With serious attempts proceeding simultaneously to enact laws authorizing marriages for same-sex couples in the neighboring New England states of Vermont and New Hampshire, the burning question is: which state will be first in the nation to legislate same-sex marriages. As of the end of March, same-sex couples could marry in Connecticut or Massachusetts, pursuant to orders by the highest courts of those states. The California legislature twice approved bills authorizing same-sex marriage, but both times Governor Arnold Schwarzenegger vetoed them, arguing that the legislature could not authorize same-sex marriages because the statute banning them was adopted through a public initiative, thus leaving the issue to the courts. In both states, it appeared that legislative majorities could be there, but that super-majorities would be needed because of the possibility that the governors, following Schwarzenegger’s example, would veto the measures.

On Monday, March 23, the Vermont Senate voted 26–4 in favor of a bill that would open up marriage to same-sex partners. The Senate vote followed upon the unanimous endorsement of the bill by the Senate Judiciary Committee on March 20, following several days of open hearings on the bill. The Senate’s initial vote was confirmed in a voice vote the following week. The bill was promptly sent to the House, where hearings began in the Judiciary Committee on March 24, with a vote projected to take place early in April. There is a Democratic majority in the House as well as the Senate, but the prediction was that the measure might pass with a closer vote in that chamber.

On March 25, however, Governor Jim Douglas, a Republican, announced that he would veto the measure, so ultimate enactment depends on it achieving a 2/3 majority in each house after such a veto. Perhaps Douglas, who would not normally announce an intent to veto a measure that was still pending in the legislature, had taken this step to forestall enactment by the House. Surely Vermont Republicans are not united in opposition to same-sex marriage, as several crossed party lines to support the bill in the Senate.

Next year is a legislative election year in Vermont, and the Senate’s Democratic leadership was hoping that if the measure were to pass this year, there would be some time to dissipate the anger of opponents and get the public used to seeing same-sex couples getting married before members would have to stand for re-election. At the same time, although Vermont was the first state to provide civil unions to same-sex partners, due to the legislature’s response to the state supreme court’s ruling in *Baker v. State*, 744 A.2d 864 (Vt. 1999), legislators remember that some who voted to pass the civil union law were defeated for re-election and the Democrats lost one house of the legislature in the ensuing election.

The governor, Jim Douglas, a Republican, had voiced opposition to the bill all along, opinioning that the Civil Union Law was adequate to provide equal legal rights for same-sex couples under state law, but did not announce his veto threat until after the measure had passed with overwhelming (and bipartisan) support in the Senate. In Vermont, a bill can become law without the governor’s signature, so the measure passes the Senate, it can become law without the governor’s signature, so the measure passes the House with a veto-proof bipartisan vote, which might encourage the governor to refrain from action and let the measure become law without his participation. *Boston Globe* (March 24); *Rutland Herald* (March 17–26).

Meanwhile, in neighboring New Hampshire, it was the larger legislative body, the House, that approved a bill authorizing marriages for same-sex couples, culminating a raucous session that included several successive votes. A committee deadlocked on the measure, sending it to the House floor without a recommendation. In the first floor vote, the legislators rejected the bill by a single vote. Then a motion to table went down to defeat. There was then a vote against permanently rejecting the measure. Meanwhile, supporters were buttonholing members pleading for support. Finally, another vote on the merits yielded passage by 186–79, and the measure was referred to the Senate. Twelve Republicans crossed party lines to vote with 174 Democrats for the bill.

Governor John Lynch, a Democrat who signed the state’s civil union law last year, is on record as being opposed to same-sex marriage, but has not issued a formal veto threat, and it is uncertain what he would do if the measure passes the upper house. Clearly, the votes for a veto override would be difficult to secure in the New Hampshire House of Representatives. *Concord Monitor*, March 27.

Marriage bills are also pending in the legislatures of Maine and Rhode Island, but are not given much chance of passage this year. However, optimists have predicted that within a few years same-sex marriage would be available throughout New England. A.S.L.
discrimination policy. Kozen writes that Kozen did not take this course to avoid having to rule on the constitutionality of Section 3 of DOMA. But in a subsequent opinion on a similar grievance by Brad D. Levenson, a federal defender, Judge Reinhardt argued that the matter could be resolved without violating the question of DOMA’s constitutionality, and he found it to be an unconstitutional violation of the Fifth Amendment Equal Protection rights of Mr. Levenson, thus becoming the first sitting federal circuit judge to opine that at least the federal marriage definition section of DOMA is unconstitutional as applied to a particular issue. Neither opinion is a ruling of the 9th Circuit; rather, both judges were ruling on internal circuit employee grievances. However, the letter from the Administrative Office of the U.S. Courts throws down the gauntlet to the circuit. Golinski has petitioned Judge Kozen for a new hearing, seeking a direct order from the judge to enforce his prior decision, and Levinson also indicated he would seek such a hearing.

Senator Joseph Lieberman (Ind.-Conn.), and Rep. Tammy Baldwin (D-Wis) have announced that they will reintroduce a measure that would carve an exception into DOMA to provide benefits to same-sex partners of federal employees. Although the measure has died in the past, this will be the first time it has been introduced in the context of substantial Democratic majorities in both houses of Congress and a President who co-sponsored the bill when it was last introduced and has placed the issue on his legislative agenda.

In the meantime, however, the Administrative Conference of the U.S. has ruled that the complaint with the Golinski and Levenson orders in the 9th Circuit, and how to respond to the complaint in Gill v. Office of Personnel Management. An additional irony is that the president has nominated M. John Berry, an openly-gay man who has been serving as director of the National Zoological Park in Washington, D.C., since 2005, to be the new Director of the Office of Personnel Management, and upon confirmation, Berry would become the lead defendant in the GLAD case. Of course, so long as DOMA is on the books, it would seem to be impossible for the Administrative Conference of the U.S. to order benefits for same-sex partners of federal employees without first getting a partial repeal of DOMA through Congress, where it is possible that the effort will face a Republican filibuster in the Senate. A.S.L.

California Supreme Court Hea Prop 8 Arguments

The California Supreme Court heard oral argument in the consolidated cases challenging Proposition 8, which was enacted by the voters on November 4, 2009, placing in the California constitution a new section stating that only the marriage of one man and one woman would be valid or recognized in California. The March 5 argument received national media attention, and the next-day commentary showed a quick consensus that the court was unlikely to strike down Proposition 8 but very likely to rule that the same-sex marriages contracted from June to November 2008 remained valid and recognized in California, because the proposition as presented to the voters did not unequivocally communicate that it would have any retroactive effect.

Shannon Minter, Raymond Marshall, Michael Maroko and Therese Stewart presented arguments for the challengers. Christopher Krueger from the Attorney General’s office presented the curiously two-faced position of Jerry Brown, ultimately calling for striking down Proposition 8 while disputing the challengers’ argument that it was a “revision” rather than an “amendment” and thus not validly placed on the ballot. And Kenneth Starr argued in support of Prop 8’s validity. Starr’s position was that popular sovereignty rules in California, subject only to the check provided by the federal constitution, in terms of the peoples’ right to make any substantive change they like in their constitution through the initiative process.

The challengers argued that the intersection of a fundamental right and a suspect classification in Prop 8 rendered it a revision. Brown argued that the case involves an “inalienable” right that cannot be changed by simple majority vote of the electorate. From the original four-vote majority in the last year’s marriage case, it appeared that at best two of the justices, Carlos Moreno and Kathryn M. Werdegar, might vote to strike Prop 8, while Chief Justice Ronald George and Joyce Kennard would likely join with marriage case dissenters Ming Chen, Marvin Baxter, and Carol Corrigan in upholding the proposition. However, it seemed possible that the decision against retroactive application could be unanimous. A.S.L.

Indonesian Man Loses Asylum Appeal Due to Inconsistent Stories About Persecution

The U.S. Court of Appeals for the Third Circuit denied an Indonesian man’s asylum claim, rejecting his appeal of a final removal order given by an Immigration Judge. Sasongko v. Attorney General, 2009 WL 524714 (March 3, 2009) (not officially reported). The court’s per curiam opinion applied a highly deferential standard of review to the Board of Immigration Appeals’ review of Damar Sasongko’s case, and upheld the Immigration Judge’s finding that Sasongko was not credible. The court also found that Sasongko had not met his burden of proof for asylum under the Convention Against Torture. Though the opinion is short on facts, it is apparent that both the IJ and the court had doubts about the legitimacy of Sasongko’s inconsistent asylum claims.

Sasongko entered the United States in 2001, but was placed in removal proceedings in 2003. With the help of a lawyer, he filed for asylum soon after, claiming that he had been and would be persecuted for his homosexuality should he be returned to Indonesia. In his asylum request, Sasongko claimed that he was beaten at an intersection in 2001 by a group because of his homosexuality.

The court does not give details, but it appears that this original application was not successful, because Sasongko filed another asylum request a year later. In the later request, the attack was again described, albeit with new and different facts. Most significantly, the later application asserted that the attack occurred behind a cafe rather than at an intersection. A number of additional facts were asserted as well, including that Sasongko was sodomized during the incident. Sasongko’s second application also detailed a number of other attacks that predated the first asylum application but were not included in it. Based on these inconsistencies the IJ denied Sasongko’s application based on an adverse credibility finding and the BIA affirmed. Sasongko then appealed to the Court of Appeals.

The short opinion outlines the highly deferential standard of review given to IJ holdings. In reviewing the final order of the BIA, the court will only look at whether the BIA properly deferred to the IJ. The court will only disturb the BIA’s review of the IJ’s holding in the presence of evidence “so compelling that no reasonable fact-finder could find as the Immigration Judge did.”

