

VIRGINIA SUPREME COURT SETS AGE OF CONSENT FOR SODOMY AT 18

The issue before the court in *McDonald v. Commonwealth of Virginia*, 645 S.E.2d 918 (Va. June 8, 2007), was a challenge to the constitutionality of the state sodomy statute as it was applied to the defendant, an adult man who claimed his consensual sex with teenage girls was constitutionally sheltered from prosecution. In the course of its decision, the Virginia Supreme Court established for the first time an age of consent for sodomy, 18, based on the state's statutory age of majority rather than the lower age of consent specified in some other sex crimes statutes. Justice Donald W. Lemons wrote for the unanimous court.

William McDonald, a man in his mid-forties when the events at issue occurred, was charged with private sexual intercourse and oral sodomy with a 16-year-old woman, and with private sexual intercourse and oral sodomy with a 17-year-old woman. He was found guilty of four counts of sodomy under Va. Code Sec. 18.2-361 and one count of contributing to the delinquency of a minor. Only the sodomy convictions were at issue in the appeal.

McDonald challenged the constitutionality of the sodomy statute at trial, but because both the Court of Appeals and the Supreme Court deemed that it was unclear whether the challenge on due process grounds and under Virginia case law was intended to be a facial challenge or a challenge to the statute as applied to him, and because the facial challenge was not briefed at trial, the appellate courts would only consider the challenge to the statute "as applied."

Virginia Code Section 18.2-361 prohibits "crimes against nature." Under section (A), if a person "carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B." Section B, which was not at issue in this case, provides for enhanced penalties for specified sexual acts performed by a parent or grandparent upon that person's minor child or grandchild, with further enhancements if the child is below the age of thirteen. Section C defines par-

ents, grandparents and children for the purposes of this statute.

At trial, McDonald argued that the acts charged were private, consensual, without coercion, and not for pay. He argued that the age of consent in Virginia was fifteen, referring to other statutes dealing with statutory rape ("carnal knowledge") and contributing to the delinquency of a minor. The trial court rejected these arguments. The court of appeals, in a published decision, ruled that McDonald could only raise a challenge to the statute as it was applied to him. According to the Virginia Supreme Court's decision, the appellate decision recognized that McDonald predicated his argument upon a contention that the "victims" were above the age of consent. The appeals court ruled that "the statute 'is constitutional as applied to McDonald because his violations involved minors and therefore merit no protection under the Due Process Clause.'"

This language is deemed significant because of *Lawrence v. Texas*, 539 U.S. 558 (2003), and the controlling Virginia case, *Martin v. Zihler*, 269 Va. 35, 607 S.E.2d 367 (2005). Each of these cases turned upon the ability of the state to proscribe private consensual sexual conduct between adults.

In *Martin*, the adult female plaintiff had been in a sexual relationship with the adult male defendant, and, after the relationship ended, sued him in tort when she discovered that she was infected with herpes. He moved to dismiss, arguing that her conduct had been in violation of the state fornication statute, so she should be denied relief because the underlying conduct was illegal. The trial court granted this motion to dismiss. The Virginia Supreme Court reversed, ruling the case indistinguishable from *Lawrence*, in that the state fornication statute, like the Texas Homosexual Conduct Act in *Lawrence*, was an unjustifiable attempt to control the liberty interest which is exercised in making personal decisions, thus violating the Due Process Clause of the Fourteenth Amendment. As in *Lawrence*, the court in *Martin* took pains to point out that the actions at issue did not involve minors.

In the instant case, the court noted that Section A of Va. Code Sec. 18.2-361, the relevant

sodomy statute under which McDonald was charged, did not contain age restrictions. The court characterized McDonald as seeking to "borrow" age restrictions from the "Contributing to the delinquency of a minor" statute (which refers only to sexual intercourse between an adult and a child, but, depending on circumstances, applies only to children below the age of 15, 16 or 17), and the "carnal knowledge statute" (which proscribes sexual activity including "specified forms of sodomy," but puts the age of consent at 15).

Justice Lemons wrote that McDonald was wrong for two reasons: First, he was improperly (in the court's view) trying to "engraft" provisions or "perceived implications" from the "carnal knowledge" statute and the "contributing to the delinquency of a minor" statute to the sodomy statute. Second, the "real issue" is the legal status of the victims as "minors," as the sodomy law is only unconstitutional to the extent dictated by *Lawrence*.

The court noted that Va. Code Section 1-203 defines an "adult" as being a person of 18 years or more, that Va. Code Section 1-204 states that "unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age, and shall reach the age of majority when he becomes 18 years of age," and that Va. Code Section 1-207 defines a minor, a child or a juvenile as being a person less than 18 years of age. Because the sodomy statute has no express age of consent, the court reasoned, it must be applied in a constitutional manner in conformity with *Lawrence* and *Martin*. The court ruled that "[n]othing in *Lawrence* or *Martin* prohibits the application of the sodomy statute to conduct between adults and minors," and that, in an "as applied" challenge to a statute, the statute must be interpreted in a manner to remove constitutional infirmities. It may be argued that this court was doing its own "engrafting" to reach this conclusion, and choosing to overlook that nothing in *Lawrence* or *Martin* compels this conclusion, either.

Duke University Constitutional Law Professor Erwin Chemerinsky represented McDonald on the appeal, with Terry Driskill of Prince George, Virginia, on the brief. *Steven Kolodny*

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Massachusetts Constitutional Convention Rejects Same-Sex Marriage Ban

In a real old-fashioned cliff-hanger, the Massachusetts Constitutional Convention voted on Thursday, June 14, to reject a constitutional amendment to overrule the state Supreme Judicial Court's ruling on same-sex marriage in the *Goodridge* case. In order for the amendment, which was proposed by anti-gay-marriage advocates who obtained signatures from more than 170,000 registered voters, to be placed on the ballot, it needed to receive affirmative votes from at least 50 members of the 200-member Convention (comprised of all the state's elected legislators) from two consecutive separately elected legislatures.

During the term of the legislature that was elected in 2004, legislative leaders sought to prevent the measure from coming to a vote, after ascertaining that more than 50 members were likely to vote for it. But during the waning days of that legislature, the Supreme Judicial Court ruled that the legislature had an obligation to vote on a measure that had received sufficient signatures, and the proposal received 62 votes. Just days later, the legislature elected in 2006 took office. Some of those who had voted for the amendment had been defeated for reelection, replaced by supporters of same-sex marriage, but it still appeared that the measure might receive more than the 50 votes needed to put it on the general election ballot in 2008.

Thus ensued a massive lobbying campaign on both sides of the issue. Governor Deval Patrick, House and Senate leaders, and prominent public officials (including, reportedly, both of the state's United States Senators) worked the phones seeking to persuade those who had voted for the measure in January. In the event, only 45 voted for the measure in a very brief session free of lengthy speeches or rancor, with 151 voting against. Even if those who were absent had all voted for the measure, it would have fallen short. There had been some suspense about whether the vote would take place, since the legislative leaders could conceivably have delayed taking up the issue until the last moment when an affirmative vote could have put it on the 2008 ballot and still be in compliance with the court's ruling.

Now the same-sex-marriage movement in Massachusetts will eventually turn its attention to the last remaining state law issue, the 1913 provision that prevents issuing marriage licenses to non-resident same-sex couples whose home state's law would expressly prohibit the marriage. As construed by the Massachusetts courts, that provision at present allows same-sex couples from Rhode Island to marry in Massachusetts, but prevents such marriages from couples from all remaining states which either have constitutional amendments, statutes, or court decisions specifically holding that same-

sex marriage is not allowed in the state. The present ambiguities of Rhode Island law may be clarified soon when the state's Supreme Court finally takes up on the merits a pending interlocutory question of whether that state's trial courts have jurisdiction to conduct divorce proceedings for resident same-sex couples who were married in Massachusetts.

Gov. Patrick has said that he would sign a repeal of the 1913 provision, and supports legislative passage of such a repeal, which seems likely sometime in the future. A.S.L.

California Supreme Court Delays Argument in Marriage Case; Poses Questions to Parties

Rather than setting a date for oral arguments in the pending consolidated same-sex marriage cases, the California Supreme Court on June 20 asked the parties to submit written responses to four specific questions by July 18, indicating that it will schedule oral arguments after reviewing the responses. Thus, it seems likely that a final ruling in the case will not occur until sometime in 2008 at the earliest, and probable that the Connecticut Supreme Court's ruling on its marriage case, which presents many of the same issues, will be rendered before the California oral arguments take place.

The first question asked the parties to list all the "differences in legal rights or benefits and legal obligations or duties" that "exist under current California law affecting those couples who are registered domestic partners as compared to those who are legally married. The second ask the parties to describe "the minimum, constitutionally-guaranteed substantive attributes or rights" of marriage under California's constitution, referencing such landmark state decisions as *Perez v. Sharp*, 32 Cal.2d 711 (1948), the case in which the court struck down the state's anti-miscegenation law. Third, the court asked whether "the terms 'marriage' or 'marry' themselves have constitutional significance under the California Constitution?" Or, put another way, whether the legislature could, consistent with the state constitution, "change the name of the legal relationship of 'marriage' to some other name," assuming all rights and obligations associated with marriage were preserved under the new name. Finally, the court asked whether the statutory provision enacted as part of Prop. 22 back in 2000 — Family Code sec. 308.5 — should be interpreted to apply only to the issue of recognition of foreign same-sex marriages, and whether this might result in federal constitutional problems under the Full Faith and Credit Clause or the Privileges and Immunities Clause of the U.S. Constitution in the event that Californians could enter into same-sex marriages in the state while such marriages contracted outside the state would not be recognized.

An odd batch of questions, as one would have expected that much of what they seek would have been addressed in the briefs already submitted. Reading tea-leaves from these questions, it sounds like the court wants the parties to help it think through an appropriate remedy, assuming it agrees that excluding same-sex couples from the full legal panoply of marital rights and status raises a significant state constitutional issue. One possible answer, that given by the Court of Appeal in this case, see *Marriage Cases*, 49 Cal. Rptr. 3d 675 (2006), is that the legislature has already remedied any inequality through enactment of the Domestic Partnership law, a point vigorously contested by plaintiffs. Another might be for the court to hold that the DPA does not close the deal adequately and to toss the issue back to the legislature, knowing that the legislature in 2005 actually approved a marriage bill that was subsequently vetoed by the governor, on the ground that Prop. 22 precluded legislation and that the matter was pending before the courts.

In any event, the posting of the questions suggests that the court is already engaged with the issues raised by the case and considering the possible consequences of alternative approaches to the issue. The questions were discussed extensively in California newspapers on June 21. A.S.L.

Federal Court Avoids the Merits in Transgender Discrimination Case Against the Air Force

Avoiding a ruling on the merits of the plaintiff's constitutional and estoppel claims, U.S. District Chief Judge Walter Herbert Rice awarded judgment to the defendants on July 5 in Joanne E. DeGroat's suit over her discharge from the Air Force in 1989. *DeGroat v. Townsend*, 2007 WL 1956701 (S.D. Ohio). Judge Rice found that DeGroat, a post-operative male-to-female transsexual, was no longer medical qualified for reinstatement, and her remaining recovery theory boiled down to a claim for retirement benefits over which the federal district court lacked jurisdiction.

DeGroat, then known as Joseph W. DeGroat, joined the Air Force in 1974, and was assigned beginning in 1985 as an instructor at the Air Force's Institute of Technology at Wright-Patterson Air Force Base in Dayton, Ohio. DeGroat began consulting Air Force medical personnel in 1980 for help with gender dysphoria, receiving counseling and medical treatment. She was advised as part of her treatment to cross-dress, but only while off-duty and off-base, and she abided by these restrictions. But some unknown informant reported to military police that she had shown up at church one Sunday in 1988 wearing female attire, and this set the commander of the base against her, leading to an investigation and her eventual Honorable Discharge from the service in August

1989, years short of her goal of retirement. At the time, she held the rank of Major and had earned highly laudatory ratings for her work as an instructor from her immediate supervisors. But the military brass on the base decided that her having appeared in public dressed as a woman justified a negative evaluation of her “leadership skills” and her “judgment and decisions,” even though she had never violated the order that was given to her not to cross-dress in public.

After exhausting internal administrative appeals, DeGroat filed suit in U.S. District Court, seeking either reinstatement or credit for the time she would have spent in the service, changing her status from discharged to retired eligible for benefits. The Air Force moved to dismiss her case, claiming that it was essentially a monetary claim within the exclusive jurisdiction of the Court of Claims. DeGroat stipulated that she was not seeking any monetary damages in excess of \$9,999.99, as a \$10,000 claim would deprive the District Court of jurisdiction. She was mainly interested in equitable relief. On that basis, Judge Rice refused to throw out the case, and the parties proceeded to engage on the merits, filing cross-motions for summary judgment. The court rejected both motions for summary judgment in 1996, observing that the briefs that were submitted were directed to the merits and would be evaluated on that basis. For some unexplained reason, it took Judge Rice over a decade to get around to releasing the opinion.

Rice found that DeGroat’s claim for reinstatement was mooted by the fact that she had undergone gender reassignment surgery after her discharge from the service. Recounting in some detail the “Declaration” submitted by the defendants from Dr. Samuel J. Peretsman, a highly ranking military urologist, Rice accepted the Air Force’s contention that a man who has undergone sex reassignment surgery including removal of testicles is not medically qualified to serve in the Air Force. (Figure it out; you have to have balls to serve in the Air Force!) Actually, Peretsman articulated the rationale that sex-reassignment surgery has many potential complications and “can affect the long term health and duty performance of the individual,” that many of those who have such surgery need to be maintained on hormone therapy with its own potential side effects, and may encounter hard-to-diagnose and manage prostatic conditions. According to Peretsman, allowing a post-operative transsexual to serve would not be in that individual’s best interest due to the need for specialized medical care that may not be available at many Air Force bases, and the Air Force maintains the policy, common to all the uniformed services, that to be medically eligible, an individual must be able to be deployed just about anywhere, including

remote locations with limited medical facilities.

Of course, this all sounds irrelevant to the case of Major DeGroat, who could easily be reinstated to teach at Wright-Patterson in proximity to all necessary medical expertise, and it would seem unlikely that the Air Force would deploy somebody of DeGroat’s experience and talent to a combat role, but the court says it is not entitled to second-guess military assessments of medical fitness.

Turning to the alternative remedy that Major DeGroat sought, credit for the years she would have served and changing her status to retired and eligible for benefits, Judge Rice found this inconsistent with her stipulation that she was not seeking benefits in the amount that would place exclusive jurisdiction of her case in the Court of Claims pursuant to the Tucker Act. According to Rice, there is some disagreement among the circuits about whether an equitable claim that would result in incidental monetary damages results in divesting the district court’s jurisdiction, but Rice followed the approach that would treat DeGroat’s remaining claim as in reality a monetary claim, so Rice concluded that the court lacked jurisdiction to award the remedy DeGroat was seeking and thus judgment must be awarded to the government. Thus, the court never addressed DeGroat’s estoppel claim (that the cross-dressing was at the direction and under the supervision of Air Force medical personnel, and should not be the grounds for discharge), or the claim that this was in effect status discrimination that violated the 1st and 14th Amendments of the Bill of Rights.

DeGroat is represented by Juila Anne Davis of Vorys Sater Seymour & Pease, a Columbus, Ohio, law firm. A.S.L.

N.Y. Court Treats Lesbian Formers Partners as Essentially Married in Ordering Equitable Distribution of Sale Proceeds of Townhouse

In *C.Y. v. H.C.*, 2007 WL 1775506 (May 30, 2007), a New York County Supreme Court judge held that lesbian domestic partners, seeking a dissolution of their relationship, “were, in all respects, a family,” in ruling that their jointly owned property would be split in the same way as marital property.

In October 2006, Justice Rosalyn H. Richter ruled that Yaffa Cheslow (C.Y. in the opinion) was entitled to summary judgment on her claim for partition and sale of the single family townhouse that she owned with Constance Huttner (H.C.). *Cheslow v. Huttner*, 831 N.Y.S.2d 346 (Oct. 17, 2006). [Author’s note it is not clear why the initials of the parties were reversed in this most recent ruling.] As part of her 2006 decision, however, Justice Richter denied Cheslow’s motion to divide the proceeds from the sale of the townhouse equally because the

Court found there to be disputed factual issues regarding the parties’ equitable share in the property. Accordingly, Justice Richter concluded that a hearing was necessary to determine the equitable share to which each party was entitled. The May 30 decision announces the outcome of that hearing.

According to the deed for the townhouse, the couple owned the property as “tenants in common, a one-half undivided interest to each.” Nevertheless, Huttner claimed at trial that, because of her disproportionate contribution to the down payment, closing costs, and maintenance expenses, she should receive 93% of the sale and Cheslow only 7%, rather than an equal division. Citing its equitable power to determine the appropriate division of the proceeds, the court examined “the nature of the parties’ relationship, disparities in down payments and mortgage payments, whether any such disparate contributions to the property were intended to be a gift” in order to determine the proper distribution of the proceeds of the property once sold.

