April 2007 turned out to be an extraordinary month for LGBT issues in the nations’ legislatures. In two states, Oregon and Iowa, bills banning discrimination on the basis of sexual orientation or gender identity were passed by the legislatures and sent to governors who had announced their support for the measures. In New Hampshire, the legislature approved a civil union bill, the Senate acting a week after the governor announced that he would sign the measure if it passed. And, in Colorado, legislation allowing same-sex couples to adopt children, including in the context of second-parent adoption, appeared headed to approval (see Legislative Notes, below).

On April 19, the Oregon Senate gave final approval to the sexual orientation/gender identity civil rights bill that had previously passed the House. The Senate vote was 19-7, and Governor Ted Kulongoski announced plans to sign it. The bill broadly defines sexual orientation to include “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” In addition to enacting bans on various forms of discrimination, the legislature set forth a purpose to institute “a program of public education calculated to eliminate attitudes upon which practices of discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability are based.”

While granting broad protection against discrimination in employment, housing, public accommodations and public services, the measure also incorporates a broad exemption for religious institutions, which was the subject of considerable negotiation and rewording late in the legislative process. The law specifically provides: “It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation: (a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff; (b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.”

The law goes beyond traditional discrimination laws to deal with an array of conceptually related subjects, such as criminal intimidation, right to serve on a jury, and rights of foster parents, and authorizes attorneys fees for prevailing parties on discrimination claims. Private lawsuits may be filed under the law, and courts are authorized to award compensatory and punitive damages in appropriate cases.

This is actually one of the most wide-ranging and detailed bills of its kind that we have seen. The text is available on the Oregon legislative website, as Senate Bill 0002. Governor Ted Kulongoski was an enthusiastic supporter of the bill, and his signature was expected as we were going to press.

The Iowa bill, which received final approval from the Senate on April 25, follows a similar procedure of defining sexual orientation and gender identity, then goes through the state’s anti-discrimination laws inserting these terms in the list of forbidden grounds for discrimination.

In Iowa, sexual orientation is “actual or perceived heterosexuality, homosexuality, bisexuality,” and gender identity is “a gender-related identity of a person, regardless of the person’s assigned sex at birth.” On the touchy subject of religious organizations, Iowa will provide that sexual orientation and gender identity can be taken into account by “any bona fide religious institution or its educational facility, association, corporation, or society” in determining job qualifications “when such qualifications are related to a bona fide religious purpose.” And, the legislators added a section during final negotiations over the bill stating that it “shall not be construed to allow marriage between persons of the same sex.”

Governor Chet Culver hailed passage of the bill as a “historic” event for Iowa.

With the addition of Oregon and Iowa to the list of states already prohibiting sexual orientation discrimination, it is likely that a majority of U.S. residents will be living in states that ban such discrimination, and the inclusion of gender identity in both bills an inclusion that is rapidly becoming the norm in new civil rights bills will mean that ten states forbid such discrimination, perhaps adding momentum to efforts to revise existing sexual orientation bills to extend explicit protection to transgender individuals. (Recent federal case law suggests, however, that such explicit amendments may not be necessary if administrators and courts will follow the logic that gender identity discrimination is a form of sex discrimination, covered by existing laws.)

There was some drama attending the progress of the New Hampshire civil union bill, because the governor assumed a Hamlet-like stance of indecision well into the process. Not until the House of Representatives passed the bill and it looked like the governor would have to take a position since Senate passage seemed likely did he buckle down, confer and consult, and make up his mind, announcing that if the Senate passed it, he would sign it. Passage came just a week later, on April 26.

The bill itself is quite compact, a sharp contrast with the lengthy, detailed New Jersey law passed last year. The operative text of House Bill 437-FN-LOCAL fits on one page, because the legislators decided that the simplest way to do this is to append it to the marriage and divorce laws and basically incorporate them by reference. Thus, after a brief statement of purpose, the bill spells out that civil unions will be available for same-sex couples who are adults and not married to anybody, so long as they are not already in another civil union. Two brief provisions parody the incest laws by forbidding civil unions between persons of close traditional family relations, and those seeking to form or dissolve civil unions are referred to the marriage and divorce laws for procedures. The legislature disclaims requiring any member of the clergy to perform a civil union ceremony, and provides that civil unions or same-sex marriages formed out of state would be recognized as civil unions in New Hampshire. And, to the operative language: “Notwithstanding any other law to the contrary, the parties who enter into a civil union pursuant to this chapter shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined to-
gethers pursuant to RSA 457 [the marriage law].” Neat and simple, no exceptions.

Once signed, the law will take effect on January 1, 2008. A.S.L.

**LESBIAN/GAY LEGAL NEWS**

**California Gay Couple Can Sue Arizona-Based Internet Business For Discrimination Under California Law**

A federal district court, sitting in diversity, held that California has a strong interest in having its anti-discrimination law enforced against out-of-state companies doing business in California. Thus, an internet adoption business with many clients in California, but which is based in Arizona, is subject to a California statute banning sexual orientation discrimination, and can be sued by a gay couple denied its services. California’s interest would “suffer impairment” by a failure to enforce the law, whereas Arizona has no discernible interest in keeping that law from being enforced. **Butler v. Adoption Media, LLC, 2007 WL 963159** (N.D. Cal. 3/30/2007). U.S. District Judge Phyllis J. Hamilton, ruling on cross-motions for summary judgment, found that fact issues existed for determination by a jury, and denied summary judgment on the issue of liability for anti-gay discrimination, and on whether an injunction should issue to bar ongoing discrimination based on marital status.

Plaintiffs Michael and Richard Butler have been registered domestic partners in California since 2000. The state has certified the Butlers as persons who are suitable to become adoptive parents. In 2002, the Butlers sought to list themselves as prospective adoptive parents on a website called ParentProfiles.com, which provides birth mothers with a place to look for parents to adopt their newborns. Information on ParentProfiles.com is reviewed by women who have given birth, or are about to give birth, and plan to give up their children for adoption. ParentProfiles.com is owned by the defendants, Dale and Nathan Gwilliam of Arizona. The policy of the website is to list only married, opposite-sex couples. Thus, the Butlers might have been denied a listing based on either their sexual orientation or their marital status, or both. The Butlers sued the Gwilliams under California’s Unruh Act. The Unruh Act, passed in 1958, originally barred discrimination in public accommodation based only on the grounds of a person’s race, color, religion, ancestry, or national origin. However, that list has long been considered illustrative rather than restrictive, **In re Cox, 3 Cal. 3d 205, 474 P.2d 992** (1970), and the courts, by interpretation, and the legislature, by amendment, have gradually expanded the bounds of the Unruh Act. The plaintiffs allege that the Gwilliams illegally discriminated based on sexual orientation, which was clearly barred by the Unruh Act when the discrimination allegedly occurred, in 2002. Further, the plaintiffs allege that the Gwilliams’ policy of barring unmarried couples from listing on the website was not applied in a neutral manner, because unmarried heterosexual couples were allowed listings, but not unmarried gay couples. Thus, a neutral policy was applied discriminatorily.

The Butlers also charged discrimination based on their unmarried status. Discrimination against unmarried people had not been held by the California courts to be prohibited under the Unruh Act, nor had the act been amended to bar such discrimination, when the alleged discrimination occurred in 2002. As of 2005, the Unruh Act does prohibit discrimination based on marital status. Cal. Civ. Code 51(b). Nevertheless, because of the expansive nature of the courts’ interpretations of the Unruh Act, the plaintiffs allege that a violation of the act occurred in 2002 based on their unmarried status. The Gwilliams defended, inter alia, on the bases that (1) California law may not be applied against out-of-state defendants, who cannot be expected to know that such discrimination is barred; (2) Arizona’s interest in promoting its policy of not unreasonably burdening business decisions is paramount to California’s anti-discriminatory policies; (3) discrimination based on unmarried status, prior to 2005, was not illegal in California, and that was the type of discrimination engaged in by the Gwilliams; (4) California’s law cannot be applied against a business wholly located in Arizona; and (5) the Gwilliams’ freedom of speech is impaired by enforcement of the statute.

Choice of law test: which state’s interest is more impaired if law not applied?

The first issue is one of choice of law: Does California law apply to the actions of the Gwilliams? A federal court sitting in diversity looks at the choice-of-law rules of the forum state, which in this case is California. Under California law, the court must apply a three-part governmental interest test: (1) *Determine whether the laws differ.* The federal court must determine the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. (2) *Determine which state’s interest would be more impaired.* If there is a difference, the federal court must examine each jurisdiction’s interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. (3) *Determine which state’s interest would be more impaired.* If the federal court finds that there is a true conflict, it must carefully evaluate and compare the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.

The court ultimately applies the law of the state whose interest would be the more impaired if its law were not applied. **Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 45 Cal. Rptr. 3d 730, 137 P3d 914** (2006).

The district court in Butler first determined that the laws of California and Arizona differ significantly as to discrimination in accommodations based on homosexuality and marital status. Whereas California’s statutes, as interpreted by the courts, afford protections, Arizona’s statutes do not protect people on these bases, and the courts have not ruled on the question whether the statutes may be read to forbid such discrimination. However, neither does Arizona law condone such discrimination, and nothing in the law would prevent a listing by a same-sex unmarried couple, nor would adoption by such a couple be prohibited.

The court then found that California’s interest in enforcing its anti-discrimination laws is strong, whereas Arizona has an uncertain interest, if any, in preventing the enforcement of such laws. It is not clear “what interest Arizona might have in allowing discrimination in public accommodations on the basis of sexual orientation or marital status, or in applying its own law to California residents.” Arizona’s only interest articulated by the parties may be in protecting its resident businesses from uncertainty. Such uncertainty might arise when an out-of-state company does business in a state; however, “a company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the law of a state in which it chooses to do business.” **Kearney, 39 Cal. 4th at 105.**

The court stated California’s interest in ensuring compliance with its laws by out-of-state businesses: “Where an out-of-state business solicits California customers and does business with customers living in California, California has an interest in ensuring that the out-of-state business does not discriminate against the California customers… [D]efendants in this case discriminated against California residents in California — not in Arizona or in any other state… Defendants have not cited any case in which a court has declined to apply California law to an out-of-state business that intentionally solicits California customers and intentionally harms California residents in California, in violation of California law.”

With that, the court reached the “impairment” issue, stated as number 3 above, finding that California’s interest would be impaired, while Arizona’s would not. “If businesses with headquarters in other states could maintain a regular practice of discriminating against California residents, that practice would substan-
tually impair the protection afforded by the statute,” while “any interest Arizona may have in its own law would not be seriously impaired by the application of California law.”

**Marital status discrimination**

Discrimination based on marital status was not specifically prohibited by the statute in 2002, nor had any court at that point held that the statute applied to marital status discrimination. The Gwilliams maintain that their policy was to only allow married couples to list on the website. Their refusal to allow the Butlers to list on ParentProfiles.com was based on their un-married status, and was permissible. Although the statute now prohibits such discrimination, the “defendants should not be subjected to damages for marital status discrimination in connection with their rejection of plaintiffs’ application. However, the claim for injunctive relief can go forward.”

**Sexual orientation discrimination**

The Gwilliams deny discriminating based on sexual orientation, and state that their only basis for refusing the listing was marital status. Although evidence showed that some un-married opposite-sex couples were allowed to list, the Gwilliams state that this was not done intentionally, and that only intentional discrimination would subject them to liability. They admit that their marriage policy has a disparate impact on gay couples, but that only intentional discrimination is prohibited by the Unruh Act.

The Gwilliams were found to be correct as to their assertion that they can only be found liable if they had a discriminatory intent in their policies, not if the policies merely had the effect of discrimination. Thus, the court barred the Butlers’ claim based on the effect on gays of a neutral policy requiring couples to be married. However, there is a jury issue as to whether the Gwilliams discriminated as to the Butlers’ homosexuality. “[T]he evidence suggests that the [marriage requirement may not have been applied evenly; and also raises questions with regard to whether the Gwilliams developed the ... policy because they are biased toward gays and lesbians, and whether the employees of the Gwilliams companies advocated and enforced [their] policy with a discriminatory motive.”

**First Amendment issues**

The Gwilliams portray themselves as “publishers,” and assert that ParentProfiles.com is not a business establishment, but rather is a vehicle for publishing the Gwilliams’ opinions. They contend that their First Amendment right to promote their view that children should only be adopted by heterosexual married couples would be violated by holding that they must list gay un-married couples.

The district court found, however, that ParentProfiles.com is clearly a business establishment, and not some other sort of entity, and must comply with laws that pertain to organizations doing business in California. The Gwilliams’ own beliefs regarding the suitability of certain prospective parents over others has little relevance to the conduct of their business, stated the court. Their website is not expressive speech, but rather is a commercial enterprise. “A governmental regulation that places a burden on expressive activity is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, and if the incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of that interest.”