In applying the standard, the court focused on three of the IJ’s findings. First, Sasongko’s original asylum application referenced only one violent attack that allegedly occurred in 2001, while his later application detailed a number of other incidents. The IJ was not swayed by Sasongko’s explanation that he only initially included the latest incident that most affected him. Second, the police report regarding the 2001 attack did not mention any form of sexual assault, while Sasongko’s later application claimed he had been forcibly sodomized. The original claim also asserted that the attack occurred at an intersection, rather than behind a cafe, as Sasongko later testified. Third, the hospital report arising from the 2001 incident made no mention of sexual assault. While Sasongko asserted that the factual differences arose because of ineffective counsel during his first application, the court agreed that the IJ could have factored this in to his adverse credibility finding.

Applying the deferential standard of review to the IJ’s findings, the court held that the record did not reveal any evidence “so compelling
that no reasonable fact-finder could find as the Immigration Judge did.” It seems the court was doubtful that some of the attacks ever happened, or at least doubted that they were of a sexual nature. On the scant facts included in the opinion, appeared to the court as if Songko trumped up his claims in the hope of gaining asylum. The only silver lining for Songko is that the court reversed the IJ’s holding that he was not eligible for voluntary departure.  

Stephen Woods

Gay Guatemalan Man Loses Asylum Claim Over Inconsistent Legal Theories

The U.S. Court of Appeals for the 9th Circuit has affirmed a Board of Immigration Appeals (BIA) decision denying a gay Guatemalan man’s petition for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) on credibility grounds, in Martinez v. Holder, 2009 WL 514101 (9th Cir., March 3, 2009).

The Petitioner had arrived in the United States and affirmatively applied for asylum in 1992 based on a false political opinion claim because, at the time, persecution on account of sexual orientation was not yet recognized as an established basis for asylum. The petitioner attended an interview with an asylum officer, where he testified that he feared persecution on account of his political activities as the leader of a student group at San Carlos University. The Officer found his testimony credible, but referred his claim to an Immigration Judge (IJ) for a full hearing.

April 4, 1996, the INS announced that it would now consider sexual orientation persecution as a grounds for asylum under the “particular social group” classification. Nineteen days later, the petitioner attended a hearing before an IJ, where he amended his asylum application from political opinion to sexual orientation, and admitted that he had lied previously because his “life [would be placed] in danger” if he were returned to Guatemala.

The IJ issued a lengthy decision denying the Petitioner asylum and withholding on credibility grounds, since the Petitioner had lied under oath twice and fabricated his claim of political persecution. The IJ further noted that the petitioner had “freely associated with other gays and... [experienced] no untoward difficulties with governmental authorities” in the United States. The BIA affirmed the IJ with a brief opinion, which was appealed to the 9th Circuit and remanded back to the BIA for a more thorough explanation of the denial.

On remand, the BIA re-affirmed the IJ’s denial of relief. The BIA seemingly misstated the Petitioner’s explanation for why he fabricated his initial claim to be that he “[fearred] experiencing additional persecution if the United States government learned of his sexual orientation,” and denied Petitioner’s claims. The BIA also denied Petitioner’s motion to consider his claims under CAT and further held that Petitioner’s false testimony required a finding of a lack of good moral character that barred him from seeking Voluntary Departure, a relief that would have allowed him to leave the United States without triggering a bar on future entry.

The Petitioner brought his claim to the 9th Circuit, where Circuit Judge Stephen S. Trott, writing for the majority of a panel of the court, agreed with the IJ and the BIA and denied Petitioner’s claims because his “skilful lies were material and went to the heart of his [claim].”

Dissenting Circuit Judge Harry Pregerson defended Petitioner’s initial fabrication of a political asylum claim, explaining that “it is not hard to see why a gay man who suffered persecution on account of his sexual orientation would want to hide that fact from immigration authorities,” and reminding the majority that prior to 1990, homosexuality was a statutory ground on which to exclude an immigrant from the United States. He also explained that whether the petitioner “was freely associating with other gays in Los Angeles ha[d] no bearing on or nexus to the IJ’s decision that Martinez was not credible, [nor] any bearing on or nexus to the suffering [petitioner] feared he would experience were he deported to Guatemala.”

It would seem that the majority in this case was particularly insensitive to the facts in this case. If the petitioner had told the truth and claimed he feared persecution on account of his homosexuality instead of fabricating his political asylum claim, he would have been denied asylum because the INS had not yet recognized gay people as a social group. The majority (and the IJ and the BIA) also seemed to place no weight on the fact that the Petitioner immediately amended his claim when sexual orientation was recognized as a ground for asylum, rather than proceeding with the false claim. Unfortunately, the Petitioner is likely to be removed from the United States as his applications for relief have all been denied. Bryan C. Johnson

Lawrence Does Not Invalidate Federal Anti-Obscenity Laws, Says U.S. District Judge in Utah

Sami and Michael Harb, the defendants in a federal obscenity prosecution, moved to have their case dismissed because Lawrence v. Texas (the Supreme Court case that overturned Texas’s anti-sodomy law) established a fundamental right for adults to view such material. Alternatively, they moved for (1) dismissal because of vindictive prosecution, or (2) change of venue from Utah to Ohio, or (3) adoption of a “national community standard” that applies to obscenity determinations. Federal District Court Judge Ted Stewart rejected these claims, and denied the motions. U.S. v. Harb (dba Movies by Mail), 2009 WL 499467 (D. Utah, Feb. 27, 2009).

MoviesByMail.com sells adult-oriented videos over the Internet, and, as the name of the website suggests, sends them to customers by mail. Several hundred of MBB’s customers reside in Utah, which is where the U.S. Attorney (Karin Fojtik, of the Salt Lake City U.S. Attorney’s Office) indicted the Harbs, represented by Jerome H. Mooney of Salt Lake City. Law Notes readers will primarily be interested in how attorneys are attempting to extend the Supreme Court’s holding in Lawrence v. Texas to encompass a right to sell and distribute adult-oriented sexual material.

The prosecution was brought under both federal statutes, 18 U.S.C. secs. 1461 and 1466, that forbid engaging in the business of selling or transferring obscene material, or using the U.S. mail to transport such material. The Supreme Court has long recognized that possession of such material is legal, Stanley v. Georgia, 394 U.S. 557 (1969), but that decision does not extend to laws forbidding the sale or transport of the material, which have been held constitutional.

Lawrence v. Texas, 539 U.S. 558 (2003), contended the plaintiffs, recognized a substantive due process right to sexual intimacy. The Fifth Circuit held, in Reliable Consultants v. Earle, 517 F.3d 736 (5th Cir. 2008), that this substantive right encompasses a right to buy and sell sexual devices, whose sale had been outlawed in most instances by Texas law. The Harbs argue that the substantive protections established by Lawrence and extended by Reliable Consultants also extend to the distribution of adult-oriented sexual material, especially because older decisions, such as Stanley, could not take account of the Internet as a vehicle for commerce in sexually explicit materials.

However, the U.S. Attorney argued that Lawrence does not overturn precedents upholding the statutes in question. The U.S. Attorney relied upon rules of judicial interpretation instructing that a lower court must apply Supreme Court precedents that directly apply to the case at hand, even if those precedents are based on reasoning rejected in later Supreme Court decisions. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Agostini v. Felton, 521 U.S. 203 (1997). The lower court must allow the Supreme Court the prerogative to overrule its own earlier decisions, argued the government. The Utah District Court accepted the U.S. Attorney’s reasoning, and held that the Harbs’ motion must be denied unless and until the Supreme Court reinterprets the binding precedents upholding the constitutionality of the obscenity statutes.

Neither did Judge Stewart find persuasive any of the arguments offered by the Harbs in support of their motions. Dismissal for prosecu-
The parents’ civil rights action on behalf of their son, WW, a student, arising from horrendous allegations of physical and verbal abuse, mostly survives a motion to dismiss, in Wolfe v. Fayetteville, Arkansas School Dist., 2009 WL 485400 (W.D.Ark., Feb. 26, 2009). Plaintiffs assert causes of action against the Fayetteville School District (FSD) and a school official sounding in discrimination on the basis of sex, perceived sexual orientation discrimination, discrimination based on the anti-homosexual nature of attacks, violation of First Amendment rights, and denial of Due Process. Plaintiffs also assert causes of action under state law for outrage, deprivation of a right to not be bullied, negligent supervision, defamation, and false light.

Based upon the complaint, for years, WW suffered traumatizing abuse at the hands of fellow-students and school officials while he attended middle, junior high, and high school. WW was a student at McNair Middle School (McNair) in the FSD from August 2003 until May 2005. While WW was at McNair, he suffered ad hominem attacks from fellow students, such as “fag” and “faggot,” as well as several acts of violence. When these attacks were reported to school officials, oftentimes there was no response, or WW was directly blamed for the attacks. For example, on November 11, 2004, WW was allegedly attacked while on an FSD school bus by fellow-students. “McNair’s principal suspended WW based on other students’ statements that WW was the aggressor. After demand by WW’s parents, the principal reviewed the tape recording from the school bus’s camera and determined WW was not at fault.”

Plaintiffs also allege that “[o]n January 28, 2005, WW’s mother informed McNair’s principal that fellow-student JW had collected a list of twenty students who planned to physically injure WW. The principal stated he knew about the list.” Three days later, WW was attacked in the restroom at McNair.

The abuse didn’t stop when WW graduated from McNair. WW went on to Woodland Junior High School (Woodland), which he attended from August 2005 until May 2007. While WW attended Woodland, Byron Zeagler was the vice principal. When WW reported an incident of abuse to Zeagler, Zeagler asked “Well, are you gay?” Zeagler otherwise belittled and trivialized WW’s complaints of abuse and/or took no action against WW’s abusers.

On May 24, 2006, WW was severely beaten by three classmates at Gulley Park in Fayetteville. WW’s parents reported the incident to FSD, but no action was taken. On December 3, 2006, Woodland students formed the “Everyone Hates [WW]” group on “Facebook.com.” This website included statements such as “[WW is] a little bitch, and [sic] a homosexual that NO ONE LIKES.” and threats against WW. When WW’s mother reported the group to Zeagler, he asked, “Well, is he a homosexual?” Again, Zeagler took no action.