The evidence adduced at trial established that the couple had been in a “committed personal relationship” between 2001 and 2005, during which time they registered as domestic partners in New York City and had a religious wedding ceremony. They lived with and raised Huttner’s two children from a prior relationship, and Cheslow gave birth to a child before their separation. With respect to their finances, the couple had commingled their funds in joint bank accounts, out of which the mortgage and other household and family expenses were paid. No effort was made to keep track of the contributions the individuals made to these accounts. “In terms of how they lived their lives, they essentially considered themselves married and operated as a couple,” wrote Justice Richter. “They held themselves out as, and were, in all respects, a family.”

The court concluded that “in light of the nature of the parties’ relationship, the manner in which they conducted their finances and the language contained in the deed, [Huttner] should not be entitled to any credit for the purportedly disparate contributions” she made to mortgage payments and other expenses. Notwithstanding Huttner’s attempt to argue that the parties had “an oral agreement that any disparate contributions for the townhouse would be ‘equalized’ in the event of a breakup,” the court refused to credit Huttner’s version of events, noting that “[i]t is simply not believable that [Huttner], an accomplished and experienced attorney, would have failed to put any such agreement into writing if such an agreement existed.”

The only modification to this 50/50 apportionment came with respect to the down payment. The court noted that there was documentary evidence about the parties’

disproportionate contribution to the downpayment of the property. "Since it is undisputed that [Cheslow] never matched [Huttner's] share of the down payment, the equitable result here, consistent with the document executed by [Cheslow], is to credit each of the parties from the proceeds of the sale, with their respective down payments."

Finally, finding that Cheslow's decision to leave the home in 2005 was involuntary and due to her fear of escalating verbal and physical abuse by Huttner, the court held that Cheslow had been ousted from the jointly-owned property. Consequently, Huttner was solely responsible for the costs of maintaining and operating the property after that date.

While it is not unprecedented for New York courts to use equitable principles in adjudicating the dissolution of same-sex relationships, the unequivocal declaration that a lesbian couple and their children constitute a family is noteworthy. Ultimately, however, the court did not rely on any domestic relations principles to achieve this result but rather rested its ruling on fairly run-of-the-mill equitable principles.

Nevertheless, in a *New York Law Journal* article dated June 7, Huttner's lawyer, Steven Harfenist, of Friedman, Harfenist, Langer & Kraut (Long Island, NY) was reported as stating, "We believe the judge's interlocutory decision was politically well-intentioned, but legally and factually incorrect in several key respects, and we intend to continue to evaluate all of our options as the case proceeds to its final judgment." Lorraine Nadel of Nadel & Associates represents Cheslow. *Anne Gibson & Sharon McGowan*

New York Court Orders Employer to Respond to Interrogatories on Anti-Gay Religious Beliefs

Do you believe that "homosexuality is a sin against God?" That "gays and lesbians are doomed to eternal damnation?" Do you "regard homosexuals as 'repulsive'?" These questions were recently put to an employer who fired a closeted gay employee for "poor work performance" upon discovering that the employee and the employee's daughter were gay. Despite the employer's objection to the questions on grounds of privacy and religious freedom, New York County Supreme Court Justice Carol Robinson Edmead ruled that the employer could not use those rights "as a cloak for acts of discrimination" and ordered the employer to answer the interrogatories. *Fairchild v. Riva Jewelry Mfg., Inc.*, 2007 NY Slip Op 31857, NYLJ, July 9, 2007, p. 18, col. 1 (June 28, 2007).

According to the complaint, plaintiff John Fairchild was hired by Ted Doudak to work in Doudak's jewelry business. Throughout Fairchild's employment, Doudak "maintained a work environment of overt sexual discrimination," telling Fairchild, whom he assumed was

straight, that he found homosexuals "repulsive." Doudak "frequently" quoted Bible passages describing homosexuality as a sin and even required Fairchild to deal with two gay representatives of Tiffany's so that Doudak himself would have no direct contact with them.

One day, Doudak questioned Fairchild about a lesbian magazine that was on Fairchild's desk. Fairchild informed his employer that he bought the magazine for his lesbian daughter. In response, Doudak "immediately began to denigrate" gay people. Fairchild informed Doudak that he himself was gay and that he was proud of his daughter. Doudak then brought out his Bible and read verses stating that "gays and lesbians were doomed to eternal damnation." The following day, Doudak fired Fairchild.

Fairchild sued for employment discrimination based upon his sexual orientation, a violation of both New York State and New York City law.

As part of discovery, Fairchild submitted the questions mentioned at the beginning of this article. Doudak refused to answer those questions, claiming they violated his right to privacy, impinged upon his freedom of religion, and were precluded by Federal Rule of Evidence 610. Fairchild then filed a motion to compel response to the interrogatories.

Justice Edmead began her analysis by first noting that New York law permits "liberal discovery," giving much discretion to the lower courts to determine what may be "material and necessary" to an action. In the action at hand, Fairchild sought to establish that Doudak's stated reason for terminating employment ("poor work performance") was nothing but a pretext for illegal discrimination. While both parties agreed that Fairchild could ask whether Doudak had said "homosexuality is a sin," they disagreed whether Fairchild could ask whether Doudak *believed* homosexuality was a sin.

In arriving at her decision to grant Fairchild's motion to compel response, Justice Edmead engaged in a balancing act weighing "the State's paramount duty to insure a fair trial" against the "highly protected," though "not absolute," rights of privacy and freedom of religion. She took note of cases involving religious discrimination where evidence establishing whether a witness held a particular religious belief was admissible. Although Fairchild's claim did not involve religious discrimination, Doudak's motivation for terminating Fairchild was central to the case. Thus, if Doudak's beliefs concerning homosexuals, whether founded in religion or not, could lead to an inference of improper motivation for firing Fairchild, then those beliefs are material. The government's interest in stamping out discrimination overcomes this slight limitation placed on Doudak's religious liberty, according to Justice Edmead, tipping the balance in favor of

disclosure of evidence that may show an illegal motivation for termination of employment.

Justice Edmead quickly disposed of Doudak's claim that the questions at issue violated Federal Rule of Evidence 610, a rule that prohibits inquiring into a witness's religious beliefs in order to influence the witness's perceived credibility. The questions in this case did not seek to establish the veracity of Doudak's testimony, but rather sought to gather evidence showing that Doudak's claimed reason for firing Fairchild was a pretext. Justice Edmead also noted that her ruling only related to discovery proceedings in the action, and that the trial judge would be the "final gatekeeper" in deciding the admissibility and possible prejudicial effects of all evidence. *Chris Bennecke*

Gay Employee Allowed to Bring Emotional Distress Case Against General Electric

A panel of the Ohio Court of Appeals has denied summary judgment to General Electric and one of its employees in the intentional infliction of emotional distress lawsuit filed by a gay employee who claimed he had been "subjected to insulting and offensive behavior as a result of his sexual orientation" for over 25 years, in *Tenney v. General Electric Company*, 2007 WL 1881315 (Ohio Ct. Appeals, 11th Dist., June 29, 2007).

Tenney had worked in a General Electric (GE) plant since 1973. He sued GE and several employees in 2000, alleging intentional infliction of emotional distress, tortious interference with employment, and sexual orientation discrimination under Ohio law. He described years of abuse and several serious incidents in support of his claim. In addition to constant verbal torment by fellow employees including animalistic grunts, obscenities, and graffiti targeting him specifically written in the washroom, Tenney also claimed that coworkers hit him with a stack of glass and caused serious and permanent damage to his groin.

Tenney's claim against Joanne O'Neil, the plant nurse, alleged that she berated him for his homosexuality, she told him he must be gay from having been raped as a child (he wasn't), and that she once physically molested him. He claimed that he had visited Nurse O'Neil because of chest pains, and that she had asked if she could give him a "motherly hug" and then proceeded to give him "an erotic embrace, pressing her breasts into him, putting her lips to his neck and his ear, and rubbing her hands up and down his back and 'tailbone,'" and that she told him she loved him and that God had sent her to him.

After a motion for summary judgment, an appeal, and a remand, only the emotional distress claim against GE, the plant foreman, and Nurse O'Neil remained. After all three were granted

summary judgment, Tenney appealed to the 11th District Court of Appeals of Ohio.

Speaking for the majority of a 3-judge panel, Judge William M. O'Neill found that the claim against the plant foreman did not rise to the level of intentional infliction of emotional distress, stating that "mere harassment is not enough; neither is humiliation or embarrassment." He found that Nurse O'Neil's comments towards Tenney were not actionable, but that her groping of Tenney was "the kind of conduct that is truly extreme and outrageous".

The dissent by Judge Diane V. Grendell accused Tenney of cleverly wording his claim as intentional infliction of emotional distress instead of sexual battery to avoid the statute of limitations (which had passed for a sexual battery claim). Judge O'Neill had distinguished Tenney's claim from a precedent case involving sexual battery, stating that Nurse O'Neil was not a sexual batterer because she "was not seeking personal sexual gratification for herself but was instead deliberately humiliating and inflicting emotional distress on a fellow worker;" and that "the touching was incidental to the mental abuse in this case."

Judge O'Neill also found that there were genuine issues of fact as to whether GE knew or should have known that as many as five different employees had victimized Tenney on at least eight separate occasions, finding that "these multiple acts over a period of time and [GE]'s inaction or finding no violations of its policies cumulatively create evidence of outrageous conduct." Accordingly, the summary judgment motion below was reversed with regard to GE and Nurse O'Neil, and Tenney will be permitted to bring his claim of intentional infliction of emotional distress against them to trial. *Bryan Johnson*

Kentucky AG's Office Offers Some Support for Domestic Partner Benefits

The Office of the Attorney General of Kentucky released an opinion indicating that state universities may extend employee health benefits to same-sex domestic partners. The opinion, authored by Assistant Attorney General James M. Herrick, sought to interpret Section 233A of the Kentucky Constitution, which is the 2004 state constitutional amendment stating that "Only a marriage between one man and one woman shall be valid or recognized as marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." KY. Const. Sec. 233A.

The University of Kentucky and the University of Louisville, presumably to compete with schools across the country, have recently announced plans to offer domestic partner health benefits to their professors and staff. In response to this announcement, Rep. J. Stan Lee

and Rep. Thomas J. Burch requested an interpretive opinion of the Attorney General's office to determine whether the universities' benefits plans would violate the 2004 amendment.

The opinion is a cautious one. It advises that the universities' current definition of "domestic partner" is too narrow and *does* attempt to confer a legal status substantially similar to marriage. Herrick dissects the universities' criteria for defining a domestic partner and finds that both textually and contextually, the policies are an attempt to approximate marriage in violation of the constitutional amendment.

Contextually, the benefits policies do not pass constitutional muster because of the exclusivity and quasi-permanence required to prove an applicant's status as a domestic partner. Under the terms of the policies, applicants must attest that neither is currently married to any other person, that they are not related by blood, and that they are in a permanent and committed relationship.

Textually, the University of Louisville's policy actually enumerates the list of qualifying individuals for benefits as "Employees, spouses & domestic partners, dependent children, retirees, surviving spouses and COBRA participants." The Attorney General's opinion notes that the words "spouses" and "domestic partners" are joined by an ampersand, unlike the other categories which are separated by a comma. This punctilious reading of the policy provides rather conclusive support for the Attorney General's determination that it is an attempt to approximate marriage.

For these reasons, the opinion determines that the universities' policies are too exclusive in defining domestic partners, because they essentially exclude all cohabitational relationships other than those that approximate a marital relationship. However, the opinion ultimately concludes that if the policies defined a domestic partner in a broader sense, by including family members or other dependents, the policies would not violate the constitution while still providing health benefits to same-sex couples. The opinion does not mention the economic feasibility of implementing the type of broad definition of domestic partner that it suggests, but it does at least recognize that same-sex couples may legally receive benefits through a partner's insurance plan. *Ruth Uselton*

[After this opinion was issued, the University of Kentucky announced that it would revise its benefits plan along the lines suggested by the opinion in order to be able to continue providing benefits for same-sex couples. *Courier-Journal.com*, June 18. This led some Republican state legislators to call for new legislation barring such benefits plans, and Governor Ernie Fletcher issued a call for the legislature to return from its recess to a special session to address this, as well as other issues. However, the

Democratic leaders of one house of the legislature absolutely refused to reconvene for this purpose. The Attorney General's office also rejected a request from the Family Foundation of Kentucky that it reconsider its ruling apparently authorizing partner benefits on a non-discriminatory basis, opining instead that because the FFK had been threatening to bring a lawsuit on the matter, the office was precluded from issuing another ruling. *Courier-Journal*, June 30.]

Federal Court Denies Man's Discrimination Claim Under Employee Benefits Plan that Excludes Non-Married Heterosexuals

On July 12, 2005, Jason Webster, an employee of Partners Healthcare System (Partners), filed a discrimination complaint against Partners before the Massachusetts Commission Against Discrimination (MCAD). Webster's complaint alleged that Partners' employee benefits plan violated a Massachusetts anti-discrimination statute, M.G.L. ch. 151B sec. 4, because the plan offers employee benefits to unmarried same-sex domestic partners of its employees, but not to unmarried different-sex domestic partners. The Massachusetts statute in question makes it unlawful for an employer to discriminate against an employee on the basis of sexual orientation in compensation or conditions/privileges of employment.

In *Partners Healthcare System, Inc. v. Sullivan*, 2007 WL 1810218 (D. Mass. June 25, 2007), Partners brought an action for injunctive relief against the defendants, MCAD and Webster, to enjoin the discrimination proceeding as preempted by the Employment Retirement Income Security Act (ERISA). U.S. District Judge Joseph Tauro held that the Massachusetts discrimination statute was preempted by ERISA. According to the court, "the purpose of ERISA preemption is to allow employers to construct one national pension and benefit plan, which can control the payment of benefits to beneficiaries across several states."

Plaintiff, Partners, has employees in Massachusetts, Rhode Island and New Hampshire and offers various benefits plans to its employees, including benefits for same-sex domestic partners. In defense of its employee benefits plan, Partners argues that because state marriage laws treat homosexuals differently, it struck a balance by providing benefits only for domestic partners who are homosexual and cannot get married outside of Massachusetts. Thus, the intention of Partners is only to provide benefits to couples who have achieved a marriage-like status. For heterosexual couples this status is obviously achieved by legal marriage; for homosexual couples, this is achieved through legal marriage in Massachusetts, civil unions in New Hampshire and a few minimal relationship recognition laws in Rhode Island.

In response to Partners' motion for summary judgment, defendants moved to dismiss based on the judicial doctrine of *Younger* abstention. This procedural rule calls for the judiciary to abstain from deciding cases enjoining state officers in ongoing state judicial proceedings that implicate important state interests.

At issue in this case was whether there can be an important state interest in the MCAD adjudicating a dispute under a state law that may be preempted by ERISA. Since the enactment of ERISA, scores of lawsuits have occurred over ERISA preemption, which essentially requires that ERISA supersede all state laws that "relate to" any employee benefit plan. 29 U.S.C. sec. 1144(a).

Judge Tauro concluded that the Massachusetts statute runs counter to ERISA's requirement that an employee benefit plan shall "specify the basis on which payments are made to and from the plan." In other words, the Massachusetts statute "governs the payment of benefits," which is a matter of crucial importance to plan administration. In support of the holding, Judge Tauro cited several cases that have struck down anti-discrimination statutes as applied to ERISA-covered benefits plans. If the state anti-discrimination statute could dictate who employers had to include within their employee benefit plans, the uniformity of employer benefit plans (the purpose of ERISA) would be destroyed.

MCAD defendants also attempted more creative arguments. For example, ERISA supersedes state laws, but it does not alter federal laws; therefore, MCAD argued that the Massachusetts statute is coextensive with Title VII. This was a futile argument given that Title VII does not include sexual orientation as a forbidden ground of discrimination, and attempts to interpret the statute to include sexual orientation discrimination have been repeatedly denied by the federal circuit courts.

The Gay and Lesbian Advocates and Defenders (GLAD) attempted to intervene as a defendant, but their motion was denied and the group instead filed an *amicus* brief in support of defendant Webster. The brief filed by GLAD is not available on West Law, but GLAD's support for defendant is curious. The court referenced GLAD's argument briefly, and the crux of it seemed to support broad administration of the Massachusetts state anti-discrimination law. However, Partners' benefits plan was already inclusive of same-sex domestic partners and specifically excluded non-married heterosexual couples in an attempt to provide equal coverage to all "marriage-like" relationships. If the court had found for defendants, it could seemingly have opened the door for other states to specifically exclude benefits for same-sex couples, which, as the court stated, would undermine the entire purpose of ERISA — to provide

uniform health benefits despite the patchwork of state laws. *Ruth Uselton*

Charney Court Sets Schedule and Confidentiality Rules for Gay Discrimination Lawsuit

New York County Supreme Court Justice Bernard J. Fried has issued a detailed schedule for the pretrial process in the now-combined lawsuits involving gay attorney Aaron Brett Charney and his former employer, the law firm of Sullivan & Cromwell. *Charney v. Sullivan & Cromwell*, No. 100625/07. The parties had failed to agree on the details of the pretrial schedule, and Charney's lawyers submitted a proposal schedule to the court during June. The schedule Justice Fried issued on June 26, if ultimately adhered to by the parties, provides almost a year for the discovery process to unfold, with a target date of next April 18 to conclude discovery. A trial would not be scheduled until after discovery is completed.