**Kansas A.G. Green-Lights Municipal Partner Registry**

The city of Lawrence, Kansas, received the green light from the Kansas Attorney General to establish a domestic partnership registry in an opinion issued April 6, 2007 (Kan. Att’y Gen. Op. No. 2007–9). The Attorney General, Paul J. Morrison, determined in a non-binding opinion that the proposed registry would not run afoul of Kansas’ constitutional provisions against same-sex marriage, largely because under the terms of the proposed ordinance no legal rights or benefits would be attendant to registration. Even that relatively weak provision, however, should be limited to Lawrence residents, Morrison opined, in order to avoid possible invalidity under Kansas’ constitutional home rule provisions.

The opinion was issued in response to an inquiry by the Lawrence Interim Director of Legal Services, Toni Ramirez Wheeler, as to whether the proposed registry was “lawful in Kansas.” Wheeler’s request, in turn, was made at the instruction of the Lawrence City Commission, following a discussion of a potential domestic partner registry at the Commission meeting on January 9, 2007. (The Commission apparently has not, at this date, taken any formal action with respect to establishing a registry.)

As described by the Attorney General, the proposed registry (“Ordinance B”) would be open to any two unmarried individuals, regardless of sex, who generally meet the requirements for marriage (age, capacity, etc.) and “who live together in a relationship of indefinite duration, with a mutual commitment in which the partners share the necessities of life and are financially interdependent.” Residence in Lawrence would not be a requirement. The registration would “create no legal rights, other than the right to have the registered domestic partnership included in the City’s Domestic Partner Registry,” and the ordinance states that it is not to be “interpreted or construed to permit the recognition of a relationship that is otherwise prohibited by state law.” (It is unclear from the opinion whether the text of “Ordinance B” reviewed by the Attorney General has actually been introduced or proposed in Lawrence. The opinion states that the ordinance is modeled upon a similar law in Cleveland Heights, Ohio.)

According to the opinion, there are at least two purposes for establishing the registry. First, the Lawrence City Commission was presented with testimony that certain private companies and insurers are reluctant to grant domestic partner benefits unless the relationship has been formally recognized in some manner by a governmental entity. Second, proponents of the registry also told the Commission that they wished the city to provide recognition that “Lawrence welcomes and embraces its alternative families.”

The Attorney General’s analysis focused on the Home Rule Amendment of the Kansas Constitution (Kan. Const. Art. 12, sec. 5(b)), which provides that cities are “empowered to determine their local affairs and government” and that such authority is to be “liberally construed for the purpose of giving to cities the largest measure of self-government.” Ordinances are entitled to a presumption of validity but are subject to invalidation if pre-empted by a statutory or constitutional provision i.e., if the ordinance either conflicts with such a provision or the legislature has clearly preempted the field so as to preclude municipal action.

The Attorney General noted that there were no statutory provisions dealing with domestic partner registries. (A bill to prohibit such registries, H.B. 2299, is pending in the Kansas legislature, however.) The obvious candidate for a conflict and, no doubt, the provision that largely prompted Lawrence’s legal concerns in the first place is the 2005 amendment to the Kansas Constitution regarding same-sex marriage (Kan. Const. Art. 13, sec. 16). The Marriage Amendment provides, first, that marriage “shall be constituted by one man and one woman only” and that all other marriages are
void. Subsection (b) of the Marriage Amendment, the focus of the Attorney General’s analysis, provides that “no relationship, other than a marriage, shall be recognized by the state as entitled the parties to the rights or incidents of marriage.”

The opinion traced the legislative history behind subsection (b) and concluded that it only “prohibits the State from recognizing non-marital relationships as being entitled to the legal rights and responsibilities accorded by common law and statute to married couples,” and that it did not, for example, prevent private employers from providing domestic partner benefits. Thus construed, the Attorney General found no conflict between the Marriage Amendment and the proposed Lawrence ordinance, because inclusion in the registry would afford no rights whatsoever to domestic partners; i.e., the ordinance “does not attempt to imbue non-marital relationships with those statutory and common law rights accorded to the marital relationship.” The Attorney General also found that the Marriage Amendment did not preempt the field of domestic partnerships generally, but only forbad, as stated, any attempt by cities to recognize non-marital relationships as being entitled to the incidents of marriage. The proposed ordinance was, therefore, not preempted by the Marriage Amendment.

The opinion then turned to the question of whether the proposed ordinance exceeded Lawrence’s authority, under the Home Rule Amendment, to legislate as to “local affairs and government.” The Attorney General noted that the distinction between “local” and “statewide” affairs was difficult to articulate and of little practical significance, and that the Kansas courts had almost never struck down a local ordinance as impermissibly intruding into statewide affairs. The opinion also reviewed rulings from other jurisdictions (including Chicago, Illinois and Broward County, Florida) that upheld these even “more ambitious” ordinances (in that registration entitled city/county employees to domestic partner benefits) against challenges that they intruded into statewide matters. The Attorney General concluded that, even recognizing “the State’s sole prerogative to regulate the marital relationship,” the proposed Lawrence ordinance would not improperly intrude on that prerogative.

The Attorney General did express concern, however, as to whether the proposed ordinance, by its failure to limit eligibility to residents of Lawrence, would have an impermissible “extraterritorial effect,” i.e., would “have a substantial impact on interests outside the boundaries of the municipality.” The opinion noted that the domestic partner registry of Cleveland Heights, Ohio, upon which the proposed Lawrence ordinance was modeled, had been upheld against just such a challenge by the Ohio courts, largely because registration afforded no rights that any person outside the municipality would be required to recognize. Despite this favorable precedent, however, and acknowledging that the Lawrence ordinance would similarly provide no actual legal benefits, the Attorney General nevertheless expressed his concern that the Kansas courts would determine that the proposed ordinance would have “an impact that extends beyond the City’s boundaries by giving unmarried couples, including same-sex couples, the opportunity to procure governmental acknowledgment of their relationship.” It was his opinion, therefore, that the proposed ordinance “extends beyond the purview of the City’s ‘local affairs’ and, as such, may be found to violate the Home Rule Amendment.” The Attorney General recommended that, should Lawrence institute its proposed registry, that availability be limited to Lawrence residents only.

High School T-Shirt Wars Continue: Court Upholds School Ban

U.S. District Court Judge William T. Hart (N.D. Ill.) ruled on April 17 in Zamecnik v. Indian Prairie School District No. 204, 2007 WL 1141597, that a suburban Chicago school district did not violate the constitutional rights of anti-gay self-described “Christian Evangelical” high school students by forbidding them from wearing t-shirts proclaiming the message “Be Happy, Not Gay” on April 19, the day after some students at their school were observing a “Day of Silence” to express support for gay students.

This was another case inspired by Alliance Defense Fund (ADF), a right-wing anti-gay litigation group that seeks to counter any school activities that might be seen as affirmative of what ADF calls the “homosexual agenda.” ADF quickly announced that it would appeal the ruling to the 7th Circuit. Chicago Tribune, April 25.

The plaintiffs in the case, Heidi Zamecnik and Alexander Nuxoll, are students at Neuqua Valley High School in Naperville. Zamecnik is a senior and Nuxoll a freshman, and apparently Zamecnik was just fed up with the Day of Silence, an event sponsored nationwide by the Gay Lesbian Straight Education Network (GLSEN) to provide a way for students to show their support for tolerance of their gay and lesbian classmates. According to Judge Hart’s opinion, “On the Day of Silence, some students wear labels identifying them as Day of Silence Participants. They generally remain silent during the day, but may be required to speak in classes or when a spoken response is deemed necessary by a school staff member. Many students and some staff members wear shirts during the day expressing their support for GSA [the Gay/Straight Alliance at the school]. In 2006, this shirt included the phrase ‘Be Who You Are’.”

ADF has been promoting its own Day of Truth to follow GLSEN’s Day of Silence, and Zamecnik was a participant in 2006, following the same silence routine that had been followed the day before. ADF provided t-shirts to participants, with the ADF logo and the words “Day of Truth” on the front and “The Truth cannot be silenced” with ADF’s internet address on the back. But ADF’s t-shirt wasn’t explicit enough for Zamecnik, who made her own t-shirt to wear in 2006 with “Be Happy, Not Gay” on the back. When she showed up wearing the t-shirt, school officials required her to cross off the words “Not Gay.”

Determined to spread her message in 2007, she and her freshman friend filed their lawsuit just a few weeks before the Day of Silence was to take place, together with a motion seeking an injunction to require the school to let her wear her t-shirt unaltered.

The school took the position that only affirmative messages would be allowed on student apparel. Thus, the school would have no problem with a t-shirt reading “Be Happy, Be Straight,” but they opposed letting any student wear a slogan that could be seen as disparaging other students, since the school had a goal of promoting tolerance among all the students. They said it would be like letting somebody wear a shirt stating “Be Happy, Not Christian” or “Be Happy, Not Jewish,” or “Be Happy, Not Muslim,” which they also would not allow. They expressed concerns both about provoking confrontations and about inflicting psychological harm on students who felt disparaged. In fact, the school was happy to let students wear the non-confrontational t-shirts supplied by ADF in support of its day.

“The central question before the court is whether a high school may prohibit negative speech about homosexuality as part of its pedagogical mission to promote tolerance of difference among students,” wrote Hart, pointing out that other federal courts around the country had generally upheld school administrators who had taken action to prevent students from wearing anti-gay t-shirts in response to Day of Silence activities in recent years. While acknowledging that students do have free speech rights under the First Amendment, he noted that the Supreme Court has identified circumstances in which schools can regulate student speech, including speech that “would substantially interfere with the work of the school or impinge upon the rights of other students.”

Hart quoted extensively from last year’s ruling by the U.S. Court of Appeals for the 9th Circuit, in San Francisco, which had upheld a decision by Poway , California, schools to prohibit students from wearing expressly anti-gay t-shirts. Harper v. Poway Unified School District,
445 F.3d 1166 (9th Cir. 2006), vacated as moot, 127 S.Ct. 1484 (2007). Although the Supreme Court ultimately vacated that decision granting injunctive relief as moot because the student involved had graduated, Hart nonetheless found its reasoning quite persuasive.

As Illinois is in the 7th Circuit, Hart was most concerned with predicting how the 7th Circuit Court of Appeals, which would hear any appeal of his ruling, might decide this issue. “The Seventh Circuit has not ruled on the question of school officials restricting student speech that is derogatory of a category of students,” he observed, but went on to assert, “It is clear, however, that the Seventh Circuit would take into consideration legitimate pedagogical concerns of the school as well as the school’s views of its educational mission, including inculcating rules of civility,” and he found this would be consistent with the approach the 9th Circuit took in the Poway schools case.

“Although ‘Be Happy, Not Gay’ does not contain invective as strong as those” in the other cases, where the t-shirts referred directly to religious condemnation of homosexuality, “it is still a negative statement disparaging homos,” Hart concluded. “It is within defendants’ discretion to prohibit such negative statements about gays and limit plaintiffs to expressing their views in a positive manner that does not directly disparage gays.”

He ruled that the school’s policy of promoting “policies of tolerance toward and respect for differences among students” were “a legitimate pedagogical interest that defendants are entitled to promote and protect,” and they also had a legitimate interest “in protecting gay students...from being harmed, both physically and psychologically.” He pointed out that the students wishing to communicate their views could do so by making affirmative statements about heterosexuality, and that the school was not threatening to discipline the students for wearing their t-shirts, just forbidding them from wearing them at school. Under the circumstances, he concluded, it was appropriate to deny their demand that he order the school officials to let them wear the t-shirts. A.S.L.

**8th Circuit Remands Case of Asylum Seeker Immigration Judge Did Not Believe Was Gay**

The U.S. Court of Appeals for the 8th Circuit has remanded the decision of the Board of Immigration Appeals (BIA), which had affirmed the decision of an immigration judge (IJ) holding that “John Doe” (who wishes to remain unnamed) lacked credibility in his claim for asylum because, among other things, the IJ did not perceive him as gay, available at 2007 WL 958144 (8th Cir., April 2, 2007).

Doe asserted that he would be mistreated if returned to his Eastern European country because of his political activities and because of his homosexuality. He claimed that after he had reported election fraud to police, officers beat and raped him, threatened his family, and repeatedly made derogatory remarks about his homosexuality. In addition to his own testimony, Doe submitted witness affidavits as well as documentation on the social and political conditions in his country.