In the afternoon of March 9, 2007, after threatening WW with an attack on the Facebook webpage, student IT punched WW in the face. An unnamed eyewitness stated that “The teachers stuck their heads out of the doors and said kids cut it out.” They ignored the attack. Despite the urging of WW’s mother, Zeagler refused to report the incident to police. Zeagler and other administrators failed to punish the students involved.

On March 14, 2007, the day WW returned to school after recovering from the attack, Zeagler reported to the Fayetteville Police that WW threatened to get even with IT. Police questioned WW, but the allegations remained unfounded.

In August 2007, WW began classes at Fayetteville High School (FHS). Unfortunately, that same year, Zeagler became the vice principal at FHS, and the harassment continued at FHS. On October 15, 2007, fellow-student NG punched WW while WW was at the bus stop. NG’s brother recorded the incident, showed the tape to other students, and put the video on the website “YouTube.com.” FSD took no action against NG.

In the meantime, this case garnered media attention. Particularly, on March 23, 2008, Dan Barry of the New York Times wrote an article detailing the harassment of WW and the FSD’s failure to act. FSD countered the publicity by claiming that WW was a bully, an instigator and that there were, in fact, two sides to this story. The “whole story” was a theme used by the District to address the WW situation. “On March 25, 2008, students, in consultation with Zeagler, a teacher, and the District’s public relations department, started the Facebook group “The Whole Story” on which harassing and threatening posts were made. Within weeks, the group was shut down by Facebook.”

District Judge Robert T. Dawson denied the motion to dismiss with respect to plaintiffs’ claims under 42 U.S.C. sec. 1983 for sex discrimination, perceived sexual orientation discrimination, discrimination based on anti-homosexual nature of attacks, and First Amendment retaliation. The court found that the allegations of a long and continuous pattern of harassment of WW create a reasonable inference of knowledge on the part of the FSD’s Board of Directors. Therefore, plaintiffs had sufficiently alleged pervasive misconduct among non-policymaking employees of the municipality as to constitute a custom or usage with the force of law. However, the court rejected plaintiffs’ claims premised upon an official policy by the FSD, because plaintiffs failed to plead the existence of a such a policy giving rise to WW’s injuries.

The court rejected the defendants’ statute of limitations argument, that all events occurring prior to September 17, 2005 are time barred and therefore cannot form the basis of an action under 42 U.S.C. sec. 1983. Judge Dawson held, rather, that because this case involved a pattern of conduct from which the constitutional claims ultimately arose, rather than a single incident giving rise to the violations, no statute of limitations issues existed.

Plaintiffs’ First Amendment retaliation claims also survived. Judge Dawson held that the complaint set forth actionable affirmative acts of retaliation, to wit: [1] Zeagler’s comments to WW’s fellow-students; [2] Zeagler’s false representations to Fayetteville Police that WW had threatened to bring a gun to school; [3] Zeagler’s involvement with Facebook groups; [4] the FSD releasing WW’s student records to the public; [5] the FSD’s publicity campaign to tell the “whole story.”

Judge Dawson dismissed plaintiffs’ sec. 1983 claim for denial of Due Process which was made only against Zeagler in his individual capacity. The court viewed Zeagler’s conduct as less than shocking, and therefore not “arbitrary, capricious, or in violation of state law.” This is the only aspect of Judge Dawson’s decision which seems infirm, given the light burden a plaintiff must meet on a motion to dismiss, and the heinous allegations against Zeagler himself. One would think that given the allegations
conducting in a park restroom “sting” opera-
A gay businessman convicted of disorderly
years of abuse suffered by WW at both Wood-
concerning Zeagler’s starring role during the
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Alliance v. Carbone
dation of the statute under which he was ar-
district court found that plaintiffs had failed to suf-
Specifically, the conduct complained of did not “transcend
inches or decencies” in the judge’s view. One
Plaintiffs asserted an imaginative argument
in support of their claim under Arkansas’s
busher, law for and near a toil-
Delaney, “Lieutenant Morris identified himself
murred, saying “it’s too risky” and suggesting
PP/IPs engaged him in conversation, during which —
dressed “loitering,” and pretty much left it up to
law claims for outrage and the right not to

The court’s denial of defendant’s motion to
dismiss plaintiffs’ remaining state law claims is
generally based on the fact that plaintiffs had
met the elements of each of their claims suffi-
ciently to withstand a motion to dismiss. The
court further declined to rule, one way or the
other, whether punitive damages were available
under Title IX against FSD, and reserved that
issue for additional briefing at a later stage in
the litigation. Eric J. Wursthorn
Ohio Appeals Court Strikes Loitering Statute;
Reverses Conviction of Gay Man

A gay businessman convicted of disorderly
conducting in a park restroom “sting” opera-
tion won a reversal of his conviction and invalida-
tion of the statute under which he was ar-
rested on constitutional grounds in City of
Alliance v. Carbone, 2009 WL 690408, 2009—Ohio—1197 (Ohio App., 5th Dist., March
16, 2009).

Police in Alliance, Ohio, had identified the
restroom area of Butler-Rodman Park as a tar-
get for a “sting operation.” Toward the begin-
ing of the court’s opinion, Judge Delaney at-
tributes this to “several complaints of lewd
activity,” but other portions of the opinion sug-
gest that the listing of this spot as a cruising
spot on the website cruisingforsex.com was the rea-
son the place was targeted. Defendant Mark
Carbone was arrested as part of this operation on
September 12, 2007, under a provision of the
local disorderly conduct ordinance that out-
lawed “loitering,” and pretty much left it up to
the arresting officer to decide whether an indi-
vidual was loitering, with any guidance in the
statute itself. Carbone challenged the constitu-
tionality of the statute in a pretrial motion that
was rejected by the Alliance Municipal Court
judge.

According to Judge Delaney’s account of the
facts established at trial, plainclothes officer
William Morris was parked near the restroom
when Carbone drove up, gave him a nod, and
pumped his brakes a few times as he pulled into
the parking lot. Morris later testified that the
pumping of breaks was an established signal
for somebody looking for a “hookup” for sex.
Morris attributed this knowledge to having per-
rused cruisingforsex.com, presumably as part
of his research efforts. As soon as Carbone
parked, Morris headed into the restroom and
hung around waiting for Carbone to put in an
appearance, which he did about two minutes
later. Carbone went directly to a stall and uri-
nated. When he emerged from the stall, Morris
engaged him in conversation, during which —
to judge by the court’s account — Morris dis-
cretely solicited Carbone for a hookup! Morris
asked, “Here in a restroom or would you like to
go into the woods,” to which Carbone de-
murred, saying “it’s too risky” and suggesting
they go to his place of business. Morris offered
to follow Carbone in his car, Carbone agreed
and gave him directions. “At that point,” wrote
Delaney, “Lieutenant Morris identified himself
as an undercover police officer and arrested
Appellant pursuant to A.M.O. 941.06(h) for
 disorderly conduct for loitering in or near a toi-
llet building.”

Carbone appealed his subsequent convic-
tion, arguing that the ordinance was unduly
vague and overbroad, and that the evidence did
not support the verdict. The court of appeals
never reached the third argument, having de-
cided that the facial unconstitutionality of the
ordinance was established under existing
precedents. The statute gave no discernable
guidance to members of the public about what
specific conduct was covered, thereby leaving
too much discretion to police officers to deter-
mine the scope of its application. Furthermore,
the court found that on its face the statute po-
tentially applied to lots of protected speech (in-
cluding, one might opine, the speech in which
Carbone engaged on this occasion).

The police officer’s theory seemed to be that
corhersing about a possible sexual engagement
was a misuse of the public restroom facility,
and thus could be considered loitering, i.e.,
hanging about for a purpose other than that for
which it was intended. Carbone’s attorney had
tried to establish, through his cross-examining
of Morris, that this was an odd contention,
since Carbone had entered, immediately used
a urinal, and that it was Morris who had held
him up on his way out by initiating conver-
sation, but evidently the jury was not impressed.
In any event, the court held the ordinance
unconstitutional and reversed the conviction.

What is perhaps the most significant, based on
the testimony of Morris quoted in the opinion, is
the degree to which the police used cruis-
ningforsex.com as a textbook to understand the
ways of street and restroom cruising, and also as
an atlas to establish places to carry out sting
operations. A word to the wise… A.S.L.

9th Circuit Orders New Asylum Hearing for Gay
Indonesian Man

The U.S. Court of Appeals for the 9th Circuit
has ordered a new asylum hearing for gay man
from Indonesia in Susanto v. Holder, 2009 WL
497277 (Feb. 27, 2009). The court “recom-
mended” that the matter be reassigned to a dif-
ferent Immigration Judge (IJ) because of “in-
sensitive comments” in the first judge’s
opinion.

The brief per curiam opinion says almost
nothing about the facts of the case. According
to the court, the IJ denied Susanto’s asylum peti-
tion “based on the finding that Susanto’s past
experiences did not amount to past persecution
and that Susanto did not establish a well-
founded fear of future persecution because
there was no pattern or practice’ of persecution
against Christians, the Chinese minority, or
homosexuals in Indonesia.”

The court concluded that the IJ, whose ruling
was affirmed without opinion by the Board of
Immigration Appeals, had misconstrued the
9th Circuit’s precedents to rule out an alterna-
tive argument suggested by Susanto’s petition,
that he was a member of a “disfavored group”
and could show an “individualized risk of being
singled out for persecution.” The court pointed
out that the “disfavored group” theory had
recently been approved by the court, in Sinha v.
Holder, 2009 WL 311075 (9th Cir., Feb. 10,
2009), which had rejected the narrower read-
ing attributed to prior 9th Circuit precedents.

Consequently, the court determined that Su-
santo was entitled to another hearing to try to
meet that standard. The court recommended
that the case be assigned to a different IJ, “in
view of the IJ’s insensitive comments regarding
Susanto’s attempt to lead a heterosexual life.” The court provided no further context to illuminate this recommendation. A.S.L.