Charney filed his lawsuit against Sullivan & Cromwell on January 16, charging sexual orientation discrimination and retaliation. Charney initiated his lawsuit with a barrage of publicity on the internet, which quickly spread to the print press. Sullivan & Cromwell discharged Charney and filed a countersuit on February 1. Initial wrangling over motions to dismiss have narrowed down the scope of both cases, which have been combined before Justice Fried.

Under Fried's schedule, initial pretrial discovery demands have to be made on or before July 20, although they can be supplemented by later discovery demands, depending on what initial discovery turns up in the way of information. Interrogatories (written questions seeking written responses) must be sent to the opposing parties by September 7. Fried is limiting each side to no more than 25 interrogatories. If they don't use up all 25 at once, they can generate more written questions later in the discovery process, but no later than 45 days before next April 18.

Any depositions (in-person questioning of potential witnesses under oath by attorneys for the parties) would begin no earlier than October 15. Evidently Justice Fried is interested in moving the case along, as he decreed that any "dispositive motions" (pretrial motions seeking summary judgment on the merits of the case) must be filed with the court by May 30, 2008, just six weeks after the close of discovery, and that the attorneys are to attend a "compliance conference" on September 12 to ensure that the pretrial activity is going along on schedule.

Because Charney is claiming compensation for emotional injuries, he must submit to a mental examination. Fried specified that such examination should take place after any deposition of Charney is completed, but no later than next February 18. Once discovery is finished

and any motions are submitted, the case will be ready for a trial, if one is needed. Although Justice Fried could theoretically dispose of the case by granting a motion for summary judgment to one side or the other, that would be an unlikely outcome in a case with such heavily contested facts.

Justice Fried also disposed of two other matters in the Charney cases on June 26, which both appear to relate mainly to S&C's concerns about the continued public discussion, both on-line and in the traditional media, about the claims being raised in these cases.

In one action, he denied a written request by Gera Grinberg's attorney, Gary Ireland, to have "certain deposition transcripts" unsealed. S&C had submitted a letter opposing the request.

Attorney Grinberg worked closely with Aaron Charney as a fellow associate at S&C on a variety of client matters, and their close working relationship seems to have sparked the incidents upon which Charney bases his lawsuit. Grinberg, and an attorney whom S&C hired to represent him, Edward Gallion, were both present at the meeting between Charney and S&C partners Vince DiBlasi and David Braff on January 31, the day before S&C discharged and sued Charney.

There is considerable dispute between Charney and S&C about what was said at that meeting, with Charney claiming that the only written record, which would back up his account, was made by Grinberg, who then turned his notes over to Gallion at that time for safekeeping. Charney has alleged that the Grinberg notes were improperly destroyed as part of a conspiracy between S&C and Gallion. Amidst the skirmishing over motions to dismiss, Grinberg and Gallion submitted to depositions focused on what occurred at that meeting, but the transcripts have been sealed, and S&C's lawyers criticized Charney for relying on and referring to that testimony in his amended complaint.

S&C placed Grinberg on paid leave after discharging Charney, and he is no longer employed by the firm. His attorney was seeking to find out what Gallion said in his deposition, to which Grinberg, as a non-party to the case, does not have access, as Grinberg considers his own future course of action.

In his June 26 order, Justice Fried provided no explanation for why the depositions must remain sealed, other than that the request to unseal them was "without merit." Did Gallion say anything that would confirm the charge that he was collaborating with S&C to suppress the potentially explosive contents of the January 31 meeting?

Justice Fried's other action on June 26 was to approve a stipulation (agreement) between the parties on the issue of confidentiality, in the form of a complicated ten-page document governing the treatment of information produced

during discovery in the case. Either party can designate any document or other information as confidential, and the opposing party can oppose such designation, the matter to be resolved by the court. Anybody drawn into the case as an expert witness, court reporter, or other person not already bound by the confidentiality requirements imposed by the lawyers' Code of Professional Responsibility will have to sign a special form signifying that they have read the confidentiality document and agree to abide by its requirements.

Justice Fried's approval of this stipulation will allow S&C to keep as much of the information that makes this story so interesting out of the public eye as it possibly can, since the stipulation also applies, with limited exceptions, to the conduct of the trial and afterwards, with provisions governing the return or destruction of any confidential documents and strict rules about references to or quotations from them during court proceedings or in papers submitted to the court.

From the earliest stages of this lawsuit, S&C has shown great concern over public exposure of its inner workings, and its discharge and countersuit against Charney were premised largely on the publicity campaign he waged when he filed the lawsuit, as well as his leaking of documents to the *Wall Street Journal* that were mentioned in an embarrassing article about morale problems at the firm. By getting Charney's agreement and the judge's approval of the confidentiality stipulation, S&C may succeed in keeping the bloggers and the press from access to the kind of materials that it successfully labored to get removed from Charney's original complaint. A.S.L.

Federal Civil Litigation Notes

Fifth Circuit — Texas — Affirming a jury verdict and refusing to upset the district court's granting of summary judgment against several claims, a panel of the 5th Circuit ruled per curiam in *Russell v. University of Texas of the Permian Basin*, 2007 WL 1879157 (June 28, 2007) (not officially published), that the defendant university had not violated Title VII in the case of Suzan Russell, who was denied a tenure-track teaching position and ultimately left the employ of the university. According to the court's summary of the facts, both Russell and her department chairperson, Sarah Shawn Watson, are lesbians. Russell claims that Watson subjected her to a hostile environment by persistent unwanted sexual advances, and that ultimately she lost the opportunity to move from a non-tenure-track visiting appointment to a tenure-track appointment because of her refusal to respond affirmatively to Watson's advances. The trial judge had granted summary judgment on hostile environment and retaliation claims, but let a sex discrimination claim

go to the jury, which ruled against Russell. According to the court of appeals ruling, the weak link in Russell's case was the failure to show any causative link between her rejection of Watson's advances and any adverse personnel action. Even accepting the district court's conclusion that failure to offer Russell the tenure-track position could be deemed an adverse employment action for purposes of Title VII, the court found nothing but inadmissible hearsay to support Russell's allegations about the reason for her turn-down. Russell had testified that one of the members of the search committee (which voted unanimously to recommend another candidate) had told her that Watson said "some really nasty things" about Russell during the committee's deliberations, and that Watson "did her in," but the court considered this to be inadmissible hearsay and found that a unanimous decision by a six-member committee could not be attributed to Watson. The court also found that Russell's pretrial allegations about Watson's conduct did not meet the demanding test for determining whether unwanted sexual attention was sufficiently detrimental to constitute a hostile environment, upholding the summary judgments on harassment and retaliation.

Ninth Circuit — In Setiawan v. Gonzales, 2007 WL 1829229 (June 27, 2007) (not officially published), a unanimous panel ruling in a summary proceeding found that the petitioner, a gay, Buddhist ethnic Chinese native of Indonesia, had not qualified for asylum, withholding of removal or protection under the Convention Against Torture. The Immigration Judge had found that he had not suffered past persecution on any protected ground, and had not demonstrated a well-founded fear of future persecution. What he did show was that the groups to which he belong are all socially disfavored in Indonesia and suffer various kinds of discrimination and poor treatment, but the test for refugee status is considerably higher than that. The court observed that the applicant must show that "he faces a particularized threat of persecution" if forced to return to Indonesia, and he presented no evidence on that point, merely generalized evidence about the disfavored status of the groups to which he belongs.

11th Circuit — The court sua sponte granted a motion for rehearing in *Mocheviciene v. U.S. Attorney General*, 2007 WL 1827836, vacating its prior opinion issued on April 12 and issuing a new opinion on June 26. The result is the same in this case of a Lithuanian woman and her daughter seeking withholding of removal from the U.S. on the ground that the mother, a lesbian, was likely to suffer persecution on return to their home country of Lithuania. As before, the key point in the court's opinion was that the mother's recent marriage to a man lent support to the IJ's questioning of her credibility in claiming to be a lesbian. In any event, the

court found that nothing presented by the appellant compelled reversal of the BIA's decision in the case.

Federal Circuit — In *McDermott v. San Francisco Women's Motorcycle Contingent*, No. 07-1101, the U.S. Court of Appeals for the Federal Circuit ruled on July 11 that Michael J. McDermott lacked standing to contest the U.S. Trademark Trial and Appeal Board's ruling, 81 U.S.P.Q.2d 1212 (TTAB 2006), approving the appellee's application to register the trademark DYKES ON BIKES. The application was originally denied by the Patent and Trademark Office, on the ground that the word "dyke" was "disparaging to lesbians." Evidently, someone in that office was at the same time politically-correct and clueless, not realizing that the applicant was an organization of lesbian motorcycle enthusiasts who embrace the word "dyke" to describe themselves. Having been subsequently educated about "with-it" usage in the LGBT community after the case was remanded for reconsideration by the Appeal Board, the PTO approved the trademark and published it for comment from the public on January 4, 2006. Michael McDermott, an individual who claimed to be offended by the trademark, filed an objection, which was dismissed by the Appeal Board on the ground that McDermott had shown to reasonable basis for his belief that he would be damaged by the registration of this trademark. The Federal Court Court of Appeals found no error in the Board's decision, rejecting the idea that McDermott had standing to oppose it based on his view that it is disparaging to men (now there's a shift in perspective) or that it is "comprised of scandalous and immoral material because the mark in full is associated with a pattern of illegal activity by the group applying for registration of the mark." But McDermott, as a man, would suffer no damage from registration of this mark, held the court, and McDermott's opposition papers "contain no allegations that his belief is shared by others and no reference to supporting evidence demonstrating such a shared belief." The panel that issued this per curiam decision designated it as a non-precedential disposition. Next step for this case? Is McDermott enough of a time-waster to file a certiorari petition?

Arizona — In case anybody was still wondering, Title VII does not forbid sexual orientation discrimination. Or so U.S. District Judge Frederick J. Martone pointed out in an unpublished decision in *Walraven v. Everson*, 2007 WL 1893645 (D. Ariz., July 2, 2007), granting a motion to dismiss the case. Walraven claimed to have been subjected to discrimination based on mental disability and sexual orientation while employed at the Internal Revenue Service, specifically seeking damages for a "sexually hostile work environment." Wrote Martone: "Plaintiff alleges that she was discriminated against after a manager at the

IRS ‘found out about her sexual orientation.’ She also contends that she ‘was subjected to insults, jokes or other verbal comments.’ Yet plaintiff does not allege that she was exposed to disadvantageous terms or conditions of employment to which men were not exposed. We agree with defendant that an allegation of discriminated premises on sexual orientation does not on its own state a Title VII claim. Plaintiff’s failure to allege discrimination because of sex is a fatal flaw.” The court also rejected a request for leave to amend the complaint, because she had failed to attach a copy of her proposed amended complaint to the pleadings, leaving the court no basis to “determine in what respect it differs from plaintiff’s original pleading.”

Arizona — U.S. District Judge David G. Campbell granted summary judgment to the employer in *Sorensen v. Southwest Behavioral Health Services, Inc.*, 2007 WL 1760763 (D. Ariz., June 18, 2007), a case involving claims of religious and sexual orientation discrimination and retaliation. Sharon Sorensen, a self-identified Jewish lesbian, was employed by the defendant as a behavioral health professional. She claimed to have encountered anti-Semitic remarks from a male employee, and complained about them to her supervisor. The supervisor investigated, the male employee denied having made the remarks, and the supervisor admonished him to be careful not to make any comments that could be perceived in a negative manner and that he would be terminated if the supervisor learned that he had made comments such as those described by Sorensen. The supervisor told Sorensen not to worry, because the male employee was a “good old boy.” Sorensen took this the wrong way and filed a grievance about it, which resulted in the supervisor being reprimanded orally and in writing and admonished about the employer’s non-discrimination policy, but the employer rejected Sorensen’s demand that the supervisor and male employee be punished further or that the company issue a public apology to the Jewish community. Sorensen was also upset because the same supervisor, a woman, when talking about lesbians, said “I don’t go that way” and “I don’t swing that way.” Sorensen decided that she had been subjected to a hostile environment by these comments. When her grievances and complaints at the company led management to conclude that the situation had become too volatile, they dismissed Sorensen. She filed a complaint under Title VII, and got a probable cause letter from the EEOC, then filed suit in federal court. Judge Campbell was convinced by the defendant’s motion that Sorensen had no valid federal claim, finding that the employer had acted reasonably under the circumstances, had enforced its non-discrimination policy, and had not fired Sorensen in retaliation for her filing the grievances. The court noted that in order for the supervisor’s comments

about lesbians to be actionable under Title VII, Sorensen would have to show that she had been subjected to a hostile environment due to her gender, and there was no evidence of that. In all, Sorensen worked for the employer less than a year.

California — In *Kentz v. Smith*, 2007 WL 1834707 (E.D. Calif., June 26, 2007), the plaintiff, a federal prisoner serving time in a private facility, brought an equal protection claim against the facility’s librarian, claiming she had refused him a position in the library because of his sexual orientation. Rejecting this claim and recommending judgment for the defendant, U.S. Magistrate Judge Dennis L. Beck found that the librarian had non-discriminatory reasons for not wanting to have the plaintiff working with her in the prison library. He had been employed in that position in the past, but his work assignment was interrupted by two periods in disciplinary detention, and after the second such period, there was no opening in the library. However, the plaintiff, unhappy with his work assignment, conducted an aggressive campaign to try to persuade the librarian to ask for him to be reassigned to the library so aggressive that she felt besieged and harassed and finally told him that she would not request his assignment to the library “because of his continuing harassing behavior toward her.” He became so belligerent that she had to call for a security officer to remove him from her office. She denied that his sexual orientation had anything to do with this decision. As against this evidence, plaintiff could produce only hearsay from third parties claiming to have heard the librarian say that she was not comfortable with plaintiff’s openly gay lifestyle, or that she had not hired him because of his “problems as a homosexual.” Magistrate Beck concluded that “plaintiff may defeat defendant’s motion only if there exists admissible evidence raising a triable issue of fact as to whether defendant intentionally discriminated against him based on his membership in a protected class. Plaintiff has not tendered any admissible evidence that defendant discriminated against him on the basis of his sexual orientation,” so judgment must be rendered for the defendant.

Idaho — In *Martin v. State of Idaho*, 2007 WL 1667597 (D. Idaho, June 7, 2007), District Judge B. Lynn Winmill granted summary judgment to the employer, the state’s Department of Corrections, on hostile environment and retaliation claims brought under Title VII by Sandy Martin, a female corrections officer. Martin had alleged that one officer had told another officer that he “got all crazy” and “forgot what he was doing” when Martin was around, and followed her around; a female officer called Martin into her office, had her look at an email on the officer’s computer, then began unbuttoning her shirt as she walked towards a private bathroom to change out of her uniform, stating

“It’s OK for you to fuck inmates, but it’s not okay for you to have a lesbian relationship with me?”; and that a third officer had stated that Martin could not work with inmates in the day room because she was “too cute” and had a “cute butt.” Martin eventually resigned. The court found that although these could constitute unwanted remarks of a sexual nature, the three incidents without more were not sufficient to constitute a hostile environment, and that Martin’s allegations of retaliation against her for complaining about these incidents fell short of being actionable.

Illinois — U.S. District Judge Robert W. Gettleman found that the airline pilots’ union did not violate its duty of fair representation to a pilot who had posted homophobic remarks on an electronic bulletin board, in violation of the employment rules of the pilot’s employer, when the union provided arguably negligent legal representation to the pilot in the arbitration process. *Held v. Allied Pilots Association*, 2007 WL 1991407 (N.D. Ill., July 10, 2007). As part of ongoing discussion on the bulletin about the deficiencies of the chairman of the union’s appeal board, Held posted a message calling the chairman, among other things, a “homosexual faggot retard,” a “dyke, low life asshole,” a “fag,” and a “little girl,” thus revealing his capacities for adult conversation about workplace issues. The union brought the posting to the attention of the airline, which initiated proceedings against Held culminating in his discharge, which was upheld in arbitration. In the suit against the union charging negligent misrepresentation, Judge Gettleman found that because Held’s termination was not wrongful or unlawful, and the facts alleged in his complaint showed that the union’s representation did not play a role in his termination, the action must be dismissed. “To cut to the chase,” wrote Judge Gettleman, “the allegations in the amended complaint demonstrate that plaintiff’s ‘gay-bashing’ posting constituted hate-related behavior that violated American’s Rule 32 and subjected plaintiff to termination.” Thus, the court granted the union’s motion to dismiss the case.

Massachusetts — Claiming that bar examiners had violated his federal constitutional rights by including an essay question on the bar exam that assumed the normality of same-sex marriages, unsuccessful test-taker Stephen Dunne filed suit against the bar examiners in federal court. *Dunne v. Massachusetts Board of Bar Examiners*, No. 07–11166. News of the filing stirred significant hilarity and scornful comments on legal blogs and in the print press. Dunne claimed that being put into a position where he had to write an answering requiring him to “affirmatively accept, support and promote homosexual marriage and homosexual parenting” violated his 1st and 14th Amendment rights, thus posing the novel, and quite

odd, question whether a test-taker's written answers to bar examination questions are compelled expressions of belief creating issues of constitutional dimensions. *Nat'l L.J.*, July 2, 2007.