The IJ found Doe’s testimony was not credible on the basis that “Neither [his] dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual,” that Doe had not given testimony showing his involvement in the gay community, and that he had not reported his abuse by the police to the authorities or to gay organizations. The IJ also stated that, in his experience “better than three-quarters of [gay applicants from Doe’s country] have used the claim that they were election observers to justify their claim for asylum,” and denied Doe’s application for asylum.

The BIA affirmed the decision of the IJ, and Doe appealed to the Court of Appeals for the 8th Circuit. The court remanded the case to the BIA to reconsider the decision of the IJ. The BIA excised the findings by the IJ outlined above and held that Doe’s testimony was still not credible and denied his application for asylum. Doe appealed the modified decision of the BIA to the 8th Circuit.

Speaking for a 3–judge panel, Judge William J. Riley found that the BIA “did not explain how the IJ’s remaining findings and credibility determination as a whole were not tainted by the IJ’s bias” and that the BIA did not explain how absent the IJ’s findings regarding Doe’s claim of persecution based on his homosexuality, the remaining record could support the IJ’s credibility determination because it “went to the heart of [Doe’s] asylum claim.”

Judge Riley granted Doe’s petition for review, and remanded the case to be reconsidered. He also recommended that the Attorney General consider reassigning the case to a different immigration judge, relying on several cases holding that where there has been inadequate performance or strong personal bias against an applicant by an IJ, the Attorney General should remand the case to a new IJ. Judge Riley briefly stated at the end of his opinion that his decision expresses no opinion of whether Doe’s claim for asylum was valid, but that the validity of Doe’s claim would be determined upon remand. Bryan Johnson

**Lithuanian Asylum Applicant Loses Appeal**

A unanimous three-judge panel of the U.S. 11th Circuit Court of Appeals, based in Atlanta, affirmed a denial of withholding of removal or protection under the Convention Against Torture in Mockoviciene v. U.S. Attorney General, 2007 WL 1091952 (April 12). Although the court found that the Immigration Judge (IJ) in this case seemed to have “misunderstood the nature of sexual orientation, either homosexual or heterosexual” in reaching the conclusion that the applicant was not actually a lesbian, the court found that the applicant’s marriage to a man in the United States justified upholding the Board of Immigration Appeals’ affirmation of the judge’s order denying her application to remain in this country.

According to the court’s opinion, the applicant and her daughter, both Lithuanian citizens, entered the U.S. on tourist visas in April 2000, overstayed their visas, and petitioned for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) in January 2004. This was several years past the short deadline to apply for asylum under U.S. law, which is one year from entry, so the IJ ruled out their asylum application, and the case going forward concerned the claims for withholding of removal and the CAT, which set a far higher standard for relief essentially that return to their home country would subject them to imminent risk of serious harm or torture.

The applicant claimed that when she told her husband in 1994 that she was a lesbian, he beat and raped her while his friends held her down. When she reported this to the police, they searched her mother’s apartment (where she was then staying) for evidence of “homosexual literature,” and told her that they would “keep an eye on her.” She testified that after this incident she lost work because the police notified her employers that she was a lesbian, and that one police officer in particular had questioned her about her sexuality, expressed “disgust” at her lesbianism, physically molested her, and threatened to make her life “a nightmare.”

The applicant testified that her neighbors became very hostile, attributing this to her husband and the police telling them that she was a lesbian. After she and her daughter went away on a weekend trip, they returned to find their new apartment occupied by another family, and when she refused to leave, neighbors called the police who arrested the applicant and detained her daughter. At the police station, an officer explained that the authorities had given her application to the other family because they did not want a lesbian living “in our district, our city or our country.” She claims that the officer kicked her after telling her this, and she was detained for two days in jail.

She then testified about a police operation in which she was deceived into submitting a written application to join a gay community group, only to discover that she had been set up by the police, who arrested her and subjected her to verbal and physical abuse, threatening her with prolonged imprisonment. She and her daughter fled to the Netherlands, obtained a tourist visa for the United States, and fled to this country.

The IJ rejected her petition for withholding of removal or protection under the CAT on two
grounds. First, the judge decided that her claim to be a lesbian was not credible. The IJ stated that during her testimony she had defined being a lesbian as “a woman who wants to be around other women and it does not necessarily involve sexual relationships.” The IJ wrote that although she had been in the U.S. for four years, she had not testified to having formed any lesbian relationships or joined any gay community organizations here, that she had no “original documents” testifying to her sexual orientation, and had not presented any witnesses directly testifying that she was a lesbian. The IJ was unwilling to credit the idea that somebody could be a lesbian without being in a sexual relationship. The IJ also purported to base his conclusion on her demeanor during her testimony. The IJ also ruled that even if it was assumed that she was a lesbian, she would not even qualify for asylum, much less withholding of removal, because her evidence did not meet the standard of persecution. The IJ said that the various police actions were not evidence of a government policy of persecuting gay people, the State Department’s country report on Lithuania did not indicate any particular anti-gay state policies, that Lithuania had repealed its sodomy law, and that “the Lithuanian President had accepted the credentials of the new Australian Ambassador who introduced his boyfriend to the President at the ceremony,” which the IJ found to demonstrate that “homosexuality is at least somewhat tolerated in Lithuania.”

The IJ concluded that what the treatment the applicant had described constituted “discrimination” rather than persecution.

The applicant, assisted by an attorney, filed a notice of appeal to the BIA, claiming that the IJ erred in concluding she was not a lesbian, and she charged error and bias by the IJ. Her attorney also filed a motion seeking to have the case sent back to immigration authorities for adjustment of status, based on the applicant’s recent marriage to a man in the United States and her desire to seek lawful permanent residence here as the spouse of a U.S. citizen.

The BIA rejected the motion and affirmed the IJ’s decision. They found that the applicant had not submitted the appropriate papers for adjustment of status, and without really addressing the IJ’s credibility determination in any detail, concluded that the applicant’s marriage had not undercut her credibility of her claim to be a lesbian and thus the IJ’s credibility determination was not clearly erroneous.” The BIA also accepted the IJ’s conclusion that since the applicant’s evidence fell short of establishing even the basis for an asylum claim, she could not qualify for the more demanding tests posed for withholding of removal or CAT protection, which require evidence of an immediate threat to her life or safety or subjection to torture were she to be returned to her home country.

The court of appeals disagreed with the IJ’s credibility determination, finding that the IJ misrepresented the applicant’s testimony concerning her definition of a lesbian, that her daughter had testified as to her mother’s lesbian identity, and that the applicant had presented affidavits supporting her claim to be a lesbian, which were apparently ignored by the IJ when he wrote that she had presented no evidence to support her claim to being a lesbian beyond her own testimony. “However,” wrote the court, “it is not our role to evaluate the record anew. We are limited to reviewing the BIA and IJ decisions and reversing only if the evidence compels us to do so. Given [the applicant’s] recent marriage, the evidence does not compel reversal of the BIA’s credibility determination.”

Perhaps more significantly, the court agreed with the IJ and the BIA that even if the applicant is found to be a lesbian, the evidence did not meet the test for withholding of removal. This would require the applicant to establish that there was a threat to her life or freedom, not merely intolerable social discrimination, quoting from a past BIA decision stating that “persecution [does] not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.” The court said that the applicant’s “description of the police’s treatment of her does not rise to the level of persecution.” Although she claims to have been detained twice, once for two days, the other time unstated, brief detention alone is not sufficient to constitute persecution.

The court insisted that her “detentions, alleged beating, and illegal eviction do not rise to the level of persecution because she presented no evidence that her life or freedom were ever in danger on account of her social group. Besides the past mistreatment, there is no reason to think that [she] will face persecution if she returns to Lithuania, either.”

If one accepts the court’s summary of the applicant’s testimony, this conclusion seems deliberately harsh, but given the standards governing such determinations, it is unlikely that the applicant can hope for further relief, as the Supreme Court has rarely responded affirmatively to any request to review these kinds of cases. One suspects that her claimed marriage was the real tipping point against her in the court’s consideration of the case. A.S.L.

**Federal Court Issues Preliminary Injunction in Florida GSA Litigation**

U.S. District Judge K. Michael Moore (S.D.Fla.) ruled April 6 in *Gay-Straight Alliance of Okeechobee High School v. School Board, 2007 WL 1031701*, that school officials in Okeechobee must allow a Gay Straight Alliance (GSA) to meet at Okeechobee High School (OHS) pending a trial in a case brought on the students’ behalf by the American Civil Liberties Union. Judge Moore found that the plaintiffs are likely to prevail on the merits of their case, which is based on the 1984 Equal Access Act (EAA), 20 USC 4071(a), passed by Congress to protect the First Amendment speech and associational rights of high school students.

Last fall, a group of students at Okeechobee High School organized themselves as a Gay Straight Alliance, found a faculty advisor, and petitioned the principal for the right to be a recognized student club and to meet at the high school. Principal Toni Wiersma stalled in responding to their request, but after they presented a written list of purposes for the organization, she turned down their request on October 12.

This was a perfect set-up for a lawsuit, since half a dozen federal cases have been decided on the issue of recognition for GSAs at public high schools since 1999, and all but one have ruled for the student groups. The one exception, *Caudillo v. Lubbock Independent School District, 311 F. Supp. 2d 550 (N.D. Tex. 2004)*, involved a student group that unwisely constructed a website with links to sexually-explicit materials and that included in their list of purposes teaching about safe sex, which was like waving a red flag in front of school administrators operating under a state law mandating that all sex education in Texas schools be abstinence-based.

In this case, the fearless high school senior who led the charge for the group was Yasmin Gonzalez, whose mother Frankie backed her up and joined with her as named plaintiffs in the complaint filed by the ACLU. Rob Rosenwald of the ACLU of Florida is lead counsel.

The school authorities in Okeechobee claimed that they had no non-curricular clubs at the school, so the EAA did not apply to them, but in case the court found that the statute was applicable, they also claimed that it was necessary to deny recognition to the GSA in order to maintain “order and discipline on school premises” and to “protect the well-being of students,” both recognized defenses under the EAA. The school officials argued that the GAS was in reality a “sex-based club” that was going to violate the state’s sex education mandates and promote teen sex.

Of course, the GSA asserted that it had no such purpose. Instead, referring to instances of homophobia at school, the club said that its goal was to “promote tolerance and equality among students, regardless of sexual orientation and/or gender identities through awareness building and education,” to “create a safe respectful learning environment for all students,” and “to work together with administration and other school clubs to end prejudice and harassment in school functions.”
Last month, Judge Moore rejected a motion by the school board to dismiss the case, finding that the ACLU’s complaint stated a valid legal claim. Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 2007 WL 7629238 (S.D. Fla., March 13, 2007). The logical next step, since so many of the students will be graduating this spring, was to grant the preliminary injunction, since Judge Moore found little substance in the defendants’ arguments. The school’s attorney came up with plenty of cases to cite to the court, but none of them had anything to do with the situation presented by the GSA.

After summarizing the purposes that the students articulated for their GSA, Moore wrote, “Defendant offers no evidence to refute Plaintiffs’ assertions or show that the OHS GSA would be involved with accessing or sharing with other students obscene or explicit sexual material; rather, this appears to be an assumption or conclusion derived from the name of the club. While this Court agrees that sharing obscene or explicit sexual material with children under the age of 18 would be contrary to the well-being of students, this Court has been given no reason to believe that the OHS GSA will not dedicate itself to the purposes, such as tolerance, that it has outlined without involving obscene or explicit sexual material.”

Moore also found no reason to believe that the GSA’s activities would “hinder the teaching of the benefits of abstinence at the school. In fact,” he asserted, “there is no apparent reason why the OHS GSA might not be an advocate for abstinence in the school.”

Moore also rejected the school’s arguments that letting GSA meet might subject the school to sexual harassment lawsuits or other legal liability as totally speculative, and apparently contrary to the purposes articulated by the group. He also rejected the school’s argument that it complied with the federal statute by making guidance counsellors available to speak with any students who had problems about sexuality to discuss. School board lawyer David Gibbs of Largo, Florida, was unavailable when the Orlando Sentinel (April 7) contacted him for comment on the case. A spokesperson for the Board of Education said they would confer with their lawyer before deciding how to respond to the court’s ruling. A.S.L.

Maryland Court Upholds Ban On “Glory Holes” in Adult Establishments

While all eyes may be on Maryland for the decision on same-sex marriage by that state’s highest court, the Maryland Court of Special Appeals (the intermediate appellate court) has concerned itself with matters somewhat less civil. In 104 West Washington v. Hagerstown, 2007 WL 968765 (April 3, 2007), that court sanctioned the decision of Hagerstown, Maryland to make its adult businesses glory-hole free.