**Kentucky Appellate Court Denies Non-Biological Mother’s Petition For Joint Custody**

A three-judge panel of the Court of Appeals of Kentucky (the state intermediary appellate court) affirmed a trial court ruling denying a lesbian non-biological mother standing to bring a custody petition. Tilley v. Kilgore, 2009 WL 485063 (Feb. 27, 2009).

Ernestine Tilley and Michelle Kilgore were a lesbian couple in Kentucky. During the relationship, Kilgore conceived two children through donor insemination. The couple raised them together and shared physical custody. After the couple broke up, Tilley filed a petition seeking joint custody, which Kilgore opposed. Because Tilley did not qualify as a biological or adoptive parent of the children, she did not qualify as the primary caregiver, and thus, under Kentucky law, she was not a de facto parent. Absent relinquishment of superior custody rights by the legal parent, these families will remain at risk.

Frank R. Riley, III of Whitesburg, Kentucky represented Appellant Ernestine Tilley. Daniel Redman

**Illinois Appeals Court Rejects Discrimination Claim by Lesbian Former Employee of Chicago Transit Authority**

In Powell v. City of Chicago, 2009 WL 723372 (Ill.App., 1st Dist., March 17, 2009), the Appellate Court of Illinois found that there was substantial evidence in the administrative record to support a determination by the City of Chicago Human Rights Commission that the Chicago Transit Authority did not violate the city’s Human Rights Ordinance, which prohibits sexual orientation discrimination, when it discharged a clerk for excessive absenteeism. Thus, the court affirmed a ruling by Circuit Court Judge Sophia H. Hall that had affirmed the Commission’s decision.

Christiana M. Powell worked for CTA from August 1987 to July 3, 2002, when she was terminated. During her last few years of employment, she missed a substantial amount of work, actually being present less often than she was absent. Most of these absences were apparently attributable to either of two causes: her own physical problems with a bad back, and the medical complications of her partner’s cancer and its treatment which required her assistance. According to the factual record summarized by Presiding Justice Karnezis, CTA accommodated her to some extent by providing leaves and excused absences, but at some point she had crossed their threshold of the amount of absenteeism they were willing to tolerate, they put her on a probation program, and further absences led to her discharge.

Powell’s discrimination claim was built on the assertion that CTA did not provide the kind of support and accommodation for her that it would provide for heterosexual employees presenting similar family responsibility issues, and that she had been warned by co-workers that management was out to get rid of her. The latter point seems to be confirmed by the court’s discussion of CTA’s case, which was devoted to showing the unusually large number of days Powell was absent from work, and the Authority’s detriment incurred by having to cover for a frequently absent clerical employee. (Powell was a clerk in the legal department.) The court noted the lack of comparative evidence in the record, finding that there was no direct evidence presented of the usual support provided to heterosexual employees.

On appeal, Powell argued that the Human Rights Commission staff had performed an inadequate investigation of her claim, thus explaining the lack of substantial evidence of discrimination in the record, but the Appellate Court rejected that argument, finding that the Commission had adequately address issue that in its consideration of Powell’s case. “In this case,” wrote the court, “the commission did more than implicitly find that the investigation was adequate. It found so explicitly, based on the facts surrounding the investigation. It addressed each of plaintiff’s arguments in detail and explained why, given the paucity of information plaintiff gave to the investigator in support of her claim, the investigation was adequate, there was no substantial evidence of a violation and the complaint was properly dismissed.” Given the limited scope of substantive judicial review of an administrative determination, the court found this to be sufficient.

“The basis for plaintiff’s complaint that the CTA discriminated against her appears to be the fact that she was a lesbian caring for a life partner rather than a heterosexual caring for a life partner,” the court observed. “But she does not point to any heterosexual employee who was granted FMLA leave to care for a partner even though he/she did not work enough hours to qualify for FMLA leave or who was not disciplined or terminated despite similarly excessive absenteeism. A bald claim by plaintiff that she was treated differently is insufficient for the commission to investigate. It should not be expected to go on a ‘fishing expedition’ to find support for plaintiff’s claim.”

It is difficult to evaluate the court’s assertions in a vacuum. Certainly, an individual lay complainant cannot be expected to know about burdens of production and proof, and the purpose of creating an administrative process for processing discrimination claims is to make available trained investigators who will have some idea of what kind of evidence needs to be amassed and will take the initiative to try to determine whether the claim has merit. This is not a “fishing expedition.” Powell contended that she gave the names of witnesses to the investigator, but that they were not interviewed. Further, she pointed out that she did not have access to the CTA records that might shed light on her claims, but that the investigators could get access through their investigatory powers. The court, however, insisted that as a long-time employee, it was her obligation to point the investigator in the correct direction, stating “after 13 years at the company, she can be presumed to be aware if such a case [a comparator case of better treatment for a heterosexual employee] exists and to point the commission in the direction of that employee or employees, to provide a name, a department, a rumor, anything at all. She presented no such evidence. It is not up to
Here’s a bit of irony. School Boards are constituted to operate our public schools, to impart learning to our youth. And yet, in some parts of the country, it appears that School Boards need to go back to school to learn how to read and interpret the English language for themselves. The federal Equal Access Act provides that so long as a public school allows non-curricular student clubs to operate and be officially recognized, it cannot discriminate based on the subject matter of the clubs with very limited exceptions. So far, with one exception that is easily dismissed in light of the context, every judge has to have considered the issue has concluded that students are entitled to form and obtain official recognition for Gay-Straight Alliances in public high schools so long as the schools allow other non-curricular clubs to function.

In Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 2009 WL 635966 (M.D. Fla., March 11, 2009), U.S. District Judge Henry Lee Adams, Jr., issued a preliminary injunction, which states: “a. Defendant shall, so long as it maintains a limited open forum under the EAA or a limited public forum under the First Amendment, grant official recognition and grant all privileges given other student organizations to the Gay-Straight Alliance of public high schools so long as the schools allow other non-curricular clubs to function.

The court found that no court has required a GSA to go into the closet and use the name Tolerance Club instead of Gay-Straight Alliance, the court found that no court has required a GSA to omit the G-word from its name in order to gain official recognition, and that this undermines one of the legitimate goals of the organization. The court found no support for the school board’s argument that letting the GSA use its preferred name would be disruptive, pointing out that in fact at one point the student group was allowed to have some meetings announce at the high school and the announcement produced no difficulties.

As to the school board’s insistence that the club go into the closet and use the name Tolerance Club instead of Gay-Straight Alliance, the court found that no court has required a GSA to go into the closet and use the name Tolerance Club instead of Gay-Straight Alliance, the court found that no court has required a GSA to omit the G-word from its name in order to gain official recognition, and that this undermines one of the legitimate goals of the organization. The court found no support for the school board’s argument that letting the GSA use its preferred name would be disruptive, pointing out that in fact at one point the student group was allowed to have some meetings announced at the high school and the announcement produced no difficulties.

Federal Court Orders Recognition of Another High School GSA in Florida

Defendant shall not require the Gay-Straight Alliance of Yulee High School to change its name as a condition to official recognition; b. Defendant shall not interfere with the CTA's ability to advocate for tolerance, respect, and equality of gay, lesbian, bisexual, and transgender people or the other goals set forth in the Gay-Straight Alliance's constitution; c. Defendant shall distribute this Preliminary Injunction to all of its teachers and staff within 72 hours.

U.S. District Judge Gladys Kessler (D.D.C.) denied a gay foreign service officer’s motion for summary judgment and refused to overturn as arbitrariness and capricious the Foreign Service Grievance Board ruling denying relief for negative work evaluations allegedly stemming from anti-gay bias. Olson v. Clinton, 2009 WL 635977 (March 12, 2009). Karl Olson alleged that anti-gay bias motivated negative reviews he received while working at the U.S. consulate in Rio de Janeiro in the mid-1990s. The defense pointed to complaints by visa-applicants, negative Brazilian press accounts, and the testimony of colleagues to bolster its claim that Olson’s work-style and personality were harmful to the office culture and American policy goals in Brazil. Plaintiff Olson sought several forms of relief, including expungement of the evaluations, inclusion in his personnel file of substantial contributions that his supervisors omitted, and professional advancement.

The court found “strong evidence in the record that anti-homosexual bias pervaded the atmosphere at the Consulate General,” citing several examples. “Numerous” staff members supported Olson’s complaints of homophobia. One of Olson’s supervisors gave him a “mock three dollar bill with the words Queer Reserve Note” printed on the front.” On a visit to the Consulate, a state department official noticed that “an atmosphere of homophobia prevailed at the top ranks of the post.”

Most egregiously, in August 1994, the Diplomatic Security Office in Brazil sent a telegram to the State Department which read: “The following state officers clearly exhibit homosexual preferences and [Regional Security Office] requests background info to conduct proper defensive briefings for each, including relationship reporting We have not learned of any infamous or notorious conduct nor have [counter-intelligence] concerns, such as contact patterns, arisen. Please advise if these men are declared. If further action is appropriate please advise.”

The opinion reports that “the Consulate received a response indicating that sexual orientation (homosexuality) was no longer considered an issue by the Department of State.” The court found that “the Cable targeted Plaintiff for no reason other than his sexual orientation.”

The court disputed several of the Foreign Service Grievance Board’s findings, including its assessment that Plaintiff’s supervisors had no reason to lie on the evaluation. Judge Kessler observed, “It is not clear that two supervisors would have no motive to lie when their professional reputations would be damaged if the Board found them to be homophobic.”

Despite this evidence, the court upheld the Grievance Board ruling. “The Board cites to evidence from numerous sources affirming the statements made in the [evaluations] at issue In the aggregate, they provide strong support for the Board’s conclusions that the [evaluations] were accurate” concerning Plaintiff’s difficult personality and work-style. “Given the quantity and consistency of the statements made by Plaintiff’s co-workers, Plaintiff has failed to demonstrate that the Board acted arbitrarily and capriciously when it found that the [evaluations] were not falsely prejudicial.”