Nevada — Here's an interesting strategic litigation question. Why would a lawyer represented a gay employee in a sexual orientation discrimination claim file suit in federal court when the only applicable law forbidding sexual orientation discrimination is a state law, and the facts clearly fall short of constituting any kind of federal claim? Well, here's another such case, *Kindinger v. Boulder Station, Inc.*, 2007 WL 1796247 (D. Nev., June 19, 2007). Corey Kindinger had been employed at Boulder Station Hotel and Casino in the food service department for over eight years when he was discharged on April 21, 2005, after complaints that he had been misappropriating tip money. Kindinger, who is gay, filed a Title VII action with a supplementary Nevada state law discrimination claim. He alleged sex and sexual orientation discrimination, hostile environment harassment, and retaliation. The company moved for summary judgment, asserting that Kindinger's attorney had failed to move the case along in a timely way and that, in any event, there was no merit to the case. Kindinger's claims, as they relate to the statute, seem to have boiled down to the argument that others also abused the tips policy and weren't fired, that a management official had muttered "faggot" under his breath in Kindinger's presence, and that he a "bad and false reference" from the employer had made it impossible for him to get new employment. District Judge Roger L. Hunt found that the company had investigated the charges against Kindinger, concluded they were true, and fired him for that reason. It didn't help that, according to the court's opinion, Kindinger had never filed a response to the employer's motion for summary judgment. The retaliation charge was largely nonsense, in the opinion of the court, because they would have to relate to Kindinger's filing of his discrimination charge, and the events he cited as retaliation took place before he filed the charge, so could not constitute retaliation. To the extent that Kindinger's case was really about alleged sexual orientation discrimination, the Title VII claim had to be dismissed in any event.

Ohio — In case anyone was in any doubt of the matter, Chief Judge James G. Carr makes clear in his decision dismissing a pro se sexual orientation discrimination complaint brought by David Aaron under Title VII of the Civil Rights Act of 1964 and 42 USC sec. 1983, in *Aaron v. Adecco USA, Inc.*, 2007 WL 1795946 (N.D. Ohio, June 20, 2007), that federal employment law does not forbid sexual orientation discrimination by private sector employers. Mr. Aaron's poorly written complaint, as summa-

rized by the court, alleges that he was hired by Adecco, a temp company, on August 12, 2006, and sent to work at K&K Interiors Warehouse in Sandusky, where the owner the company, a fellow named Kyle, made sexual advances towards him. Mr. Aaron had no objection to this. But within a period of days, K&K decided it did not need his services and he was sent back to Adecco, where he was promised another assignment but soon dismissed. He quoted someone, not otherwise identified, as telling him that his attraction "to guys" was objectionable to the company, or at least that seems to be the conclusion one might draw from his somewhat inscrutably worded complaint. Judge Carr observed that 42 USC 1983 is not applicable to private employers, and that Title VII does not forbid sexual orientation discrimination, as such. Taking note of the developing caselaw under which Title VII has been construed to protect gay employees from sexual harassment in the workplace, Carr found that Aaron's complaint could not be construed to allege such harassment. Indeed, he seemed to be happy about Kyle's sexual interest in him, and, in any event, his suit was against Adecco, not K&K. Thus, it was dismissed, and Judge Carr also certified, pursuant to 28 USC sec. 1915(a)(3), that there was no good faith basis for an appeal.

Virginia — U.S. District Judge James C. Cacheris, finding that pictures posted in a workplace ridiculing a single, 55-year-old male employee who lived with his mother, could not provide the basis for a Title VII retaliation claim where the employee in question claimed to have suffered a diminution of work assignments after he filed a civil rights claim based on the pictures. *Cumbie v. General Shale Brick, Inc.*, 2007 WL 1795735 (E.D.Va., June 18, 2007). Dana Cumbie complained to management, which investigated his complaints and had employees sign the company's anti-harassment policy, even though no employee owned up under questioning to have drawn or posted the objectionable pictures. After this incident, Cumbie, who was employed as a truck driver and paid based on his job assignments, began to experience fewer assignments, and a few months later took FMLA leave to care for his sick mother. While on leave he was effectively terminated, the company having sent his personal effects to his home although he had not requested them. Cumbie sued the company under FMLA and Title VII, claiming to have been subjected to retaliation for opposing unlawful conduct. Wrote Judge Cacheris: "The drawing posted in Plaintiff's workplace while offensive, tasteless, and insensitive could not lead a person to reasonably believe that a Title VII violation has occurred. Drawings One and Three, although juvenile and potentially hurtful, have no sexual connotations at all. Drawing One derives Plaintiff as a 'Momma's Boy' and Drawing Three mocks Plaintiff for his work

ethic and his affinity for motorcycles. Drawings Two and Four are a little more disconcerting, but not significantly. Drawing Two attempts to inappropriately ridicule Plaintiff as gay, and Drawing Four jests that Plaintiff is impotent and somehow interested in transsexuals. Although involving sexual references, the drawings do not appear to be so intimidating or insulting of Plaintiff as to be discriminatory." Consequently, Judge Cacheris concluded that Cumbie's discrimination complaints were not "protected activity," so the company's response to them, allegedly reducing his work and ultimately terminating him, could not be actionable retaliation under Title VII. One needs a thick skin in a Virginia workplace, evidently.

State Civil Litigation Notes

California — A Los Angeles County jury awarded \$6.2 million in compensatory damages and \$2,500 in punitive damages to Brenda Lee, an African-American lesbian firefighter who had sued the Los Angeles Fire Department on charges of racial and sexual orientation harassment in violation of state law. Two other firefighters who filed lawsuits contending they suffered retaliation for supporting Lee, Lewis Bressler and Gary Mellinger, were also vindicated in earlier proceedings. Bressler won a \$1.7 million jury verdict in April, and Mellinger settled his case last year for \$350,000. *Los Angeles Times*, July 5 & 6.

California — A Fresno County Superior Court jury awarded \$5.85 million in damages to Lindy Vivas in her discrimination suit against Fresno State University, accepting her claim that the school refused to renew her contract as the volleyball coach because of her advocacy of gender equity and her perceived sexual orientation. The gender equity claim was brought under Title IX of the federal Higher Education Act, and the sexual orientation claim was based on state anti-discrimination law. The verdict was almost \$2 million more than Vivas had sought in her complaint, and counsel for the university announced their belief that the jury must have been confused. Post-trial motions are likely, as well as an appeal if the matter isn't settled. *Associated Press*, July 9, *Fresno Bee*, July 11.

California — The state Supreme Court has been deluged with amicus briefs in the pending case of *North Coast Women's Care Medical Group v. Superior Court (Benitez)*, S142892, in which Lambda Legal represents Guadalupe Benitez, a lesbian who was denied fertility services by doctors at the Medical Group who stated personal religious objections to providing such services to unmarried women, a "policy" with an obvious disparate impact on lesbians. According to a July 9 article in *The Recorder* by Mike McKee, at least forty groups, acting either individually or jointly, had filed amicus briefs

in the case, twenty-four supporting Lambda's position that doctors may not deny services in a non-sectarian clinic setting governed by the state's public accommodations law based on their personal religious beliefs, while sixteen religious groups or conservative legal groups are arguing the contrary. The court has not yet set the date for oral argument.

Illinois — Threatened litigation against a homeless shelter in Chicago for denying services to a homeless lesbian was averted when a settlement was reached under which the shelter will train its employees and take other steps to ensure that the facility does not discriminate in violation of the law, which in Illinois and Chicago forbids sexual orientation and gender identity discrimination in places of public accommodation and public services. Michelle Wang, who filed the discrimination complaint with the Chicago Department of Human Services, will play an advisory role in assisting the shelter to provide proper training. An investigation by the Department showed that on the day Wang was denied services, there were at least two vacant beds at the shelter. Wang needed help when she broke up with her girlfriend and had to move out without the resources to obtain her own apartment. The ACLU of Illinois represented Wang in negotiating the settlement. *Chicago Tribune*, July 12.

New York — Mindlessly quoting an old ruling without any analysis about its continued validity, a panel of the New York State Appellate Division, 2nd Department, said in *Klepetchko v. Reisman*, 2007 WL 1704465 (June 12, 2007), that the "false imputation of homosexuality is 'reasonably susceptible of a defamatory connotation.'" The citation was to a 1984 decision of the same court, *Matherson v. Marchello*, 100 App. Div. 2d 233, which itself quoted from an older court of appeals ruling, *James v. Gannett Co.*, 40 N.Y.2d 415 (1976), which predates that court's constitutional invalidation of the state's sodomy law in 1980. Perhaps the lack of discussion accompanying this assertion is excusable by the fact that it is *dicta*, as the case apparently turns on the court's view that the challenged statement would not necessarily lead a reader to conclude that the writer, a newspaper columnist, was insinuating that the plaintiff was gay. *News Journal* columnist Phil Reisman, writing about "irresponsible dog owners, called Frank Kelepetchko "cowardly," and an "idiotic menace", and wrote that Kelepetchko lives with another middle-aged man. The court said that this statement "does not readily connote a sexual relationship," particularly given the context. But stringing the three comments together suggests to this reader that Reisman intended to make what he thought was a derogatory statement and not that Klepetchko was too poor to afford his own apartment! At any rate, this is another odd relic of New York jurisprudence, as every few years our courts repeat

this mindless mantra, ignoring contrary precedents from other jurisdictions or the incredible social progress that gay folks have made in the state. (At the time of the cited court of appeals decision, there were no openly-gay elected officials, and only one little village in upstate New York prohibited sexual orientation discrimination, while sodomy was a felony and gay people were routinely denied employment or fired from a wide range of jobs if discovered ...)

New York — In a ruling denying in part and granting in part a motion to dismiss, Justice Doris Ling-Cohan of New York County Supreme Court held that the Hispanic AIDS Forum may continue to pursue its discrimination claim against the Estate of Joseph Bruno, successor-in-interest to the landlord of the building that refused to renew HAF's lease. *Hispanic AIDS Forum v. Estate of Joseph Bruno*, 2007 WL 2003756 (July 11, 2007). This case had previously been to the Appellate Division, 1st Department, 16 App.Div.3d 294 (2005), which, reversing a prior motion ruling by Justice Marilyn Shafer, had concluded that a commercial landlord could require individuals to use anatomically-gender-appropriate restroom facilities that were made available to tenants and members of the public as part of the general facilities of the building. (The landlord had allegedly been perturbed about male transsexuals using the women's restrooms.) HAF was given leave to file an amended complaint. Justice Ling-Cohan was ruling on a motion to dismiss the amended complaint, and she found that HAF had stated a claim of sex discrimination under the state and city human rights laws by asserting that the landlord had refused to renew its lease because HAF would not stop its transgendered clients from use any or all of the public restroom facilities in the building. Ling-Cohan concluded that this allegation was conceptually different from that rejected by the Appellate Division, and not precluded. An absolute denial of any restroom facilities to transgender individuals would violate the statutes. She also found that New York courts had construed the state and city human rights laws to forbid discrimination against transgender individuals as a form of sex discrimination, and thus actionable, prior to the City Council's more recent amendment to the human rights law adding gender identity. However, she rejected disability discrimination claims, on the ground that there was no evidence that HAF ever specifically requested of the landlord any accommodation to the restroom needs of its transgender clients, and as to other claims the court found the issues res judicata as a result of the Appellate Division's ruling.

Vermont — Rutland Family Court Judge William Cohen has awarded Lisa Miller, of Winchester, Virginia, custody of the child she bore while civilly-partnered with Janet Miller-Jenkins, of Fair Haven, Vt. The decision was

made in the wake of parallel litigation in Vermont and Virginia over the effect of the Vermont civil union on the custody and visitation rights of Miller-Jenkins', the child's second parent. Courts in both states found that the Vermont court, in which Miller had instituted an action to dissolve the civil union, had primary jurisdiction over the custody and visitation decision concerning the child of the civil union. Judge Cohen's Final Order in the case, dissolving the civil union and ruling on various issues related to the dissolution, included this ruling on custody. Cohen awarded Miller-Jenkins visitation rights, and set a visitation schedule for the women to follow, under which she will have "parenting time" with the child on alternate weekends, and such time will alternate between Virginia and Vermont, with the parties to split the resulting transportation costs. "The purpose of this specific initial schedule is to facilitate reunification between [the child] and Janet," Cohen wrote, according to a June 18 report in the *Rutland Herald*. "The court has suggested that the parties utilize an outside facilitator to determine a long-term parenting schedule, but is not aware of what services are available to the parties in Virginia." The custody decision was premised heavily on the child's existing situation, where she is settled in a Virginia home, school and community. Applying the usual "best interest of the child" formulation, Cohen concluded that preserving the residential status quo was preferable, while recognizing the second parent's right to reunification and regular visitation.

Criminal Litigation Notes

Florida — Palm Beach County Juvenile Court Judge Peter Blanc ruled on July 2 that a teenager who beat a 39-year-old woman upon finding out that she was a pre-operative transsexual was guilty of aggravated battery but not of a hate crime. Judge Blanc stated that the defendant, whose identity was withheld because he is a minor, was not motivated by the victim's sexual orientation, but rather was acting out of anger and a desire for retribution at being misled. According to the evidence, the teen and a buddy were out picking up girls on a Friday night when they met the victim, who they believed to be a woman, outside a bar. The victim performed oral sex on the defendant in the back seat of his buddy's car, then came with him to Palm Beach, where they were settling down to have sex on the beach when the defendant discovered the victim's penis and freaked out, viciously beating her. The judge rejected the argument that the assault was committed in self-defense. A sentencing hearing will be held in August. The defendant's father expressed outrage that his son was being prosecuted, but that the victim was not being prosecuted for having sex with an underage person. The local

state attorney's office indicated that they do rarely prosecute consensual sex involving teens nearing the age of consent, one assumes especially if the teens initiate the sexual encounter. The victim did not testify at the trial, with the prosecution relying on testimony from eyewitnesses to the beating and the police. *Miami Herald*, July 3.

Pennsylvania — Pennsylvania District Judge Gail Greth dismissed disorderly conduct charges against Michael Marcavage and James Deferio, Christian evangelists who went on the Kutztown University campus to preach against homosexuality during the campus's observance of the national "Day of Silence." University officials maintained that they had a one-week notice requirement in place for off-campus groups that wanted permission to engage in political activities on the campus. Marcavage and Deferio, and the organization they represent, called Repent America, argued that this violated their First Amendment rights, as the campus is open to the public. In dismissing the charges, Judge Greth found merit to their argument, but opined that Repent America should have asked the university in advance for permission to come on campus. Responding to the incident, the school's trustees amended their rule to require only 24 hour notice from off-campus groups of an intention to engage in expressive activities on campus. Repent America contends this still violates its constitutional rights. A student who was arrested together with Marcavage and Deferio when they refused to disperse in response to a demand by the police had pled guilty. *Allentown Morning Call*, June 8.

Tennessee — In *State v. Anderson*, 2007 WL 1958641 (July 6, 2007), the Tennessee Court of Criminal Appeals affirmed a cumulative sentence of life without parol for Joshua Eugene Anderson, convicted in the murder of Sam McGhee and attempted murder of George England. Anderson was also found guilty of other charged crimes, including attempted aggravated robbery and felony murder (robbery). Anderson and an accomplice connected with McGhee and England in a gay bar in Knoxville, lured them to Anderson's home, then robbed and shot McGhee, threatened England, who successfully escaped, and stole McGhee's car. Anderson raised six issues on appeal, but the appellate concluded that none of the points were meritorious.

Legislative Notes

Military Recruitment on Campuses — Now that the Supreme Court has rejected a constitutional challenge to the Solomon Amendment, 10 U.S.C. sec. 983, in *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S.Ct. 1297 (2006), the Defense Department has proposed regulations to try to expand its encroachment on academic freedom, or so one might conclude

from seeing the proposed regulations, which appeared in the Federal Register on May 7, 2007. The comment period was opened through July 6. The proposed regulations, to be published at 32 CFR Part 216, could be construed to required schools to take steps to block demonstrations against the military policy while recruiters are present on campus. Among other things, the regulations require strict equality of treatment for military recruiters as compared to other recruiters, except they also insist in some instances on what might be deemed better treatment, including a guarantee of on-campus recruitment. It appears that DoD is reacting to reports from their recruiters about uncomfortable or unpleasant confrontations with student demonstrators on some campuses. The proposed regulations, in specifying grounds for finding that an institution has failed to comply with its obligations under the Solomon Amendment, includes: "Has failed to enforce time, place, and manner policies established by the covered school such that the military recruiters experience an inferior or unsafe recruiting climate, as schools must allow military recruiters on campus and must assist them in whatever way the school assists other employers." Perhaps this proposal will help to spark student activism on other fronts; after all, picketing recruiters from law firms that don't have enough minority partners or that represent exploitive corporations that violate environmental or child labor rules could set up a situation where military recruiters could not complain if they were picketed as well, right?

Federal Proposal — Military Caregiver Leave — Noting that a provision that would have granted family and medical leave to family members of military personnel who need time to care for their wounded dependents had been dropped from the recently-enacted Defense Appropriations bill, Senators Russell Feingold (D-Wis) and Robert Casey (D-Pa) introduced a stand-alone bill for that purpose, S. 1649. Under the flexible definition of the bill, LGBT employees of the federal government would be entitled to leave to take care of partners who are military members or reservists recuperating from injuries. The bill also encourages (but does not require) private sector employers to expand their family and medical leave programs to encompass such situations. *BNA Daily Labor Report*, No. 120, June 22, 2007.