The appellant in that case owned the only adult business in Hagerstown. The store had a back area with booths to view videos and sold videos, books, and other novelties in the front. Problems began when neighbors complained to the police about illegal drug activity occurring in the early hours of the morning. Another man complained to the chief of police, out of a desire to protect the gay community, after he claimed to have contracted AIDS from performing “hundreds of homosexual encounters” in the back of the store. The man stated that many heterosexual men performed homosexual acts through glory holes in exchange for money to support their drug habits, and the man feared that the addicts who had contracted STDs would then retaliate against the gay community.

In reaction to these complaints, and to protect the “health, welfare, safety, morals and general welfare” of Hagerstown citizens, the city council passed an ordinance requiring, among other things, that all adult businesses apply for a license and maintain viewing booths that cannot be completely closed but must not have any access to adjacent booths. The appellant, _inter alia_, challenged the constitutionality of the ordinance, charging that the city had to show pre-enactment evidence that the ordinance was narrowly drawn to serve a significant state interest. Asserting that the city presented no evidence on specific “negative secondary effects” of running an adult business the use of illicit drugs and the spread of STDs the appellant argued that the city could not prove that the ordinance was “narrowly tailored to serve a significant governmental interest.”

The Court of Special Appeals disagreed with the appellant’s framing of the constitutional issue. The court cited _Renton v. Playtime Theatres_, 475 U.S. 41 (1986), a case which evaluated a similar ordinance regulating adult businesses. The Supreme Court there held that no pre-enactment evidence was needed. Rather, the First Amendment only required that the “evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses.” This _Renton_ test was later applied by the Fourth Circuit in _1126 Baltimore Boulevard v. Prince George’s County_, 886 F.2d 1415 (1989). The Court of Appeals held that “little more than general, nonscientific and conclusory statements about sexually oriented businesses and their negative secondary effects” was enough to meet the burden imposed by _Renton_.

In the instant case, it was proper for Hagerstown to rely upon complaints made by the store’s neighbors and the man who claimed to have contracted AIDS. The council also relied upon the observance by the police chief of holes in the viewing booth walls when he visited the premises. This was enough evidence for the city council to “reasonably believe” that the spread of STDs would be regulated through the ordinance requiring open viewing booths with no holes to the adjacent booths. The Court of Special Appeals went on to say that the city was not obligated to pick the least restrictive means of regulating secondary effects of adult businesses, but was allowed to “experiment with solutions” that would prevent the transmission of STDs. Chris Benecke

Court Opens Government Bulletin Board to Anti-Gay Message

In _Lister v. Defense Logistics Agency_, 2007 WL 1027582 (S.D. Ohio, March 30, 2007), U.S. District Judge Edmund A. Sargus, Jr., found that a federal agency had violated the constitution by categorically excluding from a bulletin board made available for employees to post notices “items reflecting religious preference.” This exclusion was litigated on the complaint of Gary A. Lister, a DLA employee who was denied permission to post a notice inspired by his religious views denouncing the Combined Federal Campaign, a fund-raising device for channeling donations from federal employees to charities, on the ground, _inter alia_, that some CFC money goes to gay charities.

Lister sought to post the following notice on the bulletin board on October 6, 2004: “Did you know that when you support the CFC fundraisers your money may go to support the following — * abortion on demand * abortion for teens * sexual promiscuity * homosexual agenda * new age mysticism. Choose to make a difference.” He was denied permission to post the notice, because federal employees are not permitted to pursue “religious or ideological agendas [or] campaigns during work hours.” Lister filed a religious discrimination complaint with the agency’s Equal Employment Coordinator, who dismissed the complaint for “failure to state a claim.” Lister then filed in federal court, seeking a declaration that the policy of excluding religious and ideological messages from the bulletin board is facially unconstitutional, and seeking an injunction against future operation of the policy. In this opinion, Judge Sargus was ruling on cross-motions for summary judgment, and granted judgment in favor of Lister.

After lamenting “airth[sic] of caselaw involving similar facts,” Sargus analyzed the constitutional status of the bulletin board, finding it to be “essentially a non-public forum,” since only agency employees could post notices, not members of the general public. “In such context,” he wrote, “the government may restrict access, but only if such efforts are reasonable and not an effort to suppress expression. Because the bulletin board is open to all employees, however, the board has some aspects of a limited public forum.”
As such, concluded Sargus, once the government made this limited public forum available to its employees, “an outright exclusion of religious groups or messages was unconstitutional… As the Court reads the policy, an employee may post a notice for a political rally, demonstration, school activity, etc. Yet, an employee is prohibited from advertising a Christmas play, or lectures at a synagogue or meetings at a mosque.”

“The Court again notes that the government is not required to provide a bulletin board,” continued Sargus. “If it chooses to erect such a board, it may restrict messages to those posted by the government. Once the government creates a board open for posting by employees of virtually any noncommercial message, it may not exclude those messages of a religious nature. The policies applicable to the bulletin board in this case unreasonably restrict the Plaintiff’s rights under the First Amendment.”

However, as a prudential matter, the court shied away from any “wholesale invalidation” of the policy, which Lister had requested, preferring instead to declare that it was unconstitutional as applied to Lister’s desire to post his particular notice due to it being inspired by Lister’s religious views, so his final order enjoins the enforcement of the policy against posting of materials expressing religious preference.

A.S.I.

Federal Civil Litigation Notes

U.S. Supreme Court In an apparent contradiction to its ruling in Lawrence v. Texas that the state’s moral objections to homosexuality could not provide a justification for a law criminalizing private consensual adult homosexual conduct, the Supreme Court ruled 5–4 on April 18 that moral disapproval of a procedure characterized by its opponents as “partial birth abortion” could justify a federal statute banning the practice. Gonzales v. Carhart, 127 S.C.t. 1610. Writing in dissent, Justice Ruth Bader Ginsburg argued that there was no rational basis advanced for the statute, which does not ban abortions but merely bans a procedure of which most legislators have stated personal disapproval. Justice Ginsburg pointed out that the law provided no exception in cases where the procedure is the safest available for the pregnant woman in light of the medical situation. The only explanation for this decision, in light of the Court’s contrary decision concerning a similar state law in Stenberg v. Carhart, 530 U.S. 914, is the retirement of Justice Sandra Day O’Connor and her replacement with Justice Samuel Alito. Every other member of the Court voted the same way they had voted when the Court struck down a similar Nebraska statute by a vote of 5–4.

Seventh Circuit — Avoiding an important and interesting question of public policy, a panel of the U.S. Court of Appeals for the 7th Circuit held that individual taxpayers lack standing to bring a First Amendment Establish Clause challenge against federal statute, 10 U.S.C. sec. 2554, that requires the Defense Department to assist the Boy Scouts of America with its Jamboree, a national event held every four years. Winkler v. Gates, 2007 WL 983822 (April 4, 2007). Having found that plaintiffs did have standing, and that the BSA’s requirement that its members profess a faith in G-d made it a religious institution, District Judge Blanche M. Manning (N.D.Ill.), had ruled that the statute violated the Establishment Clause, and the Defense Department appealed. In a long and detailed analysis, the court determined that ordinary tax-payers do not have standing, noting that no money is given directly to the Boy Scouts under the statute, but rather that the Defense Department incurs some expenses in assisting with the Jamboree, and thus the statute is not in essence a “taxing and spending” statute as to which a taxpayer might have standing. Citing last year’s decision in Rumsfeld v. FAIR, 126 S.Ct. 1297 (2006), rejecting a constitutional challenge to the Solomon Amendment, the court pointed out that the DoD’s assistance with the Jamboree could be justified as “assisting the military in persuading a new generation to join its ranks and in building good will,” which the court characterized as “a secular and valid purpose.”

California — U.S. District Judge Jeremy Fogel refused to dismiss a sexual harassment claim brought by the Equal Employment Opportunity Commission on behalf of Joseph Michael Lowe. EEOC v. Monterey Collision Frame & Body, Inc., 2007 WL 1201767 (N.D. Cal., April 23, 2007). Judge Fogel found that the statute of limitations applicable to the filing of claims by complainants did not apply to the EEOC, which could proceed at its own pace in filing suit after determining probable cause upon receiving a timely charge of discrimination. Furthermore, the court found that the complaint adequately stated a claim for sexual harassment in violation of Title VII, without discussing any of the tortured case law on the point. Lowe charged that he was subjected to the kind of harassment that some courts have found non-actionable on the ground that it was motivated by homophobia rather than gender stereotyping, but the court makes nothing of that. Judge Fogel also granted Lowe’s motion to intervene as a co-plaintiff. The opinion says nothing about Lowe’s sexual orientation, merely reporting that the EEOC’s allegations include that co-workers were “teasing Mr. Lowe that he was homosexual and wanted to have sex with a male co-worker.”

California — U.S. Magistrate Edmund F. Brennan has awarded attorney’s fees and sanctions pursuant to 28 U.S.C. sec. 1927 to counsel for Pamela Lynn Rux, who is suing Starbucks Corporation for sexual orientation discrimination in violation of the California Fair Employment and Housing Act in a diversity action in the Eastern District of California. Rux v. Starbucks Corporation, 2007 WL 1098550 (April 12, 2007). The fee award is to compensate for unnecessary time spent by Rux’s attorney attempting to depose two Starbucks managers, whose depositions were repeatedly cancelled at the instance of Starbucks’ counsel, David R. Ongaro and David R. Burt. The better part of a year was consumed, and the discovery deadline was extended by the court several times, due to the failure of defense counsel to respond in a timely way to attempts to schedule the depositions. They even misrepresented for a period of several months that one of the witnesses had moved out of state and was unavailable, an untruth that was only revealed during the witness’s deposition when a threat of a motion to compel prompted it to be scheduled at last. Despite all the frustration, Rux’s counsel did not ask for punitive sanctions, only compensation at her hourly rate for the wasted time, in the amount of $1,406.25. Magistrate Brennan, obviously disgusted by the unprofessional conduct of Starbucks’ counsel, sua sponte increased the award by $337.50 to compensate for the court time expended by Rux’s counsel in attending the hearing on her motion for sanctions!

New York — Shawn Michael Snyder, a gay man who was incarcerated in the custody of the New York Department of Corrections, will be allowed to pursue his constitutional claims against two guards at the Washington Correc- tional Facility, as Senior U.S. District Judge Thomas J. McAvoy largely adopted the report and recommendations submitted in Snyder v. Goord, 2007 WL 957530 (N.D.N.Y., March 29, 2007), ruling on the defendants’ motion for summary judgment. Snyder, who was openly gay and known to be gay within the prison, complained that C.O. Whittier had subjected him to verbal threats and verbal and physical abuse, and had encouraged other inmates to do so as well, resulting in at least one incident where Snyder needed medical care as a result of physical injuries inflicted upon him by the officer. Snyder claimed he refrained from promptly filing a grievance due to fear of retaliation from the officer, but he had complained verbally to another officer and, after being transferred to another unit, had written to some higher officers with his complaints. Ultimately, DOCS did initiate an investigation of his charges, but had not communicated the result of the investigation to him by the time he filed suit after being released. The defendants raised the Prison Litigation Reform Act in their s.j. motion, arguing that Snyder’s claims were barred due to failure to exhaust remedies, and that his complaint should be dismissed with respect to named defendants who had no personal
involvement. Magistrate David E. Peebles agreed with the latter point, but found grounds to deny the s.j. motion as to the two named corrections officers in the complaint, finding that the circumstances might on further investigation support Snyder’s claim that he had acted appropriately in the circumstances, and that he also might have an estoppel claim against DOCs on this issue due to their launching of an investigation based on his complaints. However, Judge McAvo, rejecting a recommendation by the magistrate, ordered dismissal of Snyder’s claim that the prison interfered with his rights by its actions preventing his correspondence on the matter from reaching the National Gay and Lesbian Task Force by refusing to treat it as “legal mail” and then, after he affixed postage, by intercepting and opening his letter and returning it to him as undeliverable.

New York — Selina Benson, an African-American lesbian, will be able to pursue a retaliation claim but not a sexual orientation discrimination claim against her former employer in federal court in the Eastern District of New York. Benson v. North Shore-Long Island Jewish Health Systems, 2007 WL 1140383 (April 4, 2007). She alleged that she was treated in a variety of unfavorable ways by comparison to white, heterosexual employees, and brought charges at the New York State Division of Human Rights, which found no probable cause. After these events were set in motion, she was discharged. She then filed her federal suit under Title VII and 42 U.S.C. 1981 and 1986, adding retaliation claims to her original discrimination claims and broadening the defendant class to include individual supervisors and managers as well as the corporate employer. Among other things, she alleged that sexual orientation discrimination against her violated Title VII’s ban on sex discrimination, a claim that Judge Spatt dispatched in short order, relying mainly on the 2nd Circuit’s decision in Simonson v. Ranyon, 232 F3d 33 (2nd Cir. 2000), which held that sexual orientation discrimination claims, as such, remain “nons cognizable under Title VII. The court partly granted and partly denied defendants’ motions to dismiss the case, finding that much of what was presented to the State Division of Human Rights was precluded in a subsequent federal suit, but the retaliation claims, which postdated the SDHR no-probable-cause determination, was not precluded. She will also be able to pursue her federal civil rights claims apart from Title VII against individual named defendants.

