kemper, Ed, Hawaii’s Foray Into Same Sex Marriage: Too Soon for the Times? An Interview with Associate Judge Daniel Foley, 17-OCT Haw. B.J. 24 (Oct. 2013) (Foley, then in private practice, filed the first Hawaii marriage equality lawsuit and was co-counsel for the trial in 1996. This interview discusses that case in some detail.).


32. Schraub, David, Sticky Slopes, 101 Cal. L. Rev. 1249 (Oct. 2013) (opposite of slippery slope arguments; situations where bad decisions can get in the way of affirmative constitutional development).


34. Scorti, Mark F., From Stonewall to the Supreme Court: Part I, 43 Fam. L. (UK) 1176 (September 2013).


37. Scorti, Mark F., From Stonewall to the Supreme Court: Part I, 43 Fam. L. (UK) 1176 (September 2013).

(see Specially Noted, below; this is an IMPORTANT article about the doctrinal significance of U.S. v. Windsor in the developing equal protection jurisprudence of the Supreme Court).

40. Silber, Natasha J., Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law, 88 N.Y.U. L. Rev. 1873 (Nov. 2013) (theoretical exploration of how the Supreme Court has used insights of social construction theory to reformulate race discrimination law, and how such theory might also be used in gender and sexuality law).


42. Smith, Paul M., Julie Carpenter, Katie Fallow, Jessie Ammonson, and Micah Cogen, Supreme Court Issues Significant Decision on Unconstitutional Conditions Doctrine, 30-NOV Comm. Law. 26 (Nov. 2013) (Discussion of S.Ct. ruling mandating anti-prostitution policies by grant recipients of HIV prevention funds).


45. Stone, Geoffrey R., The Behavior of Supreme Court Justices When Their Behavior Counts the Most: An Informal Study, 97 Judicature 82 (September-October 2013) (statistical analysis of voting behavior of S. Ct. justices in the most significant constitutional cases, such as Lawrence v. Texas and U.S. v. Windsor).

46. Strasser, Mark, DOMA, the Constitution, and the Promotion of Good Public Policy, 5 Albany Gov’t L. Rev. 613-33 (2012).


SPECIALY NOTED

Siegel, Reva B., Forward: Equality Divided, 127 Harv. L. Rev. 1 (Nov. 2013) - The “Forward” to the annual Supreme Court review issue of the Harvard Law Review is traditionally a major doctrinal statement on an important area of constitutional law. Yale Law School Professor Reva Siegel’s Forward this year contrasts the Supreme Court’s developing equal protection doctrine as evidenced in the affirmative action and voting rights act cases (race discrimination) and the same-sex marriage cases (sexual orientation discrimination), showing how the Court is applying a different sort of analysis in the two kinds of cases, even though they formally invoke the same principle of American constitutional law: equal protection. The discussion of U.S. v. Windsor, in particular, is very illuminating on its potential significance in future equal protection litigation involving gay rights claims. * * * New York University Press has published Transforming Citizens: Transgender Articulations of the Law, by Isaac West (NY: NYU Press, ISBN978-1-4798-1892-1, 2014). The author is Assistant Professor in the Department of Communication Studies and the Department of Gender, Women’s and Sexuality Studies at the University of Iowa.

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.

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