Correction on Rights Laws — In our last issue, we enthusiastically reported that recent enactments meant that for the first time, a majority of states had laws banning sexual orientation discrimination. We were overenthusiastic; only 20 states have enacted such bans. However, we believe we were correct in reporting that a majority of the population lives in those twenty states, since many of the states lacking such laws have large geographical areas but relatively small populations, and those with

such laws are among the largest-population states in the country.

Federal — Senators Gordon Smith (R-Ore.) and Joseph Lieberman (I-Conn.) announced the introduction of S. 1556, the Tax Equity for Domestic Partner and Health Plan Beneficiaries Act, on June 7. This would amend the federal tax code to provide equitable treatment for domestic partnership health benefit, which are currently treated as taxable income, ineligible for the exclusion accorded to identical benefits provided to legal spouses of employees. (Note — Pursuant to DOMA, the federal government refuses to recognize as legal spouses same-sex partners who were married in Massachusetts or foreign countries that allow same-sex marriage.) A companion House bill was previously introduced as H.R. 1820. *BNA Daily Labor Report* No. 109, A. 13 (6/7/07).

Arkansas — Meeting the deadline to gather petition signatures before the measure goes into effect, a group ironically named Eureka Cares has filed a petition to repeal a domestic partnership registry ordinance that was adopted by the city council in Eureka Springs, Arkansas. The petition drive attracted 171 signatures, mainly collected by churches, and was being submitted for verification. State law requires that 15 percent of the number of votes cast for mayor in the last general election set the number for a valid referendum petition at the municipal level, so petitioners will need 144 valid signatures. *The Morning News*, June 15. City Clerk M.J. Sell concluded that the petitions were deficient under state law, and refused to accept them for filing. As a result, couples began to register and receive certificates.

California — For the second time, the California State Assembly voted to approve a same-sex marriage bill, voting 42–34 on June 5. While not specifically committing to veto this bill, Governor Arnold Schwarzenegger has indicated in public statements that the reasons that prompted his veto of the bill that was passed in 2005 have not changed. He takes the position that because of the passage of Proposition 22 in 2000, which enacted a provision of state law stating that same-sex marriages shall not be recognized in California, the legislature cannot authorize same-sex marriage. Proponents of the marriage bill, adopting a narrow reading of Prop 22, assert that it dealt with the issue of recognition of same-sex marriages performed elsewhere, and does not bar the legislature from altering the state's marriage law to allow such marriages. According to the Governor, the only legal routes to same-sex in California would be a decision by the state Supreme Court holding that it is constitutionally mandated, or a decision by the voters in a referendum to enact a same-sex marriage law. ••• On July 10, the Senate Judiciary Committee approved the same-sex marriage bill on a 3–1

vote. The bill has to go through policy committees in the Senate before it receives a floor vote.

Florida — Responding to a civil rights initiative from the Palm Beach County Human Rights Council, Lake Worth has become the third municipality in the county to amend its civil rights law to forbid discrimination based on sexual orientation, gender identity and gender expression. The initiative was inspired by the discharge of Largo City Manager Steve Stanton after he announced plans to undergo gender reassignment surgery. That story dramatically brought to light the discrimination faced by sexual minorities. Lake Worth Mayor Jeff Clemens, who had proposed the measure, which won unanimous backing, stated, “Lake Worth should always be on the cutting edge when it comes to fighting discrimination. This is just a step that will ensure that people are treated fairly regardless of their gender identity.” *Palm Beach Post*, July 6.

Maine — Governor John Baldacci indicated his intention to sign into law a bill passed by the legislature extending the state’s Family Medical Leave Act to include domestic partners and their children as family members of employees. The measure applies to all domestic partners, not just same-sex partners.

Maryland — On July 3 the Maryland State Board of Education decided to approve a proposed new sex-education curriculum for Montgomery County schools that will include discussion of homosexuality as part or the curriculum for the first time, according to a July 4 report in the *Washington Post*. The proposed curriculum has been the subject of much public argument and some litigation, and opponents of any discussion of homosexuality are still talking about going back to court. In 2005, a federal judge had halted implementation of an earlier version of the curriculum, requiring a new process that would allow input to groups opposed to the proposal. A third of the state board members abstained from the vote.

New Jersey — As a special commission established to examine the implementation of New Jersey’s new Civil Union Act began meeting, there were reports that civilly-united couples in the state have encountered difficulties in getting their unions recognized by employers for benefits purposes. In a July 9 press release, Lambda Legal reported on two United Parcel Service employees who had sought spousal benefits for their same-sex civil union partners and been denied by the employer, on the ground that they were not married. It seems likely that ERISA preemption would prevent this from becoming a viable lawsuit, since the benefits in question are provided under employee benefit plans subject to federal regulation, but the mounting evidence of such difficulties may provide a basis for returning the matter to the New Jersey legislature or the Supreme Court as evidence that opting for civil

unions results in tangible inequality for same-sex couples. (Of course, one confronts the additional problem that even if New Jersey were to change course and open its marriage law to same-sex couples, there would be some question whether New Jersey could compel employers to recognize such marriages for employee benefits plans subject to ERISA.)

New York — The State Assembly approved a bill that would make same-sex marriage available in the state on June 19 by a vote of 85–61. Assemblymember Daniel O’Donnell, a Democratic Manhattan representative, was lead sponsor of the measure, which had been proposed by Governor Eliot Spitzer. Senate Majority Leader Joseph Bruno, an upstate Republican, announced that the measure would not be considered by the Senate, so its passage was largely symbolic at this point. The Republicans hold a two-vote majority in the Senate, and Governor Spitzer has set the achievement of Democratic majorities in both houses of the legislature as his major goal for the next general elections in the state, in light of the roadblock posed by the Senate to a large portion of his legislative agenda. Unless the Republican leadership in the Senate sees passage of this bill as being in their political interest as part of the campaign to retain control of the Senate, it is unlikely it will receive a vote in that body prior to the next election.

Ohio — The Ohio State Board of Education has approved a model anti-bullying policy for public schools in the state, but decided to omit specific references to student characteristics such as religion or sexual orientation, race, or gender. Board members reportedly decided that mentioning specific categories would cause problems with some school districts, and news report indicated that the inclusion of sexual orientation was the real sticking point. The policy targets threats, taunts and intimidation through words or gestures, as well as physical violence, extortion, using the internet to spread gossip and rumors, and sending abusive or threatening instant messages. We suspect that a policy as wide-ranging yet vague as described in the news reports may encounter 1st Amendment difficulties when enforcement is attempted. *Cincinnati Post*, July 11. . *Wisconsin* — Voting on June 5, the Wisconsin legislature’s Budget Committee rejected a proposal by Governor Doyle to make health insurance and other benefits available to domestic partners of state employees. Republicans, who narrowly control the committee, prevailed in the party-line vote. It was expected that Democrats, who control the Senate, will attempt to include the benefits in that house’s version of the budget and then seek to negotiate inclusion in the final budget.

Law & Society Notes

American Psychological Association — The APA is conducting a review of its ten-year-old policy statement on psychological counseling of gay and lesbian clients. A six-member task force has been appointed to study the issue and report back to the organization. The major point of controversy is so-called reparative therapy, under which a psychologist attempts to help a person who is unhappy about being gay or lesbian to achieve a reorientation away from same-sex attraction and activity. The current policy, according to an *Associated Press* report published July 11, “opposes any counseling that treats homosexuality as a mental illness, but does not explicitly denounce reparative therapy.” The big battle will be over APA moves from that position to an outright condemnation of reparative therapy as improper practice. The task force process has attracted the attention of anti-gay groups, who are urging the APA to refrain from any change condemnatory of reparative therapy.

Federal Military Policy — On May 16, reacting to escalating media criticism of the bizarre “don’t ask, don’t tell” policy enacted by Congress in 1993, under which uniformed service members who are gay are allowed to serve provided they pretend that they are not gay and avoid saying or doing anything that would reveal their true sexual orientation, the Pentagon issued a statement on May 16, 2007, under the name of Cynthia O. Smith of the Defense Department’s Press Office. This curious statement asserts that the Pentagon must enforce the policy enacted by Congress, but pointed out that members “separated” from the Service under this policy “have the opportunity to continue to serve their nation and national security by putting their abilities to use by way of civilian employment with other Federal agencies, the Department of Defense, or in the private sector, such as with a government contractor.” Since the Bush Administration has essentially subcontracted to private sector companies a substantial portion of the functions that would otherwise be performed by U.S. troops, and Defense Department contractors may well provide higher pay and benefits and a superior working environment to that provided by the Defense Department, this observation seems to be all of a piece with the Administration’s subcontracting policies. Query: Does it reflect a strategy to make available to the Defense contracting sector some of the most qualified and best trained military personnel through the device of “separating” them from the Service for “homosexuality?” Has the LGBT rights movement underestimated the strategic competence of the Bush Administration in this regard, in light of its professed goal to privatize as much of the government as possible? Since the Armed Services are mandated by law to discriminate

against openly-gay personnel under a policy noisily supported by those solidly in the Administration's so-called political base, why not turn the policy to good effect by directing those "outed" personnel to the crucial economic sector of the Administration's base: defense contractors?

Federal Surgeon General Nominee — The president's nomination of Dr. James W. Holsinger, Jr., to be Surgeon General of the United States became controversial as LGBT rights groups brought to light his role in producing a "working paper" for a church committee on which he served in 1991, in which homosexual sex was characterized as "unnatural" and "unhealthy." This brought forth editorials in some leading newspapers questioning Dr. Holsinger's ability to separate his religious views from his public policy role. At a confirmation hearing before a Senate committee on July 12, Holsinger claimed that the statements in the 1991 paper did not represent his current views, was not intended to be published, and was not "an example of my scientific work." He also stated, "I can only say that I have a deep appreciation for the essential human dignity of all people, regardless of background or sexual orientation. Should I be confirmed as surgeon general, I pledge to you to continue that commitment." Holsinger's testimony came shortly after a prior surgeon general during the Bush Administration, Richard H. Carmona, caused a sensation by testifying about the politicization of his office on orders from political appointments of the Department of Health and Human Services, including suppressing scientific reports on political grounds and mandating that he mention the president at least three times on every page of any public speech he made. Dr. Holsinger averred that he could and would stand up to any political pressure to control his public acts or speech as surgeon general. *New York Times*, July 13.

Anglican Schism — A potential schism of the worldwide Anglican Communion seemed more likely after the executive council of the U.S. Episcopal Church announced on June 14 that it would not comply with a demand issued by the primates of the Anglican Communion to retract the U.S. church's liberal position on homosexuality, which had included consecrating openly-gay Gene Robinson to be the church's Bishop of New Hampshire. The primates had called for the U.S. church to refrain from consecrating any more openly-gay bishops and to stop blessing same-sex unions, steps that the leaders of the U.S. church are unwilling to take. Some conservative U.S. Episcopal churches have come under the sway of anti-gay African Bishops, leading to a split opening up in the U.S. church, in addition to the potential schism between the U.S. church and the world communion. *New York Times*, June 15.

United Church of Christ — Resolutions to define marriage strictly in heterosexual terms, submitted by state church conferences from Indiana and Kentucky that objected to the denomination's decision two years ago to endorse same-sex marriage, were kept away from the floor of the Church's biennial conference, which ended June 26 in Hartford, Connecticut. 650 of the 778 voting delegates supported taking no action on the resolutions. The General Synod was held in Hartford, drawing more than 11,000 of the church's approximately 1.2 million members. *Hartford Courant*, June 27.

Atlanta Lutherans — Reverend Bradley Schmeling of St. John's Lutheran Church in Atlanta, a 350-member congregation, has been removed by the Evangelical Lutheran Church in America from its clergy roster for coming out as openly gay, but initial press reports indicated that his congregation was standing behind him, even if that meant that the congregation could be subject to disciplinary action from the national church body. The congregation's president, John Ballew, said nothing would change at the church, commenting: "Our respect has only grown in the last 14 months [since the pastor came out]. For us, it means nothing." Rev. Schmeling has been at St. John's since 2000. *Associated Press*, July 6.

Illinois benefits — Illinois State Treasurer Alexi Giannoulias announced that beginning July 1 his department would extend domestic partner health benefits eligibility to same-sex partners of its employees. The treasurer's office had not been included when Governor Rod Blagojevich extended coverage to many state workers last year. Giannoulias explained that the coverage will help his office recruit competitively. *Associated Press*, June 17.

Illinois Bar Supports Civil Unions — The Assembly of the Illinois State Bar Association voted June 24 in favor of a resolution endorsing in concept Illinois House Bill 1826, which would provide a mechanism for civil unions that would provide unmarried couples, both same-sex and opposite sex, with the same legal rights available for married couples. The measure would also provide automatic recognition for couples moving to Illinois having contracted civil unions in other states. *SWNEBR.NET*, June 24.

Kansas — On June 19 the Lawrence, Kansas, City Commission finalized passage of a domestic partnership registry, which would be the first such operation in the state of Kansas. Although the registry is limited to Lawrence residents and provides no direct benefits, it does signify local recognition for unmarried-partner families and affords documentation that can be used to seek such recognition from local businesses and employers. *Wichita Eagle*, June 22. State Representative Lance Kinzer (R-Olathe), announced that he would ask the Legislature to repeal the measure, observing that the state had

authority to preempt whatever action the local government might take. Kinzer claims the registry violates the state's anti-marriage constitutional amendment adopted in 2005, thus rejecting the legal opinion by Attorney General Paul Morrison issued in April holding that the registry did not pose such a violation.

Michigan benefits fallout — As a result of a ruling by the Michigan Court of Appeals holding that public employment domestic partnership benefits plans violate the recently adopted marriage amendment to the state constitution, various employers have announced the end of existing benefits programs. The Ann Arbor school district announced, for example, that future labor contracts will not include domestic partnership benefits, although those now receiving benefits will continue to do so under the existing contract until it expires. The district has provided such benefits for the past five years. The city of Kalamazoo announced that four employees who had been receiving benefits coverage for their domestic partners could not receive the benefits after June 30, although the city was considering a proposal to redefine the benefits eligibility program in some way so as to preserve the benefits without violating the court's decision. The University of Michigan announced that it was redefining its program to make benefits available to any "other qualified adult" who lived together with an employee in a shared residence and met any of a variety of other indicia of financial interdependence. The American Family Association applauded the decision, urging the governor and other state and local employers to follow suit.

New Hampshire — Members of the State Employees' Association voted to ratify a collective bargaining agreement under which employees in same-sex relationships will be able to get benefits for their partners, according to a July 10 report in the *Concord Monitor*. As New Hampshire provides civil unions for same-sex partners, the agreement provides that a couple must either be in a registered civil union or enter into one within six months in order to gain the benefit.

Pennsylvania — A union representing state university employees in Pennsylvania has reached a tentative agreement on a new collective bargaining agreement with the State System of Higher Education under which domestic partner health insurance would be added to the menu of fringe benefits from which employees can select. If the union and the System's board ratify the agreement, state university employees will become the first union-represented state employees in Pennsylvania to have such a benefit. *Bucks County Courier Times*, July 7.

South Carolina — Responding to an inquiry from the General Counsel's office at the Medical University of South Carolina, the state's Office of the Attorney General issued a letter on May 2 advising that the University is empow-

ered to adopt a non-discrimination policy that includes sexual orientation. The University's trustees had been concerned whether such a policy would be ultra vires, in light of the lack of any state law forbidding such discrimination. Invoking the U.S. Supreme Court's opinion in *Romer v. Evans*, 517 U.S. 620 (1996), the Attorney General opined, "Thus, not only did we not find any federal or state law prohibiting MUSC from adopting the policy included in the resolution, *Romer* indicates to prohibit the adoption of such policies would violate the United States Constitution." The A.G. also opined that the general grant of authority to the University to adopt policies for "management and control of the university" was sufficient authority for it to adopt a non-discrimination policy governing its own operations. See *Opinion of the Attorney General*, 2007 WL 1651332 (S.C.A.G., May 2, 2007). Henry McMaster is Attorney General of South Carolina, but the opinion was signed on his behalf by Assistant Attorney General Cydney M. Milling and was reviewed and approved by Assistant Deputy Attorney General Robert D. Cook.

Texas — In what had appeared to be a close race until the final days, Ed Oakley fell short in attempting to become the first openly-gay mayor of a major U.S. city, when Dallas voters gave about 58% of their votes to Tom Leppert, a retired business executive with no political experience. Oakley was a veteran city council member. Although the mayoral election in Dallas is technically non partisan, Leppert is identified with the Republican Party and Oakley received the endorsement of the city's Democratic Party organization (which was noted as being unusual when it happened). Observers were divided on how Oakley's sexual orientation may have affected the vote. While he carried several election districts in the center city, the more conservative suburbs went heavily for Leppert. According to a June 17 report in the *Houston Chronicle*, the largest U.S. city with an openly-gay mayor is Providence, Rhode Island, with a population of 177,000, compared to Dallas's 1.2 million, which places it among the top 10 U.S. cities. Leppert and Oakley had topped the eleven-candidate field in an initial election. The run-off was held on June 16.