Oregon — Fundamentalist preachers who show up with anti-gay signs to preach at gay pride events have a First Amendment right to do so, regardless whether the event is gate or charges admission, so long as it is on public property. So ruled Chief Judge Haggerty of the U.S. District Court in Portland on April 9, in Gathright v. City of Portland, 2007 WL 1053324. City police had taken to requiring Gathright and other fundamentalist preachers who were attracted to large public gatherings in order to harangue the crowds to “move on” and keep their distance. Various preachers sued and their cases were consolidated. The district court granted injunctive relief against enforcement of a city ordinance that the police relied on. The city revised the ordinance in compliance with the court’s order, after it had been upheld by the 9th Circuit. See Gathright v. City of Portland, 439 F3d 573 (9th Cir. 2006). The case was remanded by the 9th Circuit for consideration whether injunctive relief was still necessary in light of the revised ordinance. Judge Haggarty found that because the city had not taken any action under the revised ordinance, its constitutionality was not in play. However, in light of past events and the arguments the city was making, Haggerty had to determine whether the same First Amendment rights would apply regardless whether an event on city property was gated. Haggerty noted that Portland Pride had taken to “gating” its events to avoid having anti-gay preachers in attendance with their signs. (Rev. Gathright’s favorite sign reads “Got AIDS Yet?”) Haggerty concluded that so long as the event was taking place on public property, the organizers could not exclude somebody on the basis of the content of their speech. The only circumstances under which the police could remove the preachers would be if a public disturbance ensued. They take free speech rights very seriously in Oregon!

Pennsylvania — U.S. District Judge James M. Munley (M.D. Penn.), refused to grant temporary injunctive relief in one of the Federal Court cases challenge the Colorado law that the United States Supreme Court just ended its docketing by a unanimous vote. Munley denied a request for a restraining order barring institutional discipline that prisoners do enjoy some constitutional rights. In Munley’s view, there was no denigration of constitutional rights. However, in light of past events and the arguments the city was making, Haggerty had to determine whether the same First Amendment rights would apply regardless whether an event on city property was gated. Haggerty noted that Portland Pride had taken to “gating” its events to avoid having anti-gay preachers in attendance with their signs. (Rev. Gathright’s favorite sign reads “Got AIDS Yet?”) Haggerty concluded that so long as the event was taking place on public property, the organizers could not exclude somebody on the basis of the content of their speech. The only circumstances under which the police could remove the preachers would be if a public disturbance ensued. They take free speech rights very seriously in Oregon!

State Supreme Court Justice Bernard J. Fried issued an order signed April 17 expanding the scope of discovery in Sullivan v. Charney, No. 600333/2007, to allow Aaron Brett Charney’s lawyers to depose S&C partner Vince DiBlasi, S&C suspended associate Gera Grinberg, and Grinberg’s former counsel, Edward Gallion, on two topics in addition to those already authorized. Responding to correspondence from the parties, Fried decided that Charney could inquire about whether S&C and Gallion “conspired” to produce an affidavit falsely depicting what happened during a January 31 meeting at which Charney, DiBlasi, S&C litigation chief David Braff, Grinberg and Gallion were present. The meeting took place the day before S&C filed suit against Charney, who had previously filed a sexual orientation discrimination suit against the law firm.

Charney alleges that he was threatened and frightened during that meeting and told that he either had to surrender the hard drive of his home computer to S&C or destroy it as S&C had determined that Charney emailed various client documents to his home computer which S&C claims should not be in his possession.
Charney subsequently destroyed the hard drive, he has testified in a deposition, without seeking legal advice on the matter, although he retained counsel the following day when he was sued and formally discharged from S&C. S&C has charged that Charney’s destruction of the hard drive constituted spoliation of evidence.

According to Charney’s deposition testimony, the only note-taker at the January 31 meeting was Grinberg, who turned his notes over to attorney Gallion at the end of the meeting for safe keeping. Grinberg later discharged Gallion, who was being paid by S&C to represent him as a witness in these proceedings, and it subsequently came out in court that Gallion had destroyed the notes, or so it was reported by Grinberg’s new attorney, Gary Ireland, who also intimated that disciplinary charges were on file against Gallion. Thus, the second topic of expanded discovery: Charney’s lawyers are authorized to inquire into what became of Grinberg’s notes.

They had previously been authorized by Justice Fried to depose DiBlasi, Gallion and Grinberg on what was said at the January 31 meeting, and particularly what Charney was told about his hard drive and whether there were threats, coercion, pressure or similar words communicated to Charney concerning the documents on the hard drive.

So far, there has been no joinder of issue on the substance of Charney’s discrimination and retaliation claims, as S&C moved to dismiss the case, arguing that litigating it would inevitably lead to public revelation of client confidences and secrets, and invoking New York case law which the firm argues supports dismissing litigation by a lawyer against his employer on this basis. Charney moved to dismiss S&C’s case, arguing that its legal theories of breach of fiduciary duty and contract are both unsound, and that S&C’s theft and replevin actions are essentiarily mooted by his having returned hard copy documents in his possession and destroyed his hard drive. Both motions have been argued and are pending before Justice Fried. They raise interesting and not entirely settled issues and are pending before Justice Fried. They raise interesting and not entirely settled issues and are pending before Justice Fried.

Georgia — The Georgia Supreme Court reiterated its decision not to hear an appeal in a second-parent adoption case. The court rejected an attempt by Sara Wheeler to get reconsideration of the court’s February 26 decision not to hear her appeal of a lower court order from 2005, in which DeKalb County Superior Court Judge Anne Workman upheld parental rights for Melody Wheeler, whose second-parent adoption of the child born to Sara Wheeler through donor insemination Judge Workman had approved in 2002. This probably puts an end to the case of Wheeler v. Wheeler, since the U.S. Supreme Court seems unlikely to take such a case. Greg Nevin of Lambda Legal, whose office in Atlanta provided assistance to Melody Wheeler in this case, observed that the finality of adoptions was the overriding concern in the case, to assure against disruption of an established parent-child relationship. Queerlaw.com posting, March 29; Docket Entry for S07C0299, indicating motion for reconsideration denied on March 27.

Georgia — A crusading anti-gay judge and a lesbian seeking to adopt a child don’t make for the best combination, and in the case of Elizabeth Hadaway and Georgia Wilkinson County Judge John Lee Parrott, the combination has proved unfortunately combustible. A detailed account is contained in www.dailyreportonline.com for April 19. Young Emma’s mother could not care for her and asked Hadaway if she would adopt the child. Hadaway agreed and petitioned for adoption in Wilkinson County, where the requisite state agency found her well-qualified. But Judge Parrott has objections to lesbians caring for children, especially if they are living with a same-sex partner, as Hadaway was at the time. Parrott ordered that the child be returned to its natural mother or surrendered to the custody of the state. Hadaway met with the mother, who reiterated that she did not want parental responsibility for the child, so Hadaway split from her long-term partner, moved to another county, and petitioned for adoption there, where it was readily granted by Bibb County Judge Superior Court Judge Tim E. Self III, who was fully advised of what had gone in previously. Parrott, outraged, issued contempt orders against Hadaway and her attorney, and pressed ethical charges against the attorney. The child is now in the custody of foster parents by direction of Judge Parrott, and Hadaway is struggling to regain her A.S.L.

California Appeal Court Upholds Refusal of Injunction in Lesbian Dispute

Court of Appeal Justice O’Leary ruled in Martinez v. Estrada, 2007 WL 1026751 (Ct. App., 4th Dist., April 5, 2007), rejecting a petition for an injunction against Aurelia Hortensia Estrada, whom she had discharged from employment.

Superior Court Judge John Flynn had found at trial that Martinez, Estrada’s supervisor, was sexually interested in her. Estrada was openly-lesbian, but, Flynn found, not interested in having an affair with Martinez. Martinez had taken Estrada, a Mexican, to a lawyer for help with her green card application, and Estrada felt indebted to Martinez and put up with many displays of affection, etc. However, disputes arose between them, especially concerning Estrada’s unhappiness with the job performance of Martinez’s sister, who also worked in the same company. Eventually Martinez discharged Estrada and sought an injunction against her, alleging harassment. Martinez told a diametrically opposed story about Estrada pursuing her, but this was not believed by Judge Flynn, who denied injunctive relief.

On appeal, Martinez argued that the trial had been tainted by inappropriate evidence about the nature of the relationship between the two women, but Judge O’Leary found that Martinez had opened the door on this subject because she had testified during her direct case about the nature of the relationship, making it fair game for discussion on cross-examination.

Judge O’Leary’s recitation of the two versions of the facts has a Rashomon-like quality, but ultimately the legal issues on appeal are minimal. A.S.L.

Criminal Litigation Notes

Federal — Kansas — Rejecting a petition for constitutional relief from a man convicted of statutory rape, U.S. District Judge Richard D. Rogers held that consensual sex between an adult and a teenager was not within the liberty interest protected in Lawrence v. Texas. Crooks v. Kline, 2007 WL 983169 (D. Kan., March 27, 2007). Jerry Crooks’ main line of defense on the statutory rape charge, brought after he impregnated then–13-year-old S.S., was that they were common law spouses, but the Kansas courts concluded that his proof fell short of that, so he did not qualify for the exception from the statutory rape law for consensual sex between spouses. Rogers pointed out that “the Lawrence decision did not involve minors. Nor did it establish a fundamental right of adults to engage in all forms of private consensual sexual conduct,” citing Math v. Frank, 412 E3d 808 (7th Cir. 2003), which rejected a Lawrence-based challenge to a state’s incest law, and said that

State Civil Litigation Notes

California — A Los Angeles Superior Court jury awarded $1.7 million to Lewis Bressler, a Los Angeles firefighter, finding that he had lost his job because he had supported an African-American lesbian colleague in her discrimination claims. However, the jury rejected Bressler’s alternative argument that he was the victim of age discrimination in its April 14 verdict. A spokesperson for the Los Angeles City Attorney’s office, which represented the Fire Department, expressed disappointment in the verdict and said the City was reviewing the trial record and “considering our options.” Brenda Lee, Bressler’s colleague mentioned above, has her own discrimination lawsuit which is awaiting trial. Another firefighter who also claimed he ran into workplace difficulties for supporting Lee had sued the city as well, settling his lawsuit last year for $350,000. Monterey County Herald, April 15.

Georgia — The Georgia Supreme Court reiterated its decision not to hear an appeal in a second-parent adoption case. The court rejected an attempt by Sara Wheeler to get reconsideration of the court’s February 26 decision not to hear her appeal of a lower court order from 2005, in which DeKalb County Superior Court Judge Anne Workman upheld parental rights for Melody Wheeler, whose second-parent adoption of the child born to Sara Wheeler through donor insemination Judge Workman had approved in 2002. This probably puts an end to the case of Wheeler v. Wheeler, since the U.S. Supreme Court seems unlikely to take such a case. Greg Nevin of Lambda Legal, whose office in Atlanta provided assistance to Melody Wheeler in this case, observed that the finality of adoptions was the overriding concern in the case, to assure against disruption of an established parent-child relationship. Queerlaw.com posting, March 29; Docket Entry for S07C0299, indicating motion for reconsideration denied on March 27.

Georgia — A crusading anti-gay judge and a lesbian seeking to adopt a child don’t make for the best combination, and in the case of Elizabeth Hadaway and Georgia Wilkinson County Judge John Lee Parrott, the combination has proved unfortunately combustible. A detailed account is contained in www.dailyreportonline.com for April 19. Young Emma’s mother could not care for her and asked Hadaway if she would adopt the child. Hadaway agreed and petitioned for adoption in Wilkinson County, where the requisite state agency found her well-qualified. But Judge Parrott has objections to lesbians caring for children, especially if they are living with a same-sex partner, as Hadaway was at the time. Parrott ordered that the child be returned to its natural mother or surrendered to the custody of the state. Hadaway met with the mother, who reiterated that she did not want parental responsibility for the child, so Hadaway split from her long-term partner, moved to another county, and petitioned for adoption there, where it was readily granted by Bibb County Judge Superior Court Judge Tim E. Self III, who was fully advised of what had gone in previously. Parrott, outraged, issued contempt orders against Hadaway and her attorney, and pressed ethical charges against the attorney. The child is now in the custody of foster parents by direction of Judge Parrott, and Hadaway is struggling to regain her A.S.L.