Janine M. Brookner of Washington, D.C., represented plaintiff. Jane M. Lyons of the
United States Attorney’s Office, Washington, D.C., represented defendant, Daniel Redman

**Gainesville Voters Rejects Anti-Gay Charter Amendment**

A measure that would have amended the city of Gainesville’s charter to repeal protection against discrimination on the grounds of sexual orientation or gender identity went down to ignominious defeat on March 24, as 58 percent of the voters rejected it. Proponents of the measure argued that it would create a dangerous and embarrassing situation in municipal restrooms when transgendered individuals attempted to use restrooms designated for the “wrong” sex to the consternation of other patrons. Hard to believe that an entire municipality became engulfed in a debate about who should have access to which bathrooms, but such is the sometimes low comedy of anti-gay ballot questions. Orlando Sentinel, March 25. A.S.L.

**Federal Civil Litigation Notes**

11th Circuit — Florida — An 11th Circuit panel ruled that a right-wing political organization, Florida Family Policy Council, did not have standing to challenge the constitutionality of state judicial ethics standards that have been cited by judicial candidates as ground for not answering substantive questions on the organization’s questionnaires. Florida Family Policy Council v. Freeman, 2009 WL 165682 (March 6, 2009). The trial judge had decided the organization did have standing, but that Florida had a compelling interest in providing the appearance of judicial neutrality to state court litigants, and thus could maintain ethical rules requiring that judges who had articulated positions on the issues outside of their judicial opinions must recuse themselves from cases presenting those issues. Thus, the burden on free speech imposed on judicial candidates was held to survive strict scrutiny. The court of appeals decided it would not need to reach that issue, because the court concluded that there would be no practical way to redress any First Amendment violation. Given the organization’s name, you know what kinds of questions were at issue here: whether candidates thought the same-sex couples had a right to marry under the Florida constitution, and whether same-sex couples have a constitutional right to adopt children were both on the list. FFPc filed the suit after it was frustrated in its attempt to compile voter information because most judicial candidates refused to answer the questions, citing the ethical rules.

10th Circuit — In United States v. Baldridge, 2009 WL 692107 (March 18), the 10th Circuit Court of Appeals found that a prosecutor had not committed reversible error in a political corruption trial by questioning two male witnesses in a way that could lead the juror to conclude that the defendant had a homosexual relationship with one of the witnesses. “The government contends the examination of Bentz and the cross-examination of Slover were proper and sought only to establish Slover’s obvious potential bias in favor of Baldridge[,]” wrote Judge O’Brien for the court. “We agree with the government. It is permissible impeachment to expose a witnesses’ biases. At common law, bias describes the relationship between a witness and a party which might cause the witness to slant his testimony for or against the party. Certainly, if Baldridge and Slover had been having an intimate relationship, Slover’s testimony might well have been slanted in favor of Baldridge. And Slover could have been biased in favor of Baldridge even if their relationship was not sexual, but merely close. Baldridge claims this situation is exceptional because an insinuation of homosexuality in rural Oklahoma is incendiary, not likely to be forgotten or forgiven by the jurors. Even if true, it is not a reason to craft a homosexual exception to a hallowed rule of evidence allowing wide latitude for the jury to assess possible witness bias. At most it would be a factor for the trial judge to consider upon a proper Rule 403 objection, absent here. Viewed in the context of the entire trial, we perceive no error in the prosecutor’s questioning of Bentz and Slover.”

9th Circuit — In Wakkary v. Holder, 2009 WL 595579 (March 10, 2009), a panel of the 9th Circuit Court of Appeals provided a detailed discussion of the circuit’s jurisprudence on how an applicant for withholding of removal on the grounds of membership in a disfavored group would prove his or her case. The case at issue does not involve sexual orientation or gender identity, although the court adverts to a recent holding involving a gay man from Jamaica to help illustrate its overall point, that membership in a group that is subject to persecution in a particular country is relevant to the plaintiff’s burden of showing his or her own objective fear of persecution if required to return to his or her home country. Most significantly, the court specifically endorses the use of “disfavored group” analysis in a withholding case for the first time in the circuit, noting the previously the circuit had embraced this methodology in asylum cases without specifically holding that it could be used in a withholding case. Other circuits differ from the 9th Circuit as to this, setting up the possibility for Supreme Court in a future case.

9th Circuit — A 9th Circuit panel rejected an appeal from a district court ruling that Hastings Law School could not refuse to accord official recognition to a student chapter of the Christian Legal Society because the organization restricted its membership based on sexual orientation and religion, requiring an oath of orthodox Christian legal belief of members. The court saw little need to expend words on the appeal in Christian Legal Society v. Kane, 2009 WL 693391 (March 17, 2009), issuing a one paragraph memorandum just a week after the case was argued to the panel of Chief Judge Kozinski and Circuit Judges Hug and Bea. Said the court, in full: “The parties stipulate that Hastings imposes an open membership rule on all student groups — all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. Truth v. Kent Sch. Dist., 542 F.3d 634, 649–50 (9th Cir. 2008).” No further explanation was given, and no recognition of possible differences in analysis between a high school and a graduate (law) school setting.

6th Circuit — In Connection Distributing Co. v. Holder, 2009 WL 414615 (Feb. 20), a 6th Circuit panel found that 18 USC 2257, the controversial provision imposing stringent record-keeping requirements on all producers of sexually explicit materials that might move in commerce, was constitutional. Ruling in a declaratory judgment action, the court produced an extensive opinion by Circuit Judge Jeffrey S. Sutton rejecting the claim that these record-keeping requirements violated the 1st Amendment’s guarantee of freedom of speech, or the 5th Amendment’s protection against self-incrimination. The ostensible concern of Congress in these regulations is to crack down on the production of child pornography by requiring reliable documentation of the age of everybody depicted in such materials, but the record-keeping requirements range far beyond merely documenting age; among other things, they essentially make it impossible for performers to maintain their anonymity by requiring that official government-issued identification be on file with the producer and open to inspection, and that such records list all the aliases used by the performer. The documentation requirements may also be used to crack down on the use of foreign performers in American productions, since only U.S. or state government identification documents are acceptable, so “vacationing” foreign performers who do not have official permission to work in the U.S. would not be in a position to present complying identification. There are significant criminal penalties for failing to maintain the prescribed records. Other courts have questioned various aspects of the requirements. A dissenting opinion sharply contested the majority’s conclusion that the requirements do not impermissibly burden free speech.

District of Columbia — In Smith v. Caf. Asia, 2009 WL 748624 (D.D.C., March 23), a long-running litigation concerning a gay former restaurant employee’s charge of harassment and hostile environment due to his sexual orientation, U.S. Magistrate Judge John M. Facciola...
had to rule on a discovery question — whether the defendant would be required to identify the sexual orientation of various individuals who were allegedly involved in harassing the plaintiff. Finding that under the precedent of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the sexual orientation of alleged harassers may be relevant to a claim of discriminatory harassment, and defendants would be required to produce such information regarding certain individuals named on the discovery list.

**Florida** — Is there another closeted minister on the loose? In *Medina v. United Christian Evangelistic Association*, 2009 WL 653857 (S.D. Fla., March 10, 2009), District Judge Marcia G. Cooke refused to dismiss a Title VII/Florida Civil Rights Act sexual harassment and retaliation claim, coupled with state law battery and intentional infliction of emotional distress claims, brought by a male former chauffeur of one Frederick Eikenkoetter, known to one and all as Rev. Ike. Plaintiff Augusto Medina claimed that his services to the Rev. included, at the Rev.’s demand, sexual services of an oral nature to which he objected and did not freely consent. Medina filed suit after his resistance to the Rev.’s continued demands led to the end of his employment. The Rev.’s employer, the named defendant Association, sought to get the case dismissed, arguing against respondeat superior liability and asserting that any sex that occurred was consensual and thus not actionable. Chiding the parties for failing to present relevant precedents on point, Judge Cooke pointed out that under the Supreme Court’s precedents on sexual harassment, the issue was not whether sex was “consensual” but rather whether it was not wanted and objected to by the plaintiff. On another point, she ruled as a matter of law that the allegation that Rev. Ike required Medina to perform oral sex on him was sufficiently outrageous to avoid dismissal of the claim of intentional infliction of emotional distress. In a prior ruling, 2009 WL 513012 (Feb. 27, 2009), she had dismissed Medina’s retaliation charge premised on the failure of the Rev. to continue calling him to work, but in the March 10 ruling discussed above, she refused to dismiss a retaliation claim based on allegations that the Rev. took various adverse actions against Medina when Medina resisted his sexual demands. It will be interesting to see how this case develops, although one suspects that the UCEA’s liability insurer (if they have one) is going to seek a settlement. The Rev. is an individually named defendant on the state tort claims, however, so who knows? Certainly, the case deserves media coverage.

**Louisiana** — We reported in January on the decision in *Adar v. Smith*, Civil Case No. 07–6541 (E.D.La., Dec. 22, 2008), where the court ruled that a gay male couple who had adopted Louisiana-born child in New York (and were now residing in Texas) were entitled to obtain from Louisiana a birth certificate reflecting the legal parental status of the two men. On March 19, U.S. District Judge Jay Zainey rejected a motion by the state’s attorney general to reconsider his ruling, and gave the state 15 days to comply with the order to issue the new birth certificate. Attorney General Buddy Caldwell announced that he would appeal the ruling to the 5th Circuit, and meanwhile would seek a stay of the decision from the court. Additionally, a bill was filed in the Louisiana legislature to make it illegal to revise birth certificates to indicate parental status for anybody who would not be entitled to adopt in Louisiana. 365Gay.com, March 20. Apparently, both the sponsoring legislator (not named in the news report we saw) and the attorney general consider it vital to do everything possible to avoid giving this adoptive child a normal life, since to do so would violate the public policy of Louisiana, which is to place anti-gay ideology above the best interest of adoptive children. (Sorry about that folks, we just had to get this one off our chest. After all, Louisiana is a state in which the governor seeks to reject federal assistance for expanded unemployment benefits, for fear that the state might actually have to extend benefits to people of whom he does not approve, so we know that the public policy mills grind rather fine in that jurisdiction.)