University of Virginia — Sticking a cautious toe in the water after having obtained an opinion from the Attorney General, the University of Virginia will recognize same-sex partners of its students and employees to the limited extent of allowing them to share gym memberships at the University. The Attorney General, Bob McDonnell, advised that so long as this benefit is offered uniformly, regardless of the nature of the relationship, to anybody who is living together with an employee or student, then there is no conflict with the state constitutional and statutory provisions forbidding same-sex marriages

or domestic partnerships. According to a June 21 report in the *Daily Press* from Newport News, Virginia Tech, Virginia Commonwealth University, and the College of William & Mary have all previously extended gym privileges to unmarried partners of employees and stiff in recent years.

Australian Body Documents Discrimination Against Same-Sex Couples

The Australian Human Rights and Equal Opportunity Commission (HREOC) has released a report, *Same Sex : Same Entitlements*, on the numerous ways in which same-sex couples and their children are discriminated against under Commonwealth (national) law. The report details 58 federal statutes that entrench discrimination against what are estimated to be 20,000 same-sex couples and families. The Human Rights Commissioner, Graeme Innes, pointed out that same-sex couples often pay more tax than opposite-sex couples because of discrimination in tax law, yet they cannot expect the same entitlements in employment, workers' compensation, veterans' entitlements, health care subsidies, family law, superannuation, aged care and immigration law. "Simple amendments to the definitions in a raft of federal laws would end this discrimination," Mr. Innes said.

President of HREOC, former Justice John von Doussa, who also led the Inquiry, said the discriminatory laws also have a negative impact on children. "The Inquiry found that the best interests of children would be better protected if federal, state and territory laws changed to recognize the relationship between a child and both parents in a same-sex couple," Mr. von Doussa said.

The report is available at http://www.hreoc.gov.au/human_rights/samesex/report/index.html.

The report was released in the same month as the state of South Australia finally commenced its own legislation to put lesbians and gay men on the same footing as heterosexuals when it comes to basic state property and financial rights. South Australia was the last of the Australian states and territories to do so. Under the Statutes Amendment (Domestic Partners) Act 2006, lesbian and gay couples in South Australia now have legal rights and duties in areas like property ownership, wills, next-of-kin, and disclosure of interest. The law applies to same-sex couples who live together as a couple on a genuine domestic basis for 3 years or more. (Under the Australian constitution, marriage is a federal responsibility and same-sex marriage is illegal. All other relationships are a state or territory responsibility.) *David Buchanan SC*

International Notes

Australia — The Victorian Law Reform Commission issued a report on June 7 recommending that the law be changed to allow same-sex couples to adopt children and to give single women (including lesbians) access to assisted reproductive technologies. The report also made recommendations concerning parental issues raised by surrogacy and home donor insemination techniques. The report urges that Victoria modernize its laws to bring it into line with the more progressive laws in the eastern states of Australia. *Australian*, June 8. ••• High Court Judge Michael Kirby has requested in writing that the Federal Government change the law governing pensions of public officials so that his long-time partner could be entitled to pension rights if he survives Kirby. According to Australian press reports, some of Australia's states have adopted policies extending pension rights to same-sex partners of state employees, so gay judges at lower levels of the judiciary have this protection, but as a judge of the nation's highest court, Kirby's pension entitlements are governed by federal law, and the federal government has yet to act.

Canada — The Anglican Church in Canada will not allow clergy to perform blessings for same-sex couples, despite national legislation opening up marriage regardless of gender. Although a majority in the church's general synod voted in favor of allowing such blessings, as did the parish priests, the bishops narrowly voted against, 21–19, presumably out of fear of getting the Canadian church thrown out of the world Anglican Communion, which is threatening to break with the American Episcopal church over this issue as well. *Globe and Mail*, June 25.

Canada — The Canadian Human Rights Tribunal has imposed a \$4,000 fine on Bobby Wilkinson of Ottawa and the Canadian Nazi party for spreading hate on a website and internet forum, on which their targets include the mentally disabled, Jews, Hispanics, blacks, gays and lesbians, gypsies, Pakistanis, Arabs, Chinese and Japanese. (They sound like close to equal-opportunity hate mongers to us; are there any minorities of which these guys approve?) According to a July 10 report by *The Canadian Press*, there is no evidence that a Canadian Nazi Party exists apart from the website, which has been shut down.

Colombia — The Associated Press reported on June 16 that the Latin American nation of Colombia might become the first country in the South America to legislate in favor of legal status for same-sex couples with respect to particular legal rights. The nation's Constitutional Court issued a ruling in February requiring that same-sex partners be recognized for shared property and inheritance rights. The UN Human Rights Committee had issued an opinion

on May 14 taking a similar position with respect to pensions. The legislation would go further, affecting health insurance and social security, as well as codifying the inheritance issue. The measure was approved by the lower house on June 14 on a vote of 62–43, having passed the Senate in a similar version in April. President Alvaro Uribe, who had stated support for the measure, was expected to sign it. However, according to a report in *El Tiempo* on June 19, these expectations were suddenly upset when several members of President Uribe's party broke ranks and voted against a conciliation report on the two bills presented to the Senate, which went down on a vote of 26–34. The lead sponsor of the legislation, Senator Armando Benedetti, called for the ouster of the four from the president's party. Although some municipalities in Latin American countries have extended recognition to same-sex partners, this legislation, if enacted, could have been the first to do so on a national level.

Cuba — Spearheaded by Mariela Castro, a sociologist who is the niece of Raul Castro, the acting President, a measure is being proposed to recognize civil law and inheritance rights for same-sex couples in Cuba. The Federal of Cuban Women drew up the draft legislation with the support of the governmental National Centre for Sex Education, of which Ms. Castro is Director. It has been presented to the Political Bureau of the Communist Party for consideration. If approved, it would be introduced into the Parliament for enactment. According to a June 18 report on Caribbean360.com, it would not officially address the issue of marriage, because that would require a constitutional amendment. (The Cuban Constitution, which defines marriage as a voluntary union between a man and a woman, has not been amended since 1962.) If the measure is enacted, it would make Cuba the first Caribbean island nation to recognize same-sex couples for any legal purpose.

Dubai — A Filipino worker in Dubai who stabbed his male roommate to death with a scissor, purportedly upon awaking to discover that the roommate had sexually molested him during his sleep, was sentenced to ten years imprisonment, according to a July 12 report in *Gulf News*. The defendant, identified as R.S., was convicted in the Dubai Court of First Instance, where the public prosecutor had charged him with stabbing the deceased once in his neck with a pair of scissors, consuming excess liquor and stealing the mobile phone of the deceased man. In his statement to the court, R.S. declared: "I woke up that morning feeling pain in my private parts and I was completely naked. I realised that the victim, who spoke to me about homosexuality the night before, had molested me during my sleep... I became irritated, grabbed the scissors and stabbed him once in the neck." R.S. claimed that he had not

intended to kill the victim, but could not control his anger.

Gibraltar — The Gibraltar High Court is considering an appeal of the government's refusal to afford a joint tenancy in a residential apartment to a lesbian couple. Nadine Rodriguez, the applicant to the court, fears that her partner, who is not recognized as a legal tenant, will be evicted if anything happens to Nadine. The claim is made that the government's refusal to recognize a joint tenancy violates Gibraltar's treaty obligations under the European Convention on Human Rights. *gibfocus.gi*, July 12.

Hungary — Gabor Szetey, State Secretary for Governmental Human Resources, became the highest-ranking Hungarian official to "come out" in a speech he gave to open the annual Gay Rights Day festivities in Budapest. At the same time, the Free Democrats' Alliance, a member of the country's governing coalition, has proposed allowing same-sex marriage by statute in Hungary. In order for the party's proposal to be enacted, it must persuade its larger coalition partner, the Socialist Party, which holds most of the cabinet positions, but as of a July 9 report in the *Budapest Business Journal*, that party had not commented on the proposal. In an email press release, the FDA stated: "There isn't and there can't be such a thing as partial liberty. Liberty is either a state of being for everyone, every day and in every facet of life in the country, or we can't talk about it. There isn't and there can't be a place in Hungary for discrimination against any religious, ethnic or sexual minority."

Iran — In reports published in the world press on July 10 concerning a recent execution of a man for committing adultery, sources in Iran indicated that about twenty men were then scheduled for execution on morality grounds, including some executions for "homosexuality." Most executions in Iran are public hangings, although in some cases stoning is the prescribed method. The daily newspaper *Etemad Melli* reported on July 9 that Jaffar Kiani was executed by stoning on July 5 in the cemetery of a small village near Takeston, the sentence being carried out by the local judge and law enforcement authorities. *International Herald Tribune*, July 10.

Israel — The Knesset, Israel's parliament, voted on June 6 to approve on first reading two bills offered by representatives of religious parties intended to suppress gay rights demonstrations. One would allow a ban on gay pride marches in Jerusalem through an amendment of the basic law governing that city, the other would suppress such events nationwide. According to press reports, the measure passed because the center and left elements of the governing coalition did not enforce party discipline and allowed a free vote to members, so the vote shows the sentiments across party lines to avoid

the kind of unpleasantness that occurred last fall when ultra-orthodox youths and young men protested against a scheduled gay pride march in Jerusalem with acts of vandalism and violence. Neither measure is likely to become law, since they will have to go through a committee process and at least two more floor votes. The immediate stimulus for the legislation was a recent decision by the police in Jerusalem to allow a gay pride march to take place on June 21. *Haaretz*, June 7. The Supreme Court rejected last-minute attempts by opponents to have the demonstration banned. The march took place without incident, although press reports indicated that the police sharply limited the length of the march and that security forces present outnumbered the marchers by at least 2–1 and possible 3–1. (Different media outlets gave different numbers.) One ultra-Orthodox man was arrested near the march route carrying a homemade explosive device, according to a report by the Associated Press.

Malaysia — A High Court judge ruled that former Deputy Premier Anwar Ibrahim's defamation suit against former Prime Minister Mahathir Mohamad must be dismissed. Dr. Mahathir had drummed Anwar out of the government and had him prosecuted for corruption and sodomy, a charge on which he was convicted and served six years in prison. The nation's highest court voided the sodomy prosecution in 2004, and Anwar is attempting a political comeback, now that Mahathir is retired. Although a prior suit by Anwar had been dismissed, he sought to bring a new suit based on Mahathir's public statements in 2005 defending his actions, in which he again stated that Anwar is gay. In a country where sodomy is serious criminal offense, calling somebody gay can be actionable. In the July 4 decision, High Court Judge Tengku Maimon Tuan Mat noted that the 2004 Federal Court ruling had made a "specific finding of homosexuality" between Anwar and his adopted brother, despite acquitting him on the specific sodomy charge against him. Thus, concluded the judge, no purpose would be served in allowing Anwar's new suit to go to trial, since it would fail on the merits. The report on this in the July 5 issue of *Straits Times* observed that this issue was unlikely to have any significant impact on Anwar's chances of reviving his political career, but his lawyer told reporters that he was quite upset at the dismissal and had instructed that an appeal be taken immediately.

Pakistan — The Supreme Court ordered that bail be set for a couple that is appealing a ruling by the Lahore High Court that they had violated the law by marrying. The husband is a female-to-male transsexual, the wife female, and law enforcement authorities charged them with attempting an unlawful same-sex marriage. The couple were arrested when the bride's family questioned the masculine bona fides of the

groom. They were sentenced to a fine and three years imprisonment. Although the husband, Shumail Raj, has had two surgeries as part of gender transposition, the work is not complete, and the court concluded that Shumail was still a woman. The family of the wife, Shahzina Tariq, wants the marriage annulled. The couple claims that they had married in part to protect Tariq from being sold into marriage to pay off her uncle's gambling debts, but that they are not homosexuals and are truly in love with each other.

Russia — On June 27, police were reported by the *Associated Press* to have blocked LGBT rights activists in Moscow from holding a demonstration, even though the organizers of the demonstrators had obtained official permission for the event to take place. The protestors had planned to rally outside the European Union's representative office in Moscow to demand that the Union impose a visa ban on Moscow Mayor Yuri Luzhkov, who has called homosexuality "satanic" and has banned past attempts to hold gay rights marches in the nation's capital. The official reason given by police for blocking the demonstration was that it would interfere with construction taking place nearby. *Florida Sun-Sentinel*, June 28.

Spain — Marking its new status as a leader on LGBT rights in Europe, Spain hosted a huge LGBT rights pride celebration centered in Madrid, with a large parade and rally and a call for unity among EU states in LGBT rights issues. According to the local organizers of the event, The Federal of Lesbians, Gays, Transsexuals and Bisexuals, thousands of people from outside the country came to take part, resulting in one of Europe's largest Gay Pride events. *El Pais*, July 2.

Sweden — Sweden may become the first nation in Scandinavia to go beyond civil unions towards the establishment of full marriage rights for same-sex couples. According to a June 18 report published online by Swedish Radio, the governing board of the Conservative Moderate Party, the largest member of the ruling coalition government, has given its approval to a measure that would make the nation's marriage law gender-neutral, while preserving the right of religious bodies to perform marriages consistent with their theology. The board's decision will be put before the annual conference of the party in October. If it is approved, the only party represented in Parliament that is opposed to same-sex marriage will be the minority Christian Democrats, who are

also part of the governing coalition, so it is possible that the measure could then be enacted.

Thailand — Sometimes a threatened boycott seems to work. The Novotel-Siam Square Hotel barred Sutthirat Simsiri-wong, a local brand manager for a French cosmetics firm who happens to be transsexual, from entering its nightclub, specifically because he is transsexual. More than one hundred organizations worldwide joined forces in promoting a boycott of Novotel's hotels. Among other prominent moves, a heavily patronized travel website hosted by *UK Gay News* removed the "gay friendly" tag from all hotels affiliated with or owned by Novotel, indicating there was a problem stemming from the company's Bangkok hotel. After a week of this, the hotel announced that its staff had erred and that it would publicly apologize to Sutthirat. The boycott organizers announced they would not terminate the boycott until the wrong was righted. *Thai Press Reports*, July 5. ••• The National Legislative Assembly passed a bill on June 20 that reforms the rape laws to make them gender neutral. Previously, the law only recognized sexual assaults by men on women as constituting rape. Now any sexual assault regardless of the genders of perpetrator or victim could come under the law. The measure passed on a vote of 118-5 with 4 abstentions. *Thai Press Reports*, June 21.

United Kingdom — Press reports indicated that the various branches of the British armed forces took differing approaches to the question whether active duty members could wear their uniforms to Gay Pride activities. The Navy gave a limited go-ahead. Admiral Sir Jonathan Band, First Sea Lord, said that sailors could wear their uniforms to march, but not at any gay rights rally, since Queen's Regulations provide that service personnel should not be in uniform at political events. Evidently the march is not seen by the Navy as being political, but a rally with speeches would be. On the other hand, the Army and the Air Force both apparently feel that the march is political as well. Air Marshall Sir Glenn Torpy, the Chief of the Air Staff, sent a letter to commanders indicating that personnel are free to attend gay pride events, but not in uniform, and the Army had previously expressed the same policy. *Times of London*, June 25. Openly gay people are allowed to serve in the U.K. military forces, and indeed are actively recruited, but are presumably cautioned about what they say when on joint assignment with U.S. troops in places like Iraq, since it is presumed that any U.S. military personnel exposed to openly gay people in uniform will

promptly suffer a disastrous collapse of morale and esprit de corps, as found by Congress in its 1993 legislation adopting the "don't ask, don't tell" policy, and will immediately lose their ability to follow orders. ••• PinkNews.co.uk reported June 30 that the new British Prime Minister, Gordon Brown, has appointed an openly-gay member of Parliament, Ben Bradshaw, to be Minister of State at the Department of Health, as well as Minister for the South West. Bradshaw was originally elected to Parliament in 1997 as part of the first wave of openly-gay candidates to come in with the New Labour government. He celebrated a civil partnership with BBC journalist Neil Dagleish a year ago.

Professional Notes

North Carolina — The North Carolina State Bar has inducted Sharon A. Thompson of Durham into its "General Practice Hall of Fame." According to a report in the July 2 *North Carolina Law Weekly*, Thompson, a family lawyer and practitioner in estate planning and probate administration, devotes much of her practice to advising "domestic partners and non-traditional families" and is a co-founder of the North Carolina Association of Gay and Lesbian Attorneys, as well as having been a co-founder of the state's Association of Women Attorneys and a two-term member of the state bar's House of Representatives.

Illinois — On June 22 the *Chicago Tribune* noted the passing of David E. Springer, a partner at the national law firm of Skadden Arps who had been a leading figure in the struggle for LGBT legal rights in the Midwest. Most notably, Springer served as part of the legal team that won the pathbreaking 7th Circuit ruling in the case of Jamie Nabozny, who had sued the Ashland, Wisconsin, school district for failing to take appropriate steps to protect him from anti-gay harassment and assaults by fellow students. The court ruled that Nabozny could sue the district on sex and sexual orientation discrimination theories, contending that it failed to respond appropriately when a male student was harassed by other male students under circumstances where it would have responded to harassment of female students. That case resulted in a jury verdict for Nabozny and a settlement for just under \$1 million, and the news coverage of the case sent shock waves through the nation's school districts, resulting in many policy changes. He is survived by his long-time partner, Bill Strausberger, and his father and sister.