California Appeal Court Upholds Refusal of Injunction in Lesbian Dispute

Court of Appeal Justice O’Leary ruled in Martinez v. Estrada, 2007 WL 1026751 (Ct. App., 4th Dist., April 5, 2007) (not officially published) that Irene Martinez was not entitled to an injunction against Aurelia Hortensia Estrada, whom she had discharged from employment.

Superior Court Judge John Flynn had found at trial that Martinez, Estrada’s supervisor, was sexually interested in her. Estrada was openly-lesbian, but, Flynn found, not interested in having an affair with Martinez. Martinez had taken Estrada, a Mexican, to a lawyer for help with her green card application, and Estrada felt indebted to Martinez and put up with many displays of affection, etc. However, disputes arose between them, especially concerning Estrada’s unhappiness with the job performance of Martinez’s sister, who also worked in the same company. Eventually Martinez discharged Estrada and sought an injunction against her, alleging harassment. Martinez told a diametrically opposed story about Estrada pursuing her, but this was not believed by Judge Flynn, who denied injunctive relief.

On appeal, Martinez argued that the trial had been tainted by inappropriate evidence about the nature of the relationship between the two women, but Judge O’Leary found that Martinez had opened the door on this subject because she had testified during her direct case about the nature of the relationship, making it fair game for discussion on cross-examination.

Judge O’Leary’s recitation of the two versions of the facts has a Rashomon-like quality, but ultimately the legal issues on appeal are minimal. A.S.L.

Criminal Litigation Notes

Federal — Kansas — Rejecting a petition for constitutional relief from a man convicted of statutory rape, U.S. District Judge Richard D. Rogers held that consensual sex between an adult and a teenager was not within the liberty interest protected in Lawrence v. Texas. Crooks v. Kline, 2007 WL 983169 (D. Kan., March 27, 2007). Jerry Crooks’ main line of defense on the statutory rape charge, brought after he impregnated then–13-year-old S.S., was that they were common law spouses, but the Kansas courts concluded that his proof fell short of that, so he did not qualify for the exception from the statutory rape law for consensual sex between spouses. Rogers pointed out that “the Lawrence decision did not involve minors. Nor did it establish a fundamental right of adults to engage in all forms of private consensual sexual conduct,” citing Math v. Frank, 412 E3d 808 (7th Cir. 2003), which rejected a Lawrence-based challenge to a state’s incest law, and said that
the same reasoning applied to this case. “In 2001, when petitioner was convicted, there was no clearly established federal law that supported a fundamental right for an adult to engage in consensual sexual intercourse with a 13-year-old child to whom the adult was not married. Nor was there clearly established law in 2001 which stated that it was irrational or a violation of the Equal Protection Clause on the basis of any other standard for the Legislature to prohibit an adult from having sexual intercourse with a 13-year-old child to whom the adult was not married.”

Arkansas — The old cat and mouse game of park cruising is alive and well, and so is police entrapment to “crack down” on it, to judge by the Arkansas Court of Appeals decision in 

Davis v. State

2007 WL 1207375 (April 25, 2007) (not officially published). Police in Fort Smith, reacting to “several citizen complaints about public sexual activities,” according to the opinion by Judge Wendell L. Griffen, started an undercover operation to catch gay men in Fort Smith Park. Davis was caught in the snare, and incautiously agreed to have oral sex with an undercover agent in his truck. He was convicted of loitering, a Class C misdemeanor, and sentenced to 15 days in the county jail and a $100 fine. This sounds like something out of the 1950s, but there it is. Davis tried to argue on appeal that “the evidence shows that no one responded to his advances; he was2

captured by a police cruiser while driving suspiciously. A theory of Coyazo’s defense was that he was a mere bystander to the bad acts of his friend, he did not pull the trigger, etc., and the jury was deadlocked on the attempted murder charge, but he was convicted on kidnapping and robbery charges. Another theory presented by the defense was that the three men were shocked by Janosik’s sexual passes, which provoked them into violent response, but the court refused to buy this theory, finding that they had “set up” a vulnerable gay man. The case was remanded for resentencing due to some technical errors.

Kansas — The continuing saga of Matthew Limon, whose case provided a rare occasion for Lawrence v. Texas to be used by a lower court in support of a gay defendant’s criminal appeal, produced yet another opinion in State v. Limon, 2007 WL 1042134 (Kan. App., April 6, 2007). Limon, then barely 18 years old, engaged in oral sex with a 15 year old boy, a fellow resident of a facility for developmentally disabled youth, which violated Equal Protection because state laws would have imposed a drastically less onerous sentence had his younger sexual partner been female. This resulted in his release on probation, since by the time his appeal triumphed he had been in prison longer than the minimum sentence for the offense. In this case, a trial judge had ruled that his post-release should be 36 months, based on a finding by the court that his crime was sexually motivated. The problem, argued Limon on appeal, was that the court had made an improper finding in violation of the Supreme Court’s ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000), that facts relevant to sentencing must be found by a jury. The Court of Appeals agreed with Limon, and remanded for resentencing to 12 months of supervised release.

Missouri — The Missouri Court of Appeals, Western District, has reversed the murder conviction of police officer Steven Arthur Rios, finding that certain statements of the victim admitted at trial constituted hearsay that may have prejudiced the case. State v. Rios, 2007 WL 1223754 (April 27, 2007). The victim, Jesse Valencia, was a then—23 year old gay man with whom Rios, a married man, had sex on several occasions. Valencia was found dead outdoors with his throat slashed. At trial, the state’s theory was that Valencia had told a woman friend that he was going to ask Rios if he was married, because Valencia did not want to have a sexual relationship with a married man, and that he was going to warn Rios to help get a ticket Rios had issued to Valencia dismissed or Valencia had a “secret” he could tell the police department about Rios. The prosecution argued that Rios’s motive to kill Valencia was to silence him, thus protecting Rios’s marriage and job. The court of appeals determined that the hearsay statements should have been excluded, finding they did not qualify for an exception for statements about what a person intended to do imminently. At the time the statements were made, said the court, there was no indication that Valencia intended imminent action. He was killed three days after having made one of the statements. Rios, who was sentenced to life imprisonment without possibility of parole, will receive a new trial. The court rejected Rios’s argument that gruesome pictures of the victim’s corpse at the crime scene and at autopsy should have been excluded, as well as pictures taken earlier the day of the murder showing Valencia attending a private party.

New York — In People v. Kozlou, 2007 WL 1213697 (April 26, 2007), the New York Court of Appeals voted 5–2 that when the legislature used the word “depict” in a statute criminalizing the dissemination of “indecent material” to minors, they meant to include textual communication, not just pictures. Reversing a decision of the Appellate Division, which held that Jeffrey Kozlou could not be convicted because the email he exchanged with an undercover investigator posing as a 14 year old youth interested in sex with adults only included text and nonsexual pictures. At the time, the relevant state law made it a crime if a person intentionally communicated by computer with a minor “knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors.” While this case was pending, the legislature, apparently disagreeing with the conclusion below, amended the law to add, after depict, “or describes, either in words or images.” So the case is really significant only for prosecutions taking place before the law was amended effective March 1, 2007. Dissenting, Judge Robert Smith disagreed with the majority’s conclusion that the word “depict” could be construed to extend to text.

New York — Local media focused on this as if it were a “dog bites man” story. Four lesbians were convicted of assaulting a straight man who came on to them in Greenwich Village last summer. One of the women, alleged to have stabbed Dwayne Buckle, was acquitted on a charge of attempted murder. They claim they were defending themselves when he reacted physically to their rejection of his advances; he claimed he was assaulted without sufficient physical provocation, and the jury believe him. After the jury brought in its verdict on April 18, Justice
Edward J. McLaughlin of State Supreme Court remanded the women to custody until their sentencing in May. The women were characterized by some as a “lesbian gang,” and one prospective juror asked if this was an organized crime gang as to which he should be fearful about retaliation. McLaughlin criticized the juror and ordered him to report to the jury assembly room to sit for the duration of the trial (although not on the jury). McLaughlin’s order was subsequently reversed by the Appellate Division, First Department. The potential penalties for gang assault would run to 3–1/2 to 15 years in prison. New York Times, April 19. A.S.L.

**Legislative Notes**

Federal — The latest iteration of the Employment Non-Discrimination Act (ENDA), H.R. 2015, was reintroduced in both houses of Congress on April 24, with some prospects of favorable action in at least one chamber the House of Representatives this year. Favorable action in the Senate would turn on whether the Republicans will let it come to a vote, since they have enough votes to block “calling the question” on any bill they oppose. There are hopes that the measure would enjoy sufficient bipartisan support to overcome that problem. An earlier version of ENDA came to a vote in the Senate in 1996, coincident with passage of the Defense of Marriage Act (DOMA), and fell one vote short of a tie, even though Republicans controlled the chamber at that time; the vote was part of a deal to get an up-or-down vote on DOMA without any proposed amendments. The current version of ENDA would ban disparate treatment discrimination in employment on the basis of sexual orientation or gender identity by employers subject to Title VII of the Civil Rights Act of 1964, incorporating the enforcement mechanisms of Title VII, but would not allow for disparate impact cases, would rule out any affirmative action remedies, and would exempt religious institutions and the military from compliance. It would also specifically provide that denial of domestic partnership benefits is not a violation of the statute and, presumably, would continue the situation where people who want to sue their private sector employer for domestic partnership benefits under a state sexual orientation discrimination law would encounter ERISA preemption blocking their claim. In other words, it remains a minimalist, “foot in the door” bill, rather than a comprehensive approach to workplace inequality experienced by sexual minorities, but enactment would be an important breakthrough in federal law, and, from a pragmatic viewpoint, the bill as introduced presents what might be possible to enact at this time. The Bush Administration did not immediately take a position on the bill, or indicate whether the president would veto it in order to comply with the political views of his “base,” which is believed to be strongly opposed to it although national polls show overwhelming support for banning workplace discrimination on these grounds, even among Republicans polled. At the time of introduction, seventeen state jurisdictions banned sexual orientation discrimination, and about half of those also ban gender identity discrimination, which has been included without much fuss in most recently-enacted state laws.

Colorado — On April 16 the Colorado Senate voted 20–15 along party lines to approve a bill that would add sexual orientation to the list of prohibited grounds for discrimination in the workplace in that state. Republicans opposing the bill argued that “protected” status should be limited to the traditional categories sanctified in federal law, and that gays were wealthy people who did not need “special” rights. Prior versions of the legislation had been vetoed more than once by former Governor Bill Owens, a Republican. Democratic legislators are hopeful that this measure will get a better reception from the current Governor, Bill Ritter, a Democrat. Governor Ritter has indicated his intent to sign into law a measure passed by the legislature that will allow unmarried cohabiting couples, including same-sex couples, to adopt children. Ritter indicated that despite heavy lobbying to veto the bill, he was persuaded that adoptive children in Colorado would be better served by having two legal parents than one. The Gazette, April 22.

Indiana — A proposed constitutional amendment banning same-sex marriage died in the House Rules Committee on a tie vote. According to an April 5 report in the Ft. Wayne Journal Gazette, the Democrats who voted against the measure objected to its ambiguous reach, as this is one of the proposals that reaches beyond the simple issue of same-sex marriage to forbid that “marital status or the legal incidents of marriage be conferred upon unmarried couples or groups,” and nobody is quite sure how such language will be construed regarding a variety of legal issues, including the legality of domestic partnership benefits plans and the enforceability of living-together agreements for same-sex couples.

Kansas — Governor Kathleen Sebelius has signed into law a statute to restrict picketing or protesting at funerals. The measure was enacted in response to picketing of military funerals by members of the Westboro Baptist Church, whose protests proclaim that US soldiers are being killed because the US tolerates homosexuality. (Ironic, isn’t it, since the soldiers are employed by the only US employer that is formally commanded by Congress to discriminate on the basis of sexual orientation in its personnel practices?) The law also authorizes the surviving families to bring defamation suits against the protesters, but will not take effect until it is upheld as constitutional by the Kansas Supreme Court or a federal court, according to an April 13 report on jurist.law.com.

Maryland — Maryland has enacted legislation requiring health insurance companies doing business in the state to offer group policies that would provide coverage to domestic partners of group members as well as the partners’ children. The measure received bipartisan support. 365Gay.com. The State Assembly had previously also approved two pro-gay measures, according to the same source. One would authorize life insurance companies to issue group life policies that would extend coverage to domestic partners of group members. Another would authorize suits for damages for sexual orientation discrimination under the state’s law forbidding such discrimination. The existing law only authorizes those discriminated against under state law to sue for discrimination in federal court, appending their state law claims, but since federal law does not include sexual orientation, gays were limited to the administrative forum for their claims. The Assembly also previously blocked a proposed anti-gay marriage amendment to the state constitution.