**Michigan** — Bradley Fowler decided that the discrimination he was encountering as a gay man was due, at least in part, to the deliberate publication of the word “homosexual” in the King James English language version of the Bible published by two publishing companies amenable to suit in Michigan. So, being an American, he filed a lawsuit against the two publishers, pro se, alleging various tort and constitutional claims. In *Fowler v. Thomas Nelson Publishing*, 2009 WL 612385 (E.D.Mich., March 6, 2009), U.S. District Judge Julian Abele Cook, Jr., granted dismissal motions filed by both publishers, finding failure to allege a viable cause of action. The opinion makes entertaining reading. In all seriousness, Judge Cook explains why each of Fowler’s legal theories is inadequate to give him a day in federal court to seek damages against these publishers who persist in printing and distributing a book that Fowler believes defames him and imposes substantial barriers to his ability to obtain employment and enjoy public accommodations. Because both defendants are private companies, the dismissal of Fowler’s constitutional claims was, of course, a foregone conclusion, but explaining why the group libel against gay people contained in the Bible is not actionable may have provided at least a modest challenge to the court. Among other things, the defendants raised a statute of limitations defense. Since the King James version of the Bible dates from the early 17th century, this seems pretty cut clear, but Fowler argued that he first learned of this objectionable use of the word “homosexual” in the defendant’s publications much more recently than that.

**New York** — Shawn Michael Snyder, an openly gay state inmate formerly at Washington Correctional Facility, sought damages under 42 USC 1983 for getting beaten up by a corrections officer, severely enough to have sustained real injuries requiring medical care. He claims he was singled out for this mistreatment because of his sexual orientation, and raises 1st, 4th, 8th and 14th Amendment claims. But he says he so feared retaliation, having been told by other inmates that C.O. Whittier was out to get him, that he delayed pursuing the matter until after being transferred elsewhere in the system, and was tripped up by federal statutes imposing requirements for quick action and exhaustion of internal prison grievance appeals before resorting to federal court. Magistrate David E. Peebles observed that had he complied with the procedural requirements, Snyder might have had a viable case: “Plaintiff’s claims against defendant Whittier stemming from his alleged assault of the plaintiff, however, present triable issues of fact which, were this case to proceed notwithstanding plaintiff’s failure to exhaust, would require a trial in order to resolve genuinely disputed issues of fact.” Sr. District Judge Thomas J. McAvoy accepted the magistrate’s recommendation to dismiss the case, overruling Snyder’s objections to the magistrate’s report. *Snyder v. Whittier*, 2009 WL 691940 (N.D.N.Y., March 12, 2009).

**State Civil Litigation Notes**

**Arkansas** — A pending suit challenging the state’s recently enacted law banning anyone living alone or with a non-marital partner from adopting or fostering children, which went into effect on January 1, has survived a motion to
Patino, a 27-year employee, claimed that he was sexually oriented harassment. Employer, Birken Manufacturing Co., for hostile work environment, and we are not persuaded to extend to a failure by management to respond effectively to complaints of harassment based on sexual orientation. Lambda Legal and the Connecticut Employment Lawyers Association have filed amicus briefs in support of Patino’s verdict. Patino is represented by Hartford attorney Jon L. Schoenhorn, Connecticut Law Tribune, March 23, 2009. A.S.L.

Criminal Litigation Notes

Federal — 6th Circuit — A 6th Circuit panel has concluded that a man who was convicted and sentenced to death for brutally murdering another man whom he picked up in a Cincinnati gay bar, is entitled to a new sentencing hearing, on the ground that his defense attorney did not make a sufficient investigation of mitigating factors prior to the original sentencing hearing. Van Hook v. Anderson, 2009 WL 605332 (March 6, 2009). The same panel had previously reversed a denial of a writ of habeas corpus based on its conclusion that the defendant’s confession should have been suppressed on 4th Amendment grounds, but the 6th Circuit reversed on that point and remanded for consideration of other points raised in the habeas petition. The court found that the defendant’s habeas attorney had uncovered substantial mitigating evidence concerning the defendant’s troubled childhood that could have been discovered had his trial counsel done more than a cursory last-minute investigation between the time of conviction and the time set for the sentencing hearing. Believing that the evidence uncovered might have been persuasive in considering whether to order the death penalty in this case, the panel reaffirmed its decision that the writ should be granted and a new sentencing hearing held.

Connecticut — The Appellate Court of Connecticut sustained the conviction of a gay man for killed his same-sex partner in State v. Velez, 2009 WL 703205 (March 24, 2009). It seems that the defendant, perhaps bisexual, frequently aroused the ire of his partner by “looking” too long at women or speaking with people of whom his partner disapproved. The two men attended a wedding reception on September 28, 2004, at which heavy drinking too place, and during which defendant danced with a woman, upsetting the victim’s jealous rage. Later that night a fight broke out between the men in their department and the defendant, the considerably younger of the two, stabbed the victim several times. “According to the defendant, he did not know what had come over him, as he had no control of himself. He claimed that he was intoxicated, scared, and going crazy. He broke things throughout the apartment. The defendant described himself as having had a psychotic episode during which he could not stop himself from doing things that he knew were wrong.” The jury didn’t buy it and convicted him on charges of murder, Burglary and criminal mischief. On appeal, the court various objections that might be characterized as technical, and affirmed the trial court.

Florida — Florida Circuit Judge J. Michael Hunter sentenced Joseph Bearden to life in prison upon conviction of second-degree murder in the death of Ryan Keith Skipper. Prosecutors contended that the murder was a gay-related hate crime, and that Skipper was selected by Bearden and an accomplice (who has yet to be tried) to be robbed and stabbed to death because he was gay. Skipper’s body was found on a “dark country road south of Winter Haven,” according to the Orlando Sentinel’s Feb. 28 report on the trial, and his car, purchased just a month prior to the murder, “was dumped miles away on a boat ramp at Lake Pansy in Winter Haven.” Bearden’s attorney claimed partial victory in that his client was not convicted of first-degree murder and sentenced to death. Bearden will also serve concurrent sentences totalling forty years for other crimes charged in connection with the same incidents. Bearden’s mother denied the hate crime allegations, claiming his son lived with some friends who were gay and that he had “no problem with it.”

Indiana — In Hobson v. State of Indiana, 2009 WL 709850 (Ind. App., March 17, 2009), the court rejected a claim of ineffective assistance of counsel, affirming the murder conviction and fifty-year prison sentence of Edward A. Hobson, a pre-operative transsexual who killed Marcus Curd, another pre-operative transsexual, during an altercation outside a bar in Indianapolis. Hobson and Curd were both in love with the same man, Troy Wright, and had both been dating him at various times, resulting in severe tension between them. Hobson, who emptied six or seven rounds from her pistol into Curd as the culmination of the fight, claimed she was acting in self-defense. Her main argu-
ment in seeking appellate review was that her defense attorney had failed to request various charges of lesser-included-offenses of the trial court. While the appellate court found that some of these charges might have been requested, nonetheless it concluded that the failure to raise them did not constitute ineffective assistance to the extent necessary to grant relief, in light of the facts in the record supporting the jury’s verdict.

Mississippi — Let’s not take on every issue at once, OK? In Walker v. Barbour, 2009 WL 691972 (S.D.Miss., March 12, 2009), Demario Walker, a state prison inmate proceeding pro se, brought suit seeking a declaration from the court that Mississippi’s refusal to allow same sex marriages is unconstitutional, that the federal Defense of Marriage Act is unconstitutional, that the federal policy barring openly gay people from military service is unconstitutional, and that the federal policy of refusing to allow convicted felons to enlist in the military is unconstitutional. District Judge Tom S. Lee found that the first claim was filed maliciously, in that Walker had filed a previous lawsuit seeking a declaration of unconstitutionality of the marriage law, and that repetitious lawsuits by paupers are deemed malicious. Lee found that because Walker and his partner are not married, they lack standing to challenging the constitutionality of DOMA. He also found lack of standing to challenge the military policy, since there was no allegation that Walker had personally been excluded from the military on account of the policy. Further, Lee found nothing in the complaint to suggest that Walker, who is presently incarcerated, had been denied enlistment. Lee ordered dismissal of all claims with prejudice.

New York — Did homophobia taint a search in conjunction with a complaint that some gay men were mistreating animals? Strange as it sounds, question arises from examining the decision by the New York Appellate Term, 2nd Department, in People v. Lewis, 2009 N.Y. Slip Op, 29091 (Feb. 27, 2009), overturning a decision by Staten Island Criminal Court Judge Matthew A. Sciarino who granted a motion to suppress evidence resulting from a search at Barry Delaney’s house. Delaney was taking care of some animals owned by Kevin Lewis. Proceeding on a complaint of mistreatment of animals, an armed, uniformed special agent of the ASPCA came to Delaney’s house to investigate. The Special Agent claimed that Delaney voluntarily allowed inspection of the animals, which eventuated in criminal charges being filed against Delaney and Lewis. But Delaney claimed that his consent was not voluntary, and the results of the search should be suppressed. A three judge panel reversed, finding that Delaney had consented, but Justice Golia sharply dissented, contending that “even a cursory viewing of the videotaped evidence shows that in point of fact defendant Delaney was trapped within the curtilage of his house by a special agent of the law, in full police-type uniform with a side arm, who had entered through the gate to his property.” There also was a film crew from a television series present, as well as a woman, apparently a neighbor, who “stood with the film crew and the special agent as if she belonged there and was part of the action taking place. She continuously made disparaging remarks about Mr. Delaney’s lack of sobriety and made known her suspicions about his sexual orientation, all the while attempting to instigate an arrest.” Golia argued that the prosecution failed to meet its “heavy burden” of demonstrating that under these circumstances Delaney had voluntarily consented to the search, and the evidence showed that the agent went there with the intent to arrest Delaney.