AIDS & RELATED LEGAL NOTES

Arkansas Supreme Court: Condom Use No Defense in HIV Exposure Prosecution

The Arkansas Supreme Court upheld a sentence of life plus 36 years for a man convicted of rape and sexual assault for having sexual intercourse with his live-in girlfriend's minor daughter and her friend in *White v. State of Arkansas*, 2007 WL 1775699 (Ark. June 21, 2007). The defendant, James Al White, was also convicted of exposing the girls to HIV the Supreme Court rejecting, with little explanation, his argument that his use of a condom during the sexual assaults prevented the possibility of exposure, thus negating liability under Arkansas' HIV exposure statute.

White lived with his girlfriend and her daughter, identified by the court only as T.H. T.H. testified that in 2004, when she was 15 years old, White with whom she testified she had been having sexual intercourse regularly since 2001 asked T.H. to bring a girl from school, K.J., to their home so that he could have sex with her as well. When K.J., also 15, arrived at the house White proceeded to have penile-vaginal sexual intercourse with both girls. Although White was HIV+, and evidence was presented that he had tested positive some three years prior, he did not tell K.J. of his status.

A jury in Pulaski County, Arkansas, convicted White of the statutory rape of T.H., fourth-degree sexual assault of K.J., and exposure of K.J. to HIV. (Local press reports indicate that the jury, which had apparently heard taped phone conversations of White unsuccessfully trying to persuade one of the girls not to testify, deliberated approximately 14 minutes.) White was sentenced to life plus 432 months in prison. On appeal, his attorney filed an *Anders* brief indicating no meritorious grounds for reversal; White, *pro se*, filed an appellate brief alleging various errors below.

Chief Justice Jim Hannah, writing for a unanimous court, made rather short work of each of White's arguments. On the rape charge, Hannah held that there was sufficient evidence that White qualified as T.H.'s guardian, which made his sexual intercourse with her (T.H. being a minor) rape under Arkansas law. The fourth-degree sexual assault charge was made out by evidence showing that White was over 20 years old at the time of the intercourse with K.J. and that she was under 16. Hannah rejected all of White's challenges to the credibility of the girls' testimony as to the sexual intercourse, and noted that although T.H. had initially denied the encounter to a school counselor, she later testified that her denial was a response to threats by White that, if she told anyone what he had done, he would "kill us, or he'll

burn the house down. He would kill our whole family and stuff like that."

On the charge of exposing K.J. to HIV, Ark. Code sec. 5-14-123, White made two arguments. First, he argued that the nurse practitioner who testified about his HIV test results thus establishing the necessary element that he knew his seropositive status was forbidden to do so under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Rejecting this argument, Hannah noted that both HIPAA and its implementing regulations allow for disclosure of otherwise-protected medical information for law enforcement purposes. Arkansas law, he noted, also specifically allows for limited disclosure of a person's HIV status for purpose of enforcing the HIV exposure statute.

White's other argument on appeal of this charge was that he had used a condom during sexual intercourse and had therefore, he said, not exposed K.J. to HIV. (The court noted, without explanation, that White was not charged with exposing T.H. to HIV.) In affirming the conviction on this count, Hannah offered little in the way of explanation and did not expressly state why White's argument regarding condom use was erroneous. (The court never suggested that White's contention was factually unsupported.) The court's treatment of the issue appeared to ignore some serious questions about the scope of Arkansas' exposure statute.

While the statute's opening paragraph states that persons with HIV are "infectious to another person through the exchange of body fluid during sexual intercourse and through the parenteral transfer of blood or a blood product," sec. 5-14-123(a), the definition of the crime itself, appears, at least where sexual activity is concerned, to reach more broadly than this justification suggests. Section 5-14-123(b) states that a person who knows that he or she is HIV+ commits an offense when he or she "exposes another person to human immunodeficiency virus infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another person without having informed the other person of the presence of human immunodeficiency virus." "Sexual penetration," in turn, is defined to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into a genital or anal opening." Ark. Code sec. 5-14-123(c).

There is an ambiguity in this language: setting aside parenteral blood transfers, does the offense require the HIV+ person simply to "engage[] in sexual penetration" or to "expose another person to [HIV] infection through ... engage[ing] in sexual penetration"?

Grammatically, the former is the more natural reading; if so, however, the statute appears to criminalize many sexual activities that would normally be considered as safer sexual practices. On the other hand, if the statute requires exposure through sexual penetration, then White's argument that his condom use prevented exposure would appear to have deserved at least a response from the court. Certainly, of course, condom use is not 100% effective against HIV transmission, but if this was the court's basis for rejecting White's appeal, it is nowhere to be found in Hannah's opinion.

The opinion, moreover, contains language that could support either interpretation of the statute. On the one hand, Hannah states that "the State had to prove that White knew he had tested positive for HIV and that he exposed another by sexual penetration without having first informed the other person of the presence of HIV." On the other hand, in reciting the evidence the court finds sufficient to sustain the conviction, Hannah notes only that "K.J. testified that she was fifteen at the time of the offense" (the significance of this is unclear), "that White sexually penetrated her by having 'vaginal sex,' and that she later learned from police that he was HIV positive."

Thus, after *White*, it would appear that it is possible, perhaps even likely, that the Arkansas courts will consider any penetrative sexual activity by an HIV+ person, regardless of the precautions taken (condoms, dental dams, gloves, etc.), to be criminal if he or she does not inform his or her partner in advance. At the very least, it appears clear that the court does not consider condom use a defense to the exposure statute, and that persons with HIV in Arkansas risk criminal liability for failing to inform their partners about their serostatus even if they use condoms. *Glenn C. Edwards*

Federal Court Rejects HIV Discrimination Claim But Allows Retaliation Claim to Proceed

In September of 2005, Bed Bath & Beyond demoted Todd Riddle, an assistant store manager in line to become store manager, shortly after learning that Riddle was HIV+. Riddle's designation and pay scale were significantly altered after he complained that he was being discriminated against, even though Riddle was one of the most successful managers for his department in the nation. In *Riddle v. Bed Bath and Beyond, Inc.*, 2007 WL 1597921 (S.D. Indiana, May 31, 2007), the U.S. District Judge John Daniel Tinder ruled that Riddle had not presented enough evidence to survive a summary judgment motion on his discrimination claim, but his claim for retaliation involved ma-

terial facts in need of development and thus survived a summary judgment attack.

Riddle started working for Bed Bath & Beyond (BB & B) in 2002 after he was hand-picked from another company and told he could expect to manage his own BB & B store within a year. After seven months, Riddle was promoted from a department manager to an assistant manager, the position from which all store managers are selected. Around this time, Riddle told a few friends at the store that he was HIV+.

Though he had spoken in confidence, the information traveled all the way up to the manager of the entire district in which Riddle's store was located.

Although Riddle had voiced his desire to be approved as a store manager, BB & B told him that he was going to head the new fine china department in the store. Riddle complained to the human resources department of BB & B, claiming that the move, as well as the absence of an annual pay raise, was a result of HIV discrimination. Riddle also voiced concerns that he would be retaliated against for complaining about the poor way he had been treated. Weeks later, Riddle's designation was changed from assistant manager to "coefficient department manager," a lower position not in immediate succession to store manager. Riddle's pay was also altered, though he now had the ability to make more money as a result of a reduction in the amount of hours that must be worked before overtime kicked in.

The court evaluated Riddle's discrimination claim only for failure to promote. Because Riddle failed to respond to BB & B's motion for summary judgment with information regarding his lack of a pay raise and subsequent demotion, Judge Tinder concluded that Riddle had abandoned these two claims. As part of his remaining claim, the court required Riddle to put forth enough evidence showing that other managers in similar situations were treated differently by BB & B. Riddle, however, had only submitted a few of his performance reviews, most of them "self evaluations" completed by Riddle. Evaluations of other employees chosen to be store managers were only for periods following their promotion to store manager, rather than the analogous period of being an assistant manager. Most importantly, evidence submitted by BB & B showed that Riddle was continually faulted for his inability to accept criticism and work well with others both before and after he disclosed his HIV status. This evidence gave tremendous support to BB & B's claim that Riddle was denied a promotion because he lacked the interpersonal skills that are required of store managers. Thus, Judge Tinder held that Riddle had not presented enough evidence to show that BB & B's claim for not promoting Riddle was disingenuous.

Next turning to Riddle's retaliation claim, the court denied BB & B's order for summary

judgment. The court noted that although Riddle was able to make more money as a coefficient department manager, an adverse employment action can nonetheless be shown when there is "some material diminution of responsibilities or benefits." Once Riddle was demoted from being an assistant manager, he was no longer in direct line to be a store manager. Further, Riddle showed that another assistant manager at a different store in the region was likewise placed in charge of fine china but was not reassigned as a coefficient department manager. BB & B also began placing "help wanted" signs in other stores in the district for a new fine china department manager. Throughout that entire time, Riddle was "achieving some of the best results in the nation" for his department. Judge Tinder held that this evidence, "while far from overwhelming," established a prima facie case of retaliation. BB & B responded that it had intended to recode Riddle's payroll before the complaint was made, but had mistakenly taken a few weeks (during which Riddle complained of discrimination) to do so. Tinder allowed Riddle's retaliation claim to move forward, holding that BB & B's "offering of coincidence as an explanation" was insufficient to achieve summary judgment. *Chris Benecke*

South African Court Rejects Testimony of HIV Denialists

The Supreme Court of South Australia has delivered a comprehensive rejection of HIV/AIDS denialism. In *R v Parenzee*, [2007] SASC 143 (April 27, 2007), the applicant had been convicted of three counts of endangering life. The basis of the convictions was that he had unprotected intercourse with three women at a time when he knew he had HIV and had been advised not to have unprotected sex. He applied for leave to appeal out of time on the ground of miscarriage of justice. He claimed that the prosecution had failed to disclose evidence that the existence of HIV had not been proven, that there was no scientific evidence that AIDS was caused by a unique infectious agent, that if HIV existed there was no proof HIV was sexually transmitted, and that the risk of sexual transmission was extremely low. He claimed that viral load and antibody tests were unreliable.

The appeal was based on long-standing claims by Australian HIV denialists called "the Perth group." The trial judge conducted a hearing as to the fresh evidence which the applicant could adduce, taking evidence from two denialists and from an array of Australian and overseas physicians, immunologists, epidemiologists, diagnosticians and virologists called by the prosecution, including Dr Robert Gallo, who in the 1980s was the leading U.S. AIDS researcher associated with isolation and identification of HIV. Justice Sulan noted that, despite testifying across a wide range of disciplines,

neither of the applicant's witnesses claimed to have practical experience or qualifications in the scientific disciplines to which their evidence pertained. Nor did they have an alternative theory to explain the observations that led to the discovery of HIV/AIDS. Rather, their work was essentially a critique of the work of others.

Justice Sulan was scathing in his criticism of the applicant's witnesses as to their lack of knowledge and practical experience, lack of independence and evasiveness and misrepresentation in their testimony. He concluded that neither witness was qualified to give evidence about the existence of HIV or whether it has been established to cause AIDS, nor whether it is transmissible, nor about tests developed to diagnose the virus. Even if they had sufficient expertise to give evidence on these subjects, Justice Sulan concluded that their opinions were so out of line with prevailing opinions and evidence on these subjects that no jury could weight to their evidence. In his view, their opinions lacked any credibility and thus their evidence was inadmissible.

The judge said that, while prosecution witnesses conceded that there are still many unknowns as to the mechanisms by which the CD4T cells are diminished, it was a misinterpretation of their evidence to conclude that there is a genuine debate about whether it has been established that HIV causes AIDS. The evidence that HIV causes AIDS, is transmissible and can be detected by testing is compelling.

Justice Sulan accepted the prosecution evidence that the denialist witnesses ignored or failed to give sufficient recognition to the considerable amount of work and research that has been conducted since the 1980s — that the debate as to whether HIV is a virus, whether it has been isolated and whether it is sexually transmissible and a cause of AIDS is long over.

R v Parenzee contains a detailed analysis of the evidence in relation to these subjects. It can be accessed at <http://www.courts.sa.gov.au/judgments/Judgments2007/0427-SASC-143.htm> or <http://www.austlii.edu.au/au/cases/sa/SASC/2007/143.html> *David Buchanan SC, Australia*

AIDS Litigation Notes

Federal — California — A man living with HIV/AIDS is entitled to additional discovery in his suit over denial of disability benefits against a private insurance company as a result of recent 9th Circuit precedent focusing on inherent conflicts of interest when insurers administer the employee benefits plans that they underwrite. In *Beckstrand v. Electronic Arts Group Long Term Disability Insurance Plan*, 2007 WL 1599769 (E.D. Calif., June 4, 2007), Magistrate Judge Theresa A. Goldner ruled on plain-

tiff Bryan Beckstrand's motion that the court reopen his case, after having granted judgment to the insurer. The 9th Circuit's ruling in *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006), has made relevant various kinds of information about plan administration that were not particularly relevant in the 9th Circuit prior to this opinion, in particular situations where insurers used a small group of doctors as repeat players in evaluating disability claims under circumstances where the doctors were not necessarily expert on the medical issues at stake, were not necessarily familiar with the applicant's particular situation, and had strong economic incentives to recommend against awarding benefits. Magistrate Goldner found that in light of the *Abatie* ruling, Mr. Beckstrand should have the opportunity for more discovery, but turned down his request to supplement the record with additional medical reporting, finding that in reviewing the plan's decision to deny benefits, the record should be based on information before the plan when it made its decision.

Federal — District of Columbia — An Amtrak maintenance worker failed to show that he was terminated in retaliation for filing a grievance about a fellow-worker's unauthorized disclosure of his HIV+ status, ruled U.S. District Judge Royce C. Lamberth in *Stevens v. National Railroad Passenger Corporation*, 2007 WL 1830867 (D.D.C., June 26, 2007), granting summary judgment for the employer. Stevens had tested positive for cocaine in 2003, took a leave of absence from work and entered a drug rehabilitation program. He signed a waiver agreement under which he indicated he knew he would be discharged if he failed a drug test in the future. He came back to work at Amtrak in 2004. He claimed that a co-worker had improperly divulged that he was HIV+, as a result of which he suffered a hostile work environment due to the reactions of his co-workers, and he filed a grievance. His mental health provider advised that he take a leave of absence, which he did. During his leave, he got into a confrontation with a supervisor when he showed up at the workplace unannounced to retrieve some medication he had left in a friend's car. The EEOC found no probable cause on his discrimination grievance. Several months later, preparatory to returning to work, Stevens went to the medical center for his mandatory drug test, gave an unusable sample and then left rather than wait to be retested because he was feeling ill. (He went to a hospital where he was diagnosed with bronchitis.) Because he left without completing the drug test, he was discharged pursuant to Amtrak's rules, and filed suit under the DC Human Rights law, claiming unlawful retaliation for the filing of his civil rights claim. Judge Lamberth found that Stevens had shown no relationship between his discharge and the filing of the claim, and

pointed out that there was no evidence that Amtrak had enforced its drug testing policy arbitrarily or capriciously in his case.

Federal — Florida — In a case of first impression, a unanimous panel of the 11th Circuit ruled per curiam in *Albra v. Advan, Inc.*, 2007 WL 1814677 (June 26, 2007), that employment discrimination retaliation claims under the Americans With Disabilities Act may not be asserted against the individual members of management as to whom retaliatory conduct is alleged, but only against the company itself. The case involves a pro se plaintiff alleging discrimination on the basis of his HIV status, as well as retaliation. The primary reason for the court upholding dismissal of the case was that the plaintiff, evidently misinterpreting the local court rules, "served" the defendants by mailing them copies of the summons, but failed to include a copy of the complaint! Secondly, however, the court ruled that even if the individual named defendants had been properly served, the complaint against them would have to be dismissed. The court drew an analogy to Title VII case law, under which it is well established in the 11th Circuit that the company, not the individual supervisor or manager, can be held liable under federal employment discrimination law.

Federal — New York — In *Acevedo v. Barnhart*, 2007 WL 1982753 (S.D.N.Y., July 3, 2007), District Judge Koeltl found that substantial evidence supported the administrative decision to deny social security disability benefits to the plaintiff, an HIV+ man with several illnesses and infections. According to the court's recitation of the medical evidence, the plaintiff, a 48-year-old native of Puerto Rico who came to the U.S. when he was about 30 years old but who still does not speak English, has not suffered any opportunistic infections as a result of his HIV infection and is taking medications that have kept his bloodwork out of the range of a full-blown AIDS diagnosis. Based on the hearing record, the ALJ had concluded that he was capable of doing light work and thus not sufficiently impaired to qualify for disability benefits, rejecting the contrary conclusion that he argued based on statements of his personal physicians. The court upheld the ALJ's finding that "the diagnoses of the plaintiff's treating physicians did not support greater limitations on the plaintiff's residual functional capacity... In regards to the plaintiff's HIV, Dr. Munsiff noted the plaintiff's substantial improvement after he started HAART [a particular drug regimen] as well as the absence of opportunistic infections."