New Hampshire The state’s House of Representatives voted 243–129 on April 4 to approve a bill establishing civil unions for same-sex couples that would carry the state law rights identified with different-sex marriage. The measure would bring the state into line with domestic relations law in its neighboring state of Vermont, and would join Connecticut and New Jersey among the ranks of civil union states. Neighboring Massachusetts allows same-sex partners to marry for now, as does Canada, with which New Hampshire shares a border. The measure was expected to be passed in the Senate later in the month. Ending much suspense and speculation, Governor John Lynch announced on April 19 that if the measure passed he would sign it. He told the Associated Press: “I believe it is a matter of conscience, fairness and preventing discrimination.” The governor’s announcement came after the originally scheduled consideration in the Senate was delayed by the leaders of that body while the governor met with many legislators to gauge support for the bill, so its ultimate enactment appears likely. Associated Press, April 19, April 4.

New York — Making good on a campaign promise, New York Governor Eliot Spitzer sent a legislative proposal to the state legislature on April 27 to open up marriage in New York State to same-sex couples. Spitzer had previously caused some consternation in the gay political community when he told reporters that his legislative priorities for this session did not include same-sex marriage. This was later clarified by an administration spokesman, who confirmed that the marriage bill would be introduced, but that the governor was not making it a priority for this session due to his focus on what he thought could be passed. So long as the state
Senate is controlled by the Republicans, it seems likely that the bill would remain buried in committee in that chamber. Its chances are better in the Democratic-controlled Assembly, although Speaker Sheldon Silver has not taken any position on the proposal publicly and proponents of same-sex marriage admit that they don’t yet have commitments from a majority of the members to vote for the bill.

Oregon — Having enacted a law banning discrimination on the basis of sexual orientation or gender identity, the legislature turned its attention to a pending civil union bill which, in the course of consideration, was renamed a domestic partnership bill, adopting the familiar terminology used to the south in California and the north in Washington State. By contrast with New Hampshire, as described above, the Oregon legislators appeared poised to take the complexity path, considering a bill setting out in detail the methods for forming and dissolving domestic partnerships. The operative language of the proposed law, however, does embody the spirit of civil union laws adopted in other states, providing that all rights and responsibilities of marriage under state law would also apply to domestic partnerships.

Pennsylvania — The members of the Borough Council in State College, Pennsylvania, home of Pennsylvania State University, have responded favorably to a recommendation from the Centre County Advisory council to amend the local human rights ordinance to include sexual orientation, gender identity, marital status or family status. The Council members who were present at an April 20 meeting unanimously requested that the borough administration draft a proposed local ordinance. Centre Daily Times, April 23.

Washington State — Governor Christine Gregoire signed into law the state’s new Domestic Partnership Act on April 21. Under the terms of the Act, same-sex couples, as well as different-sex couples with at least one partner 62 years old or above, will be able to register their partnership with the state and qualify for a limited menu of rights and benefits, including hospital visitation, the right to approve medical procedures, to make funeral arrangements, to consent to autopsies, to authorize organ donations, and to administer an intestate partner’s estate. Columbian, April 23. Washington thus sets itself on the path of New Jersey and California. In both of those states, enactment of domestic partnership laws with limited menus of rights have led to subsequent enactments expanding rights. In the case of New Jersey, a full-blown Civil Union law was enacted in response to a determination by the New Jersey Supreme Court that the domestic partnership statute did not meet the state constitution’s equality requirements. In the case of California, several subsequent rounds of amendments have produced a law that substantially duplicates the right accorded under civil union statutes, which as conceptualized in the United States have essentially accorded to same-sex couples the same rights under state law enjoyed by traditionally-married different-sex couples.

Wisconsin — LaCrosse County’s board voted 20–6 on April 9 to provide domestic partnership benefits to union-represented employees when it voted to ratify two union contracts that include medical and dental insurance for unmarried same-sex and different-sex partners of county employees. The board chair pointed out that in exchange for agreement on the benefits, the unions agreed to smaller wage increases than had been granted in collective bargaining in some neighboring counties. The county personnel director calculated that the savings on wage increases more than made up for the increased cost of providing partner benefits, based on a realistic estimate of how many employees would sign up for the benefits for their partners. La Crosse Tribune, April 10. A.S.L.

Law & Society Notes

Massachusetts Registration — Governor Deval Patrick has ordered the State Department of Public Health to register the 26 marriages that were performed for same-sex couples from out of state before former Governor Romney forced all clerks to cease issuing licenses in reliance on a 1913 law that was enacted to keep Massachusetts from performing interracial marriages for couples from anti-miscegenation jurisdictions. Although the law has been upheld by the Supreme Judicial Court, Patrick has urged the legislature to repeal it, and efforts are under way. New York Times, April 3.

Anti-Gay School’s Honor-C ode — By all accounts Brigham Young University, in Provo, Utah, the higher education institution affiliated with the Mormon Church, is about as anti-gay as a school can be, having traditionally maintained the rule that any student found to be gay must be expelled, or so everybody thought, responding to the debate provoked on campus with the visit by Soulforce, a group advocating for gay rights on campuses. But the school decided to revise its Honor Code to make clear that celibate gays are welcome on campus. According to the new text: “Brigham Young University will respond to homosexual behavior rather than to feelings or orientation and welcomes as full members of the university community all whose behavior meets university standards. One’s stated sexual orientation is not an Honor Code issue.” Commenting on this change in emphasis, some students suggested that the Honor Code should also be revised to allow students to attend off-campus events where alcohol is served, so long as they don’t imbibe. As of now, BYU students are not supposed to attend any event where alcohol is served to anybody, as ingestion is strictly forbidden under church precepts. Deseret Morning News, April 18.

When in Doubt, Sue... — There’s nothing like a lawsuit to wake up a recalcitrant municipality, or so that seems to be the lesson from Lambda Legal’s lawsuit against the city of Bellevue, Washington, on behalf of gay municipal workers who want domestic partnership benefits. The city council’s reaction to being sued was to vote to research the cost of providing benefits and to ask city officials to come up with a strategy for providing the benefits. Local observers pointed out that the recent enactment of a state Domestic Partnership law and recent changes in the composition of the council contributed to the change, although having to face a lawsuit undoubtedly made a difference as well. Seattle Post-Intelligencer, April 25.

Disneyland for Same-Sex Couples — The Walt Disney Company has decided to let same-sex couples participate in its popular Fairy Tale Wedding Program that operates at its two U.S.-based resorts and on its cruise line. Los Angeles Times, April 6. A spokesperson said they were “updating” the programs to provide commitment ceremonies, and that the policy change was instituted in response to an inquiry from a guest.

University of Kentucky — The University’s Board of Trustees voted 14–2 on April 24 to approve a new employee benefits package for the university that will incorporate domestic partnership benefits for unmarried same and different-sex couples, to go into effect July 1 if the state government or the courts do not interfere. Governor Ernie Fletcher was reported to be considering calling a special session of the legislature to override the vote, and opponents argued that the measure violates the state’s anti-gay marriage amendment, which prohibits recognizing any marriage other than that between a man and a woman. The University’s General Counsel, Barbara Jones, told the Lexington Herald-Leader, April 25, that there “is no constitutional problem. The constitution prohibits anything that recognizes marriage other than that between a man and a woman. This doesn’t establish the institution of marriage. It just establishes a partnership. What we are providing is access to benefits.” But a lawsuit seems likely. If a local group doesn’t mount the barricades, the Alliance Defense Fund or some similar organization is likely to initiate something. At present, the University of Louisville also has a domestic partnership benefits plan, and there is considerable controversy in the state on this subject.

No Good Deed Goes Unpunished — Leah Vander and Lynne Huskinson, a lesbian couple who attended St. Matthews R.C. Church, went to Canada to get married. After coming back to Wyoming, they sent a letter to their state legislator protesting against a pending bill to ban same-sex marriages. The legislator read the let-
Modified Oath of Office — Mayor David Cieslewicz and half of the city council members of Madison, Wisconsin, supplemented their oath of office when they were sworn in on April 17 by stating they were taking the oath to support the state constitution under protest with respect to the recently enacted amendment banning same-sex marriages or civil unions. Stated Cieslewicz, “I cannot in good conscience take of- 

confession of their will to sign the statement of protest were openly gay Eli Judge, a University of Wisconsin sophomore, who stated that he thought taking the oath under protest set a dangerous precedent, because conservatives might one day use the same process to protest same-sex marriage, should it become legal in Wisconsin. Another openly gay member of the council, Mike Verveer, was elected council president by his peers after the inauguration. He said he took the oath with a “heavy heart,” and he did sign the protest statement, which he characterized as a “personal decision” for each council member.

Shareholder Power — Following the practice of his predecessor, New York City Comptroller William C. Thompson, Jr., has used his position as head of the city’s public employee pension funds to pressure corporations to adopt non-discrimination policies. On April 18, Thompson announced that Robert Half International, a Fortune 500 corporation, had bowed to the pressure of the Pension Fund’s shareholder resolution on the topic and agreed to adopt a policy of non-discrimination on the basis of sexual orientation or gender identity.

son’s press announcement noted several other employers that have adopted similar policies this year at the instance of the NYC Funds: WESCO of Pittsburgh PA, Advance Auto Parts of Roanoke VA, Cleveland-Cliffs, Inc. of Cleveland, OH, and First Horizon Corporation of Memphis TN. It is particularly noteworthy that these corporations are headquartered in states that do not ban sexual orientation or gender identity discrimination, so this corporate strategy is effectively extending protection to employees who could not resort to the law for redress.

Lobbying Pays Off — The Seattle-based Pride Foundation has persuaded Washington Group International, a Boise, Idaho, based engineering and construction company, to add sexual orientation to its corporate non-discrimination policy. Pride Foundation had filed a shareholder resolution seeking this change, but withdrew it when informed of the corporation’s voluntary action, which took place shortly after a majority of shareholders of Micron Technology, a Boise-based semiconductor manufacturer, voted in support of such a policy. In the case of Micron, whose board had opposed the resolution, the ultimate decision whether to adopt the policy is up to the board, as shareholder resolution’s on these subjects are not binding on management. Idaho Statesman, April 18. A.S.L.

International Notes

Australia — The government of Victoria has announced that it will establish a registry for same-sex partners, to facilitate their ability to prove their relationships for purposes of property dealings, superannuation, inheritance, or next-of-kin issues during medical emergencies. The Department of Justice’s Registry of Births, Deaths and Marriages will house the registry. A paper evidencing the relationship will be issued by the Registry for use by the happy couples. Herald Sun, news.com.au, April 24.

Nepal — Human Rights Watch issued a news release on April 16 urging the Communist Party of Nepal-Maoist calling on the Party to stop anti-gay violence by its members and re- 

Professional Notes

The ACLU LGBT/AIDS Projects announced that attorney Christine Sun has been appointed to take charge of their LGBT/AIDS-related work in the southern states, housed in the ACLU of Tennessee’s office in Nashville, Sun, a 1998 NYU Law School graduate, clerked for U.S. District Judge Robert L. Carter (S.D. N.Y.) and practiced in San Francisco before joining the ACLU as a staff attorney. ACLU Press Release, April 10.
AIDS Litigation Notes

Federal — California — U.S. Magistrate Sandra M. Snyder recommended granting a motion by defendant R.A. Gaulden, a corrections officer, to dismiss any state law claims against him in the pending case of Crowder v. Gaulden, 2007 WL 1113541 (E.D. Cal., April 13, 2007), in which an HIV+ inmate is suing the officer for having revealed the inmate’s HIV+ status to his cellmate. The judge had previously found that Crowder had stated a valid constitutional claim against the officer, but it appeared, at least to the defendant, that the pro se complaint sought damages against him under state law, and argued that Crowder's failure to make a claim to the California Victim Compensation and Government Claims Board meant that he had failed to exhaust administrative remedies and was thus barred from suing. Judge Snyder found that Crowder had not made any claim under state law, but from an excess of caution granted defendant's motion to the extent that some state law claim might be found lurking in Crowder’s pro se complaint. On the other hand, Snyder recommended denying Crowder’s cross-motion for preliminary injunctive relief, finding that the conduct of which he complained all took place in the past, and there was an adequate remedy at law to compensate him for the violation of his privacy rights.