New York — The Daily News (March 19) reported that a Brooklyn juror reached a murder verdict in the case of Omar Willock, who stabbed Roberto Duncanson, a gay man, to death on September 12, 2007. Willock had testified that Duncanson flirted with him, provoking him into the fight. The jury deliberated four days. The prosecutors had initially charged Duncanson with a hate crime enhancement, but that part of the charge was dropped due to lack of necessary evidence going to the requisite intent. The possible sentence in the case is 25 years to life.

Tennessee — The Court of Criminal Appeals refused to set aside the conviction of Micheal S. Morani for attempted murder and property theft on grounds of ineffective assistance of counsel in Morani v. State of Tennessee, 2009 WL 528801 (March 3, 2009), finding the trial counsel’s decision not to make anything of the homosexual relationship between Morani and his victim during the trial had been a strategic decision, based on her concern that making the relationship an issue would have caused more harm than good to Morani in the eyes of the jury. A.S.L. @H2 Legislative Notes Federal — Don’t Ask, Don’t Tell — While the Obama Administration pursues a “go slow” strategy towards the goal of repealing the current policy prohibiting uniformed military service for openly gay people, U.S. Rep. Ellen Tauscher decided to take the more direct approach, pushing for hearings on a bill to end the policy and put in its place a ban on sexual orientation discrimination in the Armed Services. Although allowing openly gay persons to serve now has overwhelming public support, to judge by opinion surveys, barriers to Congressional action remain, including the necessity to have a supermajority in the Senate to overcome a predicted Republican filibuster, and the need to “convert” the views of some senior Democrats in the House who might bottle up the effort in committee, despite a wide level of co-sponsorship among Democrats and some Republicans. San Francisco Chronicle, March 3.

Alabama — Will wonders never cease? According to a March 5 report in the Birmingham News, the Alabama House Judiciary Committee approved a bill that would add sexual orientation to the state’s hate crimes law, on a voice vote with no debate. A similar bill narrowly passed the House last year, but never came to a vote in the Senate. The article did not report any prediction about how it might do this year, merely noting that “Republican lawmakers have mostly opposed the bill, saying it makes an assault on certain people worse than an attack on others.” They presumably support equal opportunity gay-hashing...

Colorado — On March 23, the Colorado Senate voted to pass House Bill 1260, which allows unmarried adults (regardless of gender) to enter into “beneficiary agreements” which can be filed with county clerks as a public record and bestow on the parties rights to inheritance, medical decision-making, and several other enumerated rights. All Senate Democrats and two Republicans voted for the measure. Republican critics argued that it was “marriage light” for same sex couples, and constituted an “end run” around the 2006 general election vote against a proposal for civil unions for same-sex partners. Denverpost.com, March 23.

Delaware — On March 26, the Delaware Senate voted 11–9 to reject a proposed constitutional amendment against same-sex marriage. At the same time, the House was voting 26–14 to approve a bill banning sexual orientation discrimination in housing, employment, public works contracting, public accommodations and insurance. This was the fourth time the Delaware House has passed such a bill. On each previous occasion, the measure has died in the Senate without a vote, but there were hopes that a recent rules change in the Senate under which measures can come to the floor without the approval of relevant committee chairs fueled hope that the measure might actually come to a vote this year. Delaworeanline.com, March 27.

Florida — State Sen. Nan Rich (D-Weston), co-chair of the Children & Families Committee, has introduced a bill to repeal the 1977 statutory ban on “homosexuals” adopting children in Florida. She also introduced a companion bill that provides that judges decide adoption petitions based solely on “the best interests” of children. In the meantime, Liberty Council, a right-wing legal organization, filed a motion with the Florida Supreme Court on February 25, asking the court to enjoin the filing of an amicus brief by the Florida State Bar’s Family Law Section in the pending appeal of a ruling by Miami-Dade Circuit Judge Cindy Lederman, In the Matter of the Adoption of John Doe and James Doe, 2008 WL 5006172 (Fla. 11th Dist. Ct., Nov. 25, 2008), which held the adop-
tion ban unconstitutional. The Florida Bar’s executive committee voted to allow the Family Law Section to file an amicus brief supporting Judge Lederman’s decision. Liberty Council argues that the brief does not represent the views of all members of the Florida Bar, and that since Florida has a unitary bar under which all practitioners must belong, it should not be allowed to file amicus briefs in controversial cases. Miami Herald, March 11.

Hawaii — After the Judiciary Committee of the State Senate deadlocked on a civil union bill, an effort was made to pass a discharge motion on the floor to bring the matter to a vote, but fell short of the necessary number. It is thought that a majority of Senators support the bill, but the numbers are not there to get it out of committee. New York Times, March 26.

Illinois — The Associated Press reported on March 6 that a bill establishing a civil union option for same-sex couples had been narrowly approved on a 4–3 vote by the Illinois House Youth and Family Committee. A similar bill won committee approval last year, but its sponsor did not push for a floor vote, having counted noses and come up short. Lead sponsor Rep. Greg Harris (D-Chicago) said that this year the bill is on the “front burner” but that rounding up sufficient votes in the House would be difficult.

Illinois — McLean County — The Pantagraph (Bloomington, IL) reported on March 5 that the McLean County Board’s finance committee had approved changes to the county’s personnel policy that included the addition of “sexual orientation” as a forbidden ground of discrimination. However, the personnel policy also informs elected officials that they are only legally bound by federal and state law, not by county policy. Illinois law forbids sexual orientation discrimination however....

Kentucky — Senate Bill 68, which would prohibit adoption or foster parenting by any person “cohabiting with a sexual partner outside of a marriage that is valid in Kentucky” was approved in a Senate committee, but died for the current legislative session when the House of Representatives adjourned for the session on March 27 before the measure could advance further. Human Rights Campaign Press Release, March 27.

Maine — A bill to open up marriage to same-sex couples has been introduced in the state Senate by Senator Dennis Damon of Trenton, who has persuaded more than sixty legislators from both parties to sign the bill as co-sponsors. Support is so widespread, said Damon, that he was able to get the leadership of the Senate to waive the usual limitation of ten co-sponsors on a bill. If the measure is passed, Maine would be the first state to allow same-sex marriage through legislation, as opposed to being ordered by the state’s highest court, the situation pertaining in neighboring New England states of Massachusetts and Connecticut. Sun Journal, March 13. Two other neighboring states, Vermont and New Hampshire, make civil unions available for same-sex partners, but a serious proposal to expand that to full marriage is pending in Vermont.

Maryland — A bill titled the “Religious Freedom and Civil Marriage Protection Act,” introduced in the state legislature by openly-gay Senator Richard Madaleno, Jr., has picked up more than 50 co-sponsors to support the call to allow same-sex partners to marry while exempting religious bodies from any requirement to perform the contemplated marriages. The bill responds to a 2007 decision by the Maryland Court of Appeals, the state’s highest court, rejecting a claimed constitutional right for same-sex couples to marry, but commenting that the legislature has the authority to adopt a law authorizing marriages for same-sex couples. The Senate Judicial Proceedings Committee has held hearings on the bill, but at press time there was no vote to report. DelmarvaNow.com, March 11, 2009.

Minnesota — The state Senate’s Education Committee approved a measure that would amend the anti-bullying policy at Minnesota schools by listing a dozen characteristics, including “sexual orientation,” that would be prohibited grounds of harassment. Some Republican members of the committee objected to the addition of categories, warning against litigation floodgates. And, of course, the so-called Minnesota Family Council objected that the bill will “open the door to promoting a certain social agenda.” Of course, this is about promoting a social agenda of civility in the schools. St. Paul Pioneer Press, March 25.

Missouri — The Columbia, Missouri, City Council is scheduled to take up during April a proposal to create a domestic partnership registry for unmarried couples. Columbia Daily Tribune, March 25. Due to an anti-same-sex marriage state constitutional amendment adopted in 2004, however, the Council is limited in terms of what rights it can accord to same-sex partners.

New York — The New York City Board of Health voted unanimously on March 24 to change the rules governing birth certificates so that married lesbian couples will both be named as parents when a child is born to one of them. The state, which controls birth certificate policy outside of New York City, had made a similar policy change in 2008, responding to Governor David Paterson’s call for state agencies to modify policies if necessary to include recognition for same-sex marriages contracted out-of-state. When a child is born to a member of a married couple, both spouses are presumed to be the legal parents of the child, so recognizing the marriage involves extending this presumption. However, gay male married couples do not benefit from this policy, because state law requires that a birth mother’s name be listed as one of the parents on every birth certificate. Male couples who are raising a child born by a surrogate must arrange for adoption by any non-biological father and issuance of a substitute birth certificate. Newsday, March 26.

North Dakota — The House Human Services Committee voted 7–0 against approving S.B. 2278, which is intended to add “sexual orientation” to the state’s anti-discrimination law. Opponents claimed that the bill would create a “special class” of protected people, an argument premised on the assumption that straight people never suffer discrimination on account of their sexual orientation and thus the measure, despite its wording, would only really protect gay people. To which a proponent asked why gay people should not be protected from discrimination? Bismarck Tribune, March 25.

Pennsylvania — State Rep. Dan Frankel (D-Allegheny) reintroduced a bill to amend the state’s civil rights law to add sexual orientation or gender identity or expression to the list of prohibited grounds of discrimination in employment, housing, credit and public accommodations. The measure has 78 bi-partisan co-sponsors, nine more than when it was first introduced in the 2007–2008 legislative session, according to a press release by the Representative’s office published in US Federal News, 2009 WLN 45:40532, on March 10. Frankel indicated that a public opinion poll showed 71% support for the measure in Pennsylvania. Many Pennsylvanians are already covered by such protection due to local laws in Allentown, Easton, Erie County, Harrisburg, Lancaster, Lansdowne, New Hope, Philadelphia, Pittsburgh, Scranton, Swarthmore, West Chester and York. The municipality of State College has a more limited ordinance covering only sexual orientation discrimination in housing and employment. Pennsylvania is largely surrounded by states that ban sexual orientation discrimination: New York, New Jersey, and Maryland. The House State Government Committee approved the bill by a vote of 12-11 on March 11 and sent it to the floor for consideration by the full House. The measure was opposed by the Pennsylvania Family Institute, a conservative group, which contends that it would “put at risk clergy, religious ministries or schools or child care centers, or even employers or business owners with religious beliefs, who may have moral objections to hiring homosexuals or transgendered cross-dressers in the place of employment.” Half right. The position embodies the usual scare tactics about discrimination charges against churches, and then blends them with the accurate observation that other businesses will be required not to discriminate against LGBT people even though their proprietors have religiously-based moral objections to homosexuality. In other words, a law of this type is intended to combat discrimi-
nated. Surprise! Pittsburgh Post-Gazette, March 12.