California — In *Hernandez v. Estate of Hopkins*, 2007 WL 1828272 (Cal. Ct. App., 2nd Dist., June 26, 2007) (not officially published), the court affirmed a jury verdict of \$1 million in damages for Israel Hernandez, a janitor who had worked in the building where Dr. Hopkins

leased office space. Hernandez incurred HIV infection after suffering needlestick injuries while removing trash bags containing improperly-disposed-of needles from Dr. Hopkins' suite. He and his wife sued (she for loss of consortium damages). The jury had found Dr. Hopkins 50 percent responsible for plaintiffs' injuries. The court noted evidence in the record that the suite was "unsanitary;" although there were "sharps containers" for the proper disposal of hazardous waste, "needles were repeatedly thrown in the regular trash... Mr. Hernandez described plastic bags that were ripped and had blood squirting out onto the floor." Although the landlord had warned Dr. Hopkins about the need to correct unsanitary conditions, he had failed to do so. On the other hand, of course, the jury could conclude that Hernandez was also negligent in proceeding to deal with trash bags squirting blood, thus the apportionment of liability. Much of the opinion was taken up with argument about whether Hopkins breached a duty to Hernandez, an employee of the building, as a tenant of the building, and whether such a breach could be said to have "caused" the injury to Hernandez, issues that were resolved in Hernandez's favor.

Connecticut — Superior Court Judge Grant H. Miller dismissed a suit for libel and wrongful disclosure of HIV status that was brought by a state prison inmate against a two television stations that had mentioned his lawsuit against the state. *Mercer v. Cosley*, 2007 WL 1828078 (Conn. Super., June 5, 2007) (not reported in A2d). The context is that Governor Rell, responding to some public agitation on the issue, had banned provision of medications for erectile dysfunction to state prison inmates, the immediate context being a controversy over reports that registered sex offenders were being provided with Viagra. Mercer, an HIV+ inmate who is not a sex offender, got caught in the middle of this, being denied medication for erectile dysfunction incident to his HIV treatments, and filed suit for his medications. Reporting on the ongoing controversy, NBC 30 stated on the air "on another front, there is a prison inmate, Eugene Mercer, who is suing the state. He's not a sex offender, he's a convicted killer. But he wants his Viagra, and the state doesn't buy it for inmates." WTIC-TV Fox 61 reported that the governor's "ban isn't only for registered sex offenders, but also for all inmates. 42-year-old Eugene Mercer, an inmate at the Osborne Correctional Facility for the last twenty years, is suing the Medical Services Director for denying him erectile dysfunction drugs. He claim he has AIDS, which he says is a disability. He argues that is why he should get the drugs. Attorney General Richard Blumenthal disagrees, and says his office is moving to immediately dismiss the case." Mercer claimed that these news reports subjected him to harm in prison, as other inmates would conclude he was an

HIV+ sex offender seeking Viagra in order to have sex in prison. In dismissing the case, Judge Miller found the reports privileged as being substantially true, and in addition found that the defendants had not violated state confidentiality law on HIV-related information, having provided a substantially accurate report about Mercer's lawsuit based on statements made in his complaint.

Louisiana — A company that supplied plastic containers to a hospital for disposal of sharp objects was not liable when a child visiting the hospital reached into such a container mounted on the wall in the maternity ward and suffered a needle-stick injury, because the hospital selected the model container it wanted and the defendant companies role was limited to dropping off empty cleaned containers at the hospital's loading docked and picking up full containers for disposal. So ruled the Court of Appeal of Louisiana, 5th Circuit, in an opinion by Judge Susan M. Chehardy issued June 26 in *Marshall v. East Jefferson General Hospital Foundation and Medical Waste Services of America*, 2007 WL 1828905. Mr. Marshall brought 2-year-old Jacob to the hospital to visit Mrs. Marshall, who had just given birth to a daughter. While sitting in Mrs. Marshall's hospital room, Jacob stuck his hand in the round opening at the top of the plastic container hanging on the wall and suffered the needle-stick injury. His doctor advised follow-up testing for HIV and hepatitis-B for two years; the Marshalls suffered emotional distress, of course, this being the United States of Torts.... They sued the hospital for negligence and Medical Waste Services on a products liability theory, claiming that a safer sharps disposal unit would have prevented their child's injury. In granting Medical Waste Services' motion to be dismissed from the case, trial judge Robert J. Klees noted that the hospital had selected from among available designs for sharps containers,

and decided where to place this particular one. MWS played no role in any of those decisions, and there was no evidence that the container they provided (of which they were not the manufacturer) was not safely useable in other hospital contexts, although expert testimony supported the idea that it should not have been mounted where it was in the maternity ward where small children might be present. The court also found that the Marshall's complaint failed to make the necessary "failure to warn" claim that might have supported an alternative products liability theory in this case.

New York — The New York Court of Appeals ruled in *Melendez v. Wing*, 2007 N.Y. Slip Op. 04722 (June 7, 2007), that Section 131-c(1) of the N.Y. Social Services Law should be construed to override an administrative regulation under which applicants for an emergency shelter allowance for people with HIV/AIDS were required to include Social Security Disability income received by their dependent minors in determining their household income for purposes of eligibility for the benefit. However, the court also determined that the legislature had "superseded this requirement in its appropriation for the emergency shelter allowance (ESA) for the 2006-2007 fiscal year." The case was brought by Zoraida Melendez, a person qualified for the ESA, whose daughter received SSI disability benefits. Melendez's monthly allowance was adjusted downward to take into account the disability payments to her daughter, and she sued. At first turned down by the trial court, she won a reversal in the Appellate Division, which remanded for a new trial, at which she won a substantial award of back-benefits owed, which the state appealed. Writing for the court, Judge Read found that the AIDS housing assistance program was intended to make benefits available without regard to SSI disability benefits being received by their dependents.

Washington — King County Superior Court Judge Gregory P. Canova erred by ordering that Daniel Richardson, convicted of failing to register as a sex offender, undergo HIV testing. *State v. Richardson*, 2007 WL 1885080 (Wash.App. Div. 1, July 2, 2007) (not officially published). Richardson was first convicted of child molestation in 1993 when he was 13 years old. Richardson then registered as a sex offender, and re-registered a few times when he changed residences, but became homeless and at some point fell afoul of the registration law, incurring new criminal penalties accompanied by the HIV testing order. On appeal, the state conceded and the court ruled that failing to register was not one of the "sex offenses" for which mandatory testing was authorized.

International AIDS Notes

Libya — The highest court in Libya has upheld death sentences for five Bulgarian nurses and a Palestinian doctor who were convicted of infecting Libyan infants with HIV while employed at a Libyan hospital. International medical experts who invested the case found that the HIV transmissions were due to deficiencies in the Libyan medical facilities and not to deliberate acts of the defendants. Indeed, it appeared that some of the infection cases occurred prior to the arrival of these defendants to begin working at the hospital. It appears that Libyan authorities have manufacture the case as a means of shifting blame away from themselves for the deficiencies in their health care facilities, and to blackmail Bulgaria and other European countries concerned about the case into handing over millions of dollars worth of aid as part of the deal to free the defendants. Under Libyan law, the defendants would be free if the families of the HIV-infected infants (some of whom have died) are willing to pardon them. There are still hopes that a settlement deal can be worked out to save the lives of the defendants. *New York Times*, July 13.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

The International Lesbian and Gay Association (ILGA) is seeking to hire an Executive Director, who will be responsible for ensuring that ILGA is a forceful and effective advocate for LGBT rights. According to an email release announcing the search, "Candidates should be strongly committed to working for this cause, and have excellent competencies and experience in general management, including development of strategy, planning/executive of work programmes, and staff and financial management." Application deadline is July 27. A complete application package with job description and application form can be found on ILGA's

website: <http://www.ilga.org/index.asp>. Those interested should download the package, as individual email questions will not receive a response, per the ILGA announcement.

The Transgender Law Center in San Francisco is accepting applications for the position of Legal Director. This is a full-time managerial position, requiring regular availability to work on weeknights and weekends and to travel around the state of California on behalf of the organization. The Legal Director will oversee the organization's programs, manage the program staff, and coordinate litigation and policy work, helping to shape TLC's efforts to advance transgender rights throughout the state. Interested candidates should send a cover letter and

resume to info@transgenderlawcenter.org as soon as possible. Questions concerning the position can be sent to the same address, and more details about qualifications can be found on the Center's website.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Abrams, Kerry, *Immigration Law and the Regulation of Marriage*, 91 Minn L. Rev. 1625 (June 2007) (excellent summary of the interrelationship of state marriage law with federal immigration law, taking note of current controversies over same-sex relationships in this context).

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Blome, Jessica L., *The Religious Freedom and Civil Marriage Protection Act: How Governor Schwarzenegger Failed His Constituents*, 10 J. Gender, Race & Justice 481 (Spring 2007).

Books Received, *Transgender Rights*, edited by Paisley Currah, Richard M. Juang, and Shannon Price Minter, 22 Berkeley J. Gender, L. & Justice 274 (2007).

Bridgeford, Lydell C., *Changing Faces, Changing Benefits: The Impact of Demographic Shifts on the Benefits Landscape; This Month: Same-Sex Couples Must Navigate the Tax Nuances of Domestic Partners Benefits*, 2007 WLNR 12480382, Employee Benefits News, July 1, 2007.

Brown, Herbert C., Jr., *History Doesn't Repeat Itself, But It Does Rhyme Same-Sex Marriage: Is the African-American Community the Oppressor This Time?*, 34 S.U. L. Rev. 169 (Summer 2007).

Buckel, David S., *Lewis v. Harris: Essay on a Settled Question and an Open Question*, 59 Rutgers L. Rev. 221 (Winter 2007).

Cahill, Courtney Megan, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 Wash. & Lee L. Rev. 393 (Spring 2007).

Chriss, William J., *Personhood and the Right to Privacy in Texas*, 48 S. Tex. L. Rev. 575 (Spring 2007).

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Constable, Pamela, *Persecuted Gays Seek Refuse in U.S.: Foreigners' Abuse Increasingly Seen as Ground for Asylum*, Washington Post, July 10, 2007, A06.

Cox, Walter T., III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 Duke J. Gender L. & Pol'y 791 (May 2007).

Dent, George W., Jr., *"How Does Same-Sex Marriage Threaten You?"*, 59 Rutgers L. Rev. 233 (Winter 2007) (Opponent of same-sex marriage provides the detailed argument of the opposition, which was not presented by the state of New Jersey to its Supreme Court).

Diefenbach, Clare, *Same-Sex Sexual Harassment After Oncale: Meeting the 'Because of Sex' Requirement*, 22 Berkeley J. Gender, L. & Justice 42 (2007).

Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights, Note, XLVIII Boston Coll. L. Rev. 387 (March 2007).

Fishbayn, Lisa, *"Not Quite One Gender or the Other": Marriage Law and the Containment of Gender Trouble in the United Kingdom*, 15 Am. U. J. Gender, Soc. Pol'y & L. 413 (2006).

Frank, Daniel J., *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 Iowa L. Rev. 1037 (March 2007).

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Fu, Jesse, *The Researcher's Second Laboratory: Protection Our Children From Social Surveys in Public Schools in Light of Fields v. Palmdale School District*, 80 S. Cal. L. Rev. 589 (March 2007).

Gabriel, Raquel J., *Intimate Partner Violence in the GLBT Communities: A Selected Annotated Bibliography*, 43 Cal. West. L. Rev. 417 (Spring 2007).

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cruitment and Law Schools, 14 Duke J. Gender L. & Pol'y 1143 (May 2007).

Grodin, Honorable Joseph R., *Same-Sex Relationships and State Constitutional Analysis*, 43 Willamette L. Rev. 235 (2007).

Hartwell, Alison J., *Makeup for Success: Why Jespersen v. Harrah's Stifles Diversity By Promotion Stereotypes in Employment*, 13 Cardozo J. L. & Gender 407 (2007).

Hassel, Diana, *Sex and Death: Lawrence's Liberty and Physician-Assisted Suicide*, 9 U. Pa. J. Const. L. 1003 (April 2007).

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Jansen, Yakare-Oule, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 Akron L. Rev. 311 (2007).

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Keaney, Colleen C., *Expanding the Protectional Scope of Title VII "Because of Sex" to Include Discrimination Based on Sexuality and Sexual Orientation*, 51 St. Louis U. L. Rev. 581 (Winter 2007).

Kelbley, Charles A., *Privacy, Minimalism, and Perfectionism*, 75 Fordham L. Rev. 2951 (May 2007) (part of symposium on Minimalism vs. Perfectionism in Constitutional Theory).

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Maitra, Ishani, and Mary Kate McGowan, *The Limits of Free Speech: Pornography and the Question of Coverage*, 13 *Legal Theory* 41 (March 2007).

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McKinstry, Oliver J., *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 *U. Pa. J. Lab. & Emp. L.* 679 (Spring 2007).

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Murray, Rachel, and Frans Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union*, 29 *Hum. Rts. Q.* 86 (2007).

Newman, Stephen A., *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 *N.Y. L. Sch. L. Rev.* 907 (2006/7).

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Richards, Robert D., and Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 13 *Vill. Sports & Ent. L.J.* 233 (2007) (fascinating interview with the defense lawyer who won the "virtual child pornography" case in the Supreme Court, and who is trying to use *Lawrence v. Texas* to get U.S. obscenity laws invalidated).

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Romero, Anthony D., and Dina Temple-Raston, *In Defense of Our America: The Fight for Civil Liberties in the Age of Terror* (Harper-Collins Publishers, New York: 2007) (Book recounting important civil liberties cases involving the ACLU in recent years, including detailed account of the *Limon* case from Kansas, an equal protection suit on behalf of a gay teenager sentenced to 17 years for consensual oral sex with a younger teen).

Safranek, John, and Stephen Safranek, *Finding Rights Specifically*, 111 *Penn St. L. Rev.* 945 (Spring 2007).

Savastano, Gennaro, *Court of Appeals of New York*, 23 *Touro L. Rev.* 515 (2007) (Annual New York State Constitutional Issue: Equal Protection — Case Note on *Hernandez v. Robles*).

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Shield, Sonja, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 *N.Y.U. Rev. L. & Social Change* 361 (2007).

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gal Parentage, 15 *Am. U. J. Gender, Soc. Pol'y & L.* 379 (2006).

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Younger, Judith T., *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 *Wm. & Mary J. Women & L.* 349 (Winter 2007).

Zhu, Ann Xin, *Same-Sex Marriages in New York: The Langan and Hernandez Decisions*, 14 *Buff. Women's L.J.* 1 (2005–2006).

Specially Noted:

The New York City Comptroller, William C. Thompson, Jr., released a study by his Office of Fiscal & Budget Studies on the potential fiscal and economic impact of same-sex marriage on New York State. The study, titled *Love Counts: The Economic Benefits of Marriage Equality for New York*, is available as a download from the Comptroller's website, www.comptroller.nyc.gov. The study estimates that the economic impact of marriage equality would be to add \$142 million net to New York City's economy over a three-year period following legislative approval, taking into account expected spending, taxes, benefits, and other issues. The report includes detailed tables showing the calculations and assumptions on which they are based. ••• The New York City Bar Association and the Empire State Pride Agenda jointly published a study titled "1324 Reasons for Marriage Equality in New York State." The many participants in preparing the study, which was coordinated by Allen A. Drexel, co-chair of the LGBT Rights Committee of the bar association and Ross D. Levi, Director of Public Policy & Education for the Pride Agenda, are listed on the second page of the study. The list includes members of the committee, volunteer attorneys from Proskauer Rose LLP, staff from the Pride Agenda, and various others. At the heart of the study is systematic review of provisions of New York State statutes that "confer a benefit or responsibility through marriage." Just dipping into the report at random turns up an incredible array of rights and responsibilities, vast and broadly encompassing, very few of which have anything to do with procreation or child-rearing, which same-sex marriage opponents routinely claim to be the central focus of marriage. The timely release of this report has been credited with helping move the N.Y. State Assembly to approve the marriage equality bill. ••• On July 8, the *Miami Herald* published an article by Steve Rothaus titled "Workplace: Wanted: Openly Gay Lawyers," documenting the expansion of openly-gay legal practitioners

both in South Florida and nationally. ••• The *Duke Journal of Gender Law and Policy*, Vol. 14 (May 2007) issue, contains a symposium on military personnel policy, with a particular focus on the “don’t ask, don’t tell” anti-gay policy and the continuing Solomon Amendment controversy. Individual articles of note, including an edited transcript of panel discussions from a March 2007 conference held at Harvard Law School, are noted above.

AIDS & RELATED LEGAL ISSUES:

Burris, Scott, and Leo Beletsky, Joseph Burleson, Patricia Case, and Zita Lazzarini, *Do*

Criminal Laws Influence HIV Risk Behavior? An Empirical Trial, 39 *Ariz. St. L. J.* 467 (Summer 2007) (The answer: No).

Clark, Sean C., *Never in a Vacuum: Learning From the Thai Fight Against HIV*, 13 *Wm. & Mary J. Women & L.* 593 (Winter 2007).

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EDITOR’S NOTE:

CORRECTION: In the June 2007 issue of *Law Notes*, we misidentified Jennifer Granholm as Governor of Wisconsin. She is, in fact, Governor of Michigan. *** All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.