Federal — California — In Daniels v. Latimore, 2007 WL 1140827 (E.D. Cal., April 17, 2007), state prisoner Jack Daniels alleged violation of his 8th Amendment rights through denial of his HIV meds on three distinct occasions by Emanuel Latimore, a Medical Technical Assistant at the prison. Moving for summary judgment, Latimore claimed he provided the medications and treated the prisoner with respect, and submitted documentary evidence in the form of Medical Administrative Records, showing that Daniels had received his medication on the dates in question. Daniels argued that the documents Latimore submitted had been “doctored by another MTA” and that he had not received the medication. Magistrate Judge Craig M. Kellison ruled in favor of defendant Latimore, on the ground that Daniels had not offered any “evidence” in support of his assertion that the medical report was tampered with, stating that “questioning of the credibility of the moving party’s evidence is not enough to avoid summary judgment.” Daniels is representing himself pro se. He was deposed by Latimore’s attorney, who got him to say that he had no specific recollection of Latimore refusing to give him his medication. As far as Magistrate Kellison was concerned, that was the end of the case.

Federal — Georgia — In Brown v. Johnson-Waters, 2007 WL 1136077 (S.D. Ga., April 16, 2007), U.S. District Judge B. Avant Edward adopted Magistrate James E. Graham’s report and recommendation that defendants’ motion for summary judgment be denied and that John R. Brown’s 8th Amendment deliberate indifference claim concerning alleged deprivation of medication for his HIV infection and hepatitis C be set down for trial “on the next available trial calendar.” Brown was alleging that he was denied treatment entirely, while the prison defendants, of course, argued that they were exercising appropriate medical discretion and that he received any treatments that were necessary. The judge ruled that this dispute could not be decided on summary judgment, when factual allegations by the party opposing judgment had to be accepted for purposes of the motion.

Federal — Illinois — A state inmate was not entitled to summary judgment of his excessive force and deprivation of medical care suit, but neither were the defendants, as Judge Harry D. Leinenweber found that there were disputed issues of material fact relevant to resolving the complaint. Ford v. Clark, 2007 WL 1149200 (N.D. Ill., April 18, 2007). Bobby Ford had alleged being subjected to unnecessary rough strip search, including anal examinations that left him injured and in need of medical attention, which he claims to have been denied. He also alleged that a corrections officer wrongly accused him of banging his head against a prison wall, telling the officer he wanted to bleed on him because he had AIDS. Individual defendants denied various of Ford’s allegations, but the court decided that if Ford’s allegations held up, he had stated potential claims, and in light of the sharply disputed facts, neither side could have summary judgment.

Federal — Indiana — U.S. District Judge David F. Hamilton reversed a decision by the Social Security Administration to deny disability benefits to David Buckhalter, an HIV+ man whose doctor said he was not capable of holding down employment due to the debilitating effects of medication he was taking for his HIV infection. Buckhalter v. Barnhart, 2007 WL 965743 (S.D. Ind., March 9, 2007). How can one believe these ALJ’s at Social Security don’t understand his condition? The ALJ found that Buckhalter was not disabled, on the assumption that it would be possible for him to find a light work assignment where he would have access to a restroom where he could change his underwear every two hours, as his doctor said this would be necessary because of the explosive diarrhea he was suffering as a result of his AIDS meds. Judge Hamilton found that the court’s conclusions were not supported by the testimony in the record. The court found that the ALJ had misrepresented the record in his opinion, employed illogical reasoning, and imputing to Buckhalter an intention to worsen his symptoms by deliberately avoiding treatment, which the court found incredible. In view of the “serious errors of reasoning” found by the court, “this court is unable to discern a logical bridge between the credibility determinations of the ALJ and substantial evidence in the record,” wrote Hamilton. “The errors in this case were not harmless,” he concluded. “On this record, a reasonable trier of fact could have come to a different conclusion,” so the refusal of benefits was reversed and remanded for “reconsideration consistent with this entry.”

Federal — Maryland — The memorandum and order of U.S. Magistrate James K. Bredar in U.S. v. Carson, 2007 WL 1101175 (D. Md., April 5, 2007), reveals a shocking state of affairs in the Maryland state prison system concerning medical care for inmates. Christopher Carson, an HIV+ transgender person, was a federal detainee remanded to the custody of the Maryland State Department of Public Safety, with orders by the court to provide appropriate medical treatment both in relation to his HIV infection and his transgender condition. When it was brought to the attention of Magistrate Bredar by Carson’s counsel that no medical treatment was being provided, the magistrate scheduled a contempt hearing against the relevant federal and state officials. Further investigation revealed that the federal marshal’s service delivered the court’s order concerning medical treatment to the state facility when delivering Carson, but that the order was never sent to the medical personnel in the state prison and there appeared to be no established procedure for communicating such information from the court to the medical officials. The judge ordered the relevant authorities to quickly devise an appropriate procedure, which was presented to him in written form. Meanwhile, he authorized the release of Carson from custody so that he could obtain appropriate treatment in light of his “manifest health issues.” Magistrate Bredar ultimately decided not to hold the prison authorities in contempt, finding that this had more to do with bureaucratic ineptitude than deliberate defiance of the court’s order, but warned the authorities that future lapses in this regard would incur penalties. Bredar wrote that “The Court is under no illusions that this momentary attention paid to a chronic problem in this district will forever resolve the issue. The Marshals Service, the U.S. Attorney and the State are collectively charged with the responsibility to be vigilant and to insure that conditions do not again deteriorate to the deplorable state revealed at the hearing and by the subsequent investigation.
Arkansas — The Arkansas Court of Appeals, Division 1, ruled on April 25 in Estate of Slaughter v. City of Hampton, 2007 WL 1207203, that an HIV+ employee of the city water department who became seriously ill and died after sudden exposure to chlorine gas on the job was covered by the Workers Compensation Law for his death, even though his HIV+ was a contributing factor. The WC Commission had denied a death benefits claim filed by his estate, on the ground that various other physical and medical problems, including his HIV infection, were primarily responsible for his death. The court was persuaded by expert medical testimony talking about how the sudden intense gas exposure was a significant factor.

Missouri — Remanding for resentencing but sustaining the conviction, the Missouri Eastern District Court of Appeals upheld the conviction of Daniel White, an HIV+ man, for illegally exposing his girlfriend to HIV transmission without disclosing his HIV+ status to her, rejecting various objections he made to the prosecutor’s conduct at trial. State v. White, 2007 WL 1119648 (Mo. App. E.D., April 17, 2007).

According to the per curiam opinion, White tested HIV+ in 1997 and was informed of that fact. In June 2002, after his release from prison, he met the victim and they became sexually involved during the summer, sometimes using condoms and sometimes not. White got into an argument in the victim’s presence with a former girlfriend, who told him that she had AIDS and mentioned their recent sexual contact. After hearing this, the victim asked White if he had HIV, and “he told her he did not.” They broke up towards the end of the summer, and the victim had sex with several other partners over the following months. In December 2002, she learned that she was HIV+, contacted White and told him he should be tested. In January 2003, the victim met with a St. Louis police department detective and gave White’s name as the person “had likely exposed her to the virus.” The detective investigated and learned that White tested positive in 1997. White was then charged with the felony of exposing the victim to HIV without disclosing his status and convicted. He was sentenced to eight years. After rejecting various technical arguments White raised, none of which had been preserved for review at trial by objection, and none of which led the court to believe that reversible error had been committed, the court determined that resentencing was needed because White had been sentenced under the wrong statute. It seems that at the time the offense was committed, the mandatory sentence for this offense in Missouri was five years, and a later amendment of the statute increasing the penalty should not have been applied retroactively. A.S.L.

**PUBLICATIONS NOTED**

**LESBIAN & GAY & RELATED LEGAL ISSUES:**

Baskin, Sienna, Deviant Dreams: Extreme Associates and the Case for Porn, 10 N.Y.City L. Rev. 155 (Winter 2006).


Corbin, Caroline Mala, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham L. Rev. 1965 (March 2007).


Cownie, Fiona, Dressing the Part: Gender, Performance and The Culture of Law Schools, 57 N. Ireland Legal Q. 557 (Autumn 2006).


Dripps, Donald A., Is the Privilege of Private Discrimination an Artifact of an Icon?, 43 San Diego L. Rev. 1063 (Fall 2006).


Furfaro, John P., and Risa M. Salins, Transgender Discrimination, NYLJ, April 6, 2007, p. 3.


Healy, Thomas, Stigmatic Harm and Standing, 92 Iowa L. Rev. 417 (Feb. 2007).


Lenta, Patrick, Constitutional Interpretation and the Rule of Law, 2005 Stellenbosch L. Rev. 272.

Little, Charles Thomas, Transsexuals and the Family Medical Leave Act, XXIV The John Marshall J. Computer & Info. L. 315 (Winter 2006) (Yes, we are also puzzled about why this article appears in this particular journal...).


Mayer, Albert, Weighing the Effects on Children of Exposure to Domestic Violence Versus the...
Effects of Residence in a Same-Sex Household: Why the Mississippi Case of Weigand v. Houghton Was Wrongly Decided, 6 Whittier J. Child & Fam. Advoc. 125 (Fall 2006).

Metzger, Gillian E., Congress, Article IV, and Interstate Relations, 120 Harv. L. Rev. 1468 (April 2007) (Argues that enactment of the Defense of Marriage Act was within the legislative authority of Congress under Article IV in its constitutional role of mediating interstate relations, although that role would have to be reconciled with the obligations imposed by the 14th Amendment).


Pitzer, Nimrod, Due Process For All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers, 95 Cal. L. Rev. 169 (Feb. 2007).

Raysman, Richard, and Peter Brown, COPA Litigation and Internet Content Regulation, NYLJ, April 10, 2007, p. 3.

Recent Cases, Constitutional Law First Amendment — Seventh Circuit Holds That Public University Cannot Refuse to Recognize Student Group Based on Group’s Violation of School Nondiscrimination Policy. Christian Legal Society v. Walker, 453 E3d 853 (7th Cir. 2006), 120 Harv. L. Rev. 1112 (Feb. 2007).


Wardle, Lynn D., What Is Marriage?, 6 Whittier J. Child & Fam. Advoc. 53 (Fall 2006) (not a household headed by a same-sex couple, according to this persistent opponent of legal recognition for same-sex couples).


Williams, Angela, Religious Influences in American Legislation: Lawrence v. Texas, the Right to Privacy, the Right to Choice, and the “Right to be Let Alone”, 7 J. L. Society 196 (Spring 2006).


Symposium:
The Role of the Judge in the Twenty-First Century, 86 Boston Univ. L. Rev. No. 5 (Dec. 2006).

Specially Noted:
Thomson-West has published a new law school casebook by Shannon Gilbreath, of Wake Forest University Law School, titled Sexual Identity Law in Context: Cases and Materials, ISBN 978-0-314-17618-9. The book runs 816 pages and was particularly designed for use in 2 and 3 credit elective courses. The chapter layout, in line with the title, intends to provide contextual materials for students to absorb before they read cases, and the case materials are followed by questions for discussion intended to develop an analysis of the subject matter of each chapter. This marks the first time that one of the legal case book publishers has in print two substantial casebooks on this subject matter, the other being William Rubenstein’s Sexual Orientation and the Law (2nd edition, 1997). We understand that Prof. Rubenstein has acquired co-authors and a third edition is in preparation.

In The Treaty, a novel by Donnelly Wright Hadden (Xlibris Corp., www.Xlibris.com,) (2006), the author builds a rather fantastic story around the existence of an “Agreement” between Canada and the U.S. concerning the law applicable to the employment rights of individual employed by multi-national corporations that do business in both countries. According to this 1981 agreement, still in force (and available on a Canadian government website), Canadian nationals employed in Canada by multinational corporations that also have operations in the U.S. will have their employment rights determined under Canadian law even if they are transferred to work in an American operation of the same employer, for a period up to 60 months. So, what if a same-sex marriage Canadian is transferred by his employer from Canada to the U.S., to a state that bans same-sex marriage and any legal recognition of same-sex couples? Would Canadian law follow him, or would the U.S. jurisdictional law override and require him to forfeit all partnership benefits his employer was providing in Canada? The question is posed but ultimately not resolved in the book. Fighting shy of the need to take a position, the author proposes a non-legal factual change at the end of the story that makes the pending lawsuit moot. A bit of a let-down, but the story is vividly imagined, if not ideally written).

BNA’s Daily Labor Report (No. 76, April 20, 2007) carried a special report titled “Discrimination: Small but Growing Number of Employers Have Policies, Benefits for Transgender Employees,” which documents a growing trend documented by Human Rights Campaign’s Workplace Project, which noted that the number of Fortune 500 companies that include gender identity in their personnel policies has grown from three in 2000 to 124 at present.

HRC also indicated that 65 companies now score 100% on HRC’s Corporate Equality Index, which includes some form of specific benefits coverage for transgender employees for issue related to their gender identity.

AIDS & RELATED LEGAL ISSUES:


Stein, Michael Ashley, Disability Human Rights, 95 Cal. L. Rev. 75 (Feb. 2007).

EDITOR’S NOTE:

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