South Dakota — Following the recommendation of their lawyer, the Aberdeen, S.D., school board voted unanimously to reject a proposal to add “sexual orientation” to the school district’s anti-discrimination policy. Rory King, the attorney, claimed that people with “nontraditional sexual orientations” were already protected by the existing policy, even though it did not refer to them. The current policy lists race, color, creed, religion, age, gender, disability, national origin or ancestry. King told the board that the question of adding sexual orientation should be decided on the state, not local, level, and minimized the significance of facts presented at the meeting, such as that the fifty largest employers in the state have nondiscrimination policies that include sexual orientation, as do several other school districts. American News (Aberdeen, SD), March 24.

Washington State — On March 10, the state Senate approved a measure to expand the rights of domestic partners to encompass virtually every state law right and benefit enjoyed by married couples, by a vote of 30–18. The measure is given a good chance of passing the House as well. Olympian, March 12. If enacted, this would bring Washington into parity with other jurisdictions that have created parallel legal status to marriage for same-sex couples, including Vermont, New Hampshire, New Jersey, and California. (Connecticut has a similar statute, but now makes same-sex marriages available as a result of last year’s KERRIGAN decision by the state’s Supreme Court. As noted above, the question whether California’s Domestic Partnership Law is ultimately supplanted by marriage rights is pending before the state Supreme Court in the challenge to enactment of Proposition 8. See story above about the oral argument.)

West Virginia — The West Virginia State Senate voted on March 13 to approve a bill that would ban discrimination in housing or employment based on sexual orientation. A similar bill passed unanimously last year, but died in the House of Delegates. The unanimous vote was attributed to misleading tactics by the proponents of the bill, charged those who opposed the measure. The bill passed on March 13 was narrower, in that it included an express exemption for religious organizations not found in the bill passed last year, and several members voted against it. The measure is expected to face difficulty in the House of Delegates. Charleston Gazette (online edition), March 13, 2009. Agitation continues in the state for the legislature to put same-sex marriage on the ballot in the form of a referendum. Those agitating for it are opposed, claiming that the public overwhelmingly opposes same-sex marriage and should be allowed to register its views before the legislature or the courts intervene to address the subject. Dominion Post, March 26.

Law & Society Notes

Are Most Americans Protected from Sexual Orientation Discrimination — The Daily Labor Report (2009 Issue No. 45, March 11) reported on a program presented in Philadelphia under the auspices of the Society for Human Resource Management, at which WolfBlock attorneys Michael S. Cohen and Marc J. Scheiner spoke on sexual orientation and gender identity issues in the workplace. According to the article, Cohen said “that approximately 53 percent of the U.S. population now lives in a jurisdiction with a law prohibiting discrimination based on sexual orientation or gender identity,” when one takes into account 20 state laws, the District of Columbia, and about 170 counties or cities in the other thirty states that have addressed the issue in local legislation. Elsewhere we report on legislative efforts to add more states to the list this year.

Massachusetts — Because of the federal Defense of Marriage Act, a gay man from Brazil who married his same-sex partner in Massachusetts has been separated from his husband since August 2007, when he left the U.S. after his request for asylum was denied and he lost an appeal of that decision. Senator John Kerry, asked the Justice Department to reconsider the asylum decision, noting evidence that the man had been attacked and raped as a teenager in his home country. The Immigration Judge found his testimony credible, but decided that he “was never physically harmed” and thus was not entitled to asylum. The New York Times (March 22) quoted Kerry as stating: “Nobody’s asking to overturn or change the federal law. This is really a humanitarian situation that deserves an appropriate focus.”

New York — Acting on a complaint by Lambda Legal, the Civil Rights Bureau of the NY State Attorney General’s Office sent inquiries to two on-line adoption services that refused services to same-sex couples seeking to adopt children. The AG’s office takes the position that such a service denial violates the state’s Human Rights Law. The two on-line adoption services have indicated they will no longer do business in New York rather than comply with the law. The services are Adoption Profiles LLC and Adoption Media LLC, doing business at the URL ParentProfiles.com. According to a brief report in the NY Law Journal on March 9, these are the same services that have stopped doing business in California as a result of a similar complaint filed in that state.

New York — Since Governor David Paterson appointed Rep. Kirsten Gillibrand to take the seat vacated by Senator Hillary Clinton’s confirmation as Secretary of State, Senator Charles Schumer had been the only statewide office-holder in New York who was not on record as supporting the right of same-sex couples to marry. Schumer’s position had been that civil unions were sufficient to satisfy the equality demands of LGBT people. Feeling that this situation could no longer persist, Empire State Pride Agenda Executive Director Alan Van Capelle and former GMHC board president and philanthropist Jeffrey Soref arranged to have a dinner with the senator to persuade him to get with the program, to good effect, as the state’s daily newspapers carried the story on March 24 that Schumer has now fallen into line with the Governor, the Attorney General, the Comptroller, and his new junior Senator, and agreed to endorse the right of same-sex couples to marry. Furthermore, Schumer asserted that he would become a leader on the issue. That remains to be seen. New York Times, March 24.

California — Californians Against Hate has filed charges with the California Fair Political Practices Committee claiming that the Mormon Church violated California election law by providing the start-up costs for a group called “National Organization for Marriage in California,” specifically to support passage of Proposition 8, without disclosing its involvement through campaign finance filings. A spokesperson for NOMC stoutly denied the charge. Salt Lake Tribune, March 20.

Gay Rights Hero in the Ministry — Los Angeles newspapers noted the passing of retired Methodist Bishop Melvin E. Wheatley, an early supporter of fair treatment of gay people in the clergy. According to obituaries published on March 13, Bishop Wheatley passed away at the age of 93 on March 1. In 1980, he revised to the “One Church” practices committee claiming that the Mormon Church violated the rule of marriage in California, specifically to support passage of Proposition 8, without disclosing its involvement through campaign finance filings. A spokesperson for NOMC stoutly denied the charge. Salt Lake Tribune, March 20.

Asylum for Malaysian — The Hebrew Immigrant Aid Society (HIAS) reported success in obtaining U.S. asylum for a gay man from Malaysia in a February 12 press advisory. HIAS assisted the man in presenting his case to the Asylum Office of the U.S. Citizenship and Immigration Services, with funds under a grant program intended to provide free legal assistance to scientists, scholars, professionals, artists and their families who have been persecuted in their native country. The Malaysian
man was found qualified for this assistance based on his advanced degree in Business Administration. For more information about HIAS’s PRINS program, contact Simon C. Wettenhall (212–613–1454) or Aleksander Milch (212–613–1376) at HIAS. A.S.L.

International Notes

International — The Obama Administration indicated that it was prepared to sign in support of the gay rights resolution introduced last year in the United Nations General Assembly. At the time, the measure received sufficient support to give it some weight in international deliberations, attracting 66 co-signing nations, but the failure of the United States to endorse it deprived it of substantial weight. At the time, Secretary of State Condoleezza Rice had indicated there were problems with voting for the resolution, not least all the conservative closeted Republican legislators that get caught time to time in sting operations — not. (Not that they don’t get caught, but that this was probably not the official reason the Bush Administration gave for rejecting to be a co-signer of the resolution, which was principally sponsored by France.) The official reason given was an odd federalism argument, suggesting that it was inappropriate for the federal government to join in any international effort of this sort without unanimous support of all the states, since there were states that were significantly out of compliance. (Actually, the federal government is also officially out of compliance with the sentiments voiced in the resolution, due to the Defense of Marriage Act and the Don’t Ask Don’t Tell Military policy.) When questioned at a press conference on March 18 about the change of position, a State Department spokesperson said that “Supporting this statement commits us to no legal obligations. So it was felt after a careful interagency review that we would sign on to this French initiative.” Not exactly a ringing endorsement of gay rights, but at least a change of position.

Maritius — Our London correspondent, Rob Wintemute, reports that the Mauritius Equal Opportunities Act of 2008 expressly prohibits sexual orientation discrimination, yet the nation maintains a criminal penalty for consensual sodomy. A proposed sexual offenses law that would have decriminalized consensual conduct failed to pass in 2007.

Israel — Paid parental leave for a gay man upon the birth of his son in India from a woman who served as his gestational surrogate? Yes, said Israel’s National Insurance Institute, in the case of Yonatan Gher, director of Jerusalem Open House, a prominent gay community organization. According to a report by 365gay.com based on a JOH press release, Gher and his partner decided to go the surrogacy route in India using in vitro fertilization techniques, a donated egg, and Gher’s sperm, because of the limits of what the law allows at this point in Israel. Gher is still awaiting an answer to his request for coverage of the hospitalization costs. Coincidentally, it was also reported that the family court in Tel Aviv had approved the adoption of a foster child by a gay male couple for the first time, all previous such joint adoptions by same-sex couples having involved lesbians. A more extensive report in Ha’aretz (March 16) reported that the District Labor Court in Tel Aviv is considering a similar leave request from a male couple following the birth of their daughter from a surrogate mother in the U.S.

South Africa — According to a recent study, almost half of South African women will be raped during their lifetimes, and the number of rapes committed each year is estimated at 500,000. Of particular note, according to a recent study by ActionAid, an anti-poverty group, is that only one out of every 25 men brought to trial on charges of raping women results in a conviction, and that many rapes involve a belief among South African men that they can “cure” lesbianism by raping a woman who is so inclined. Zanele Twala, the head of ActionAid South Africa, said, “So-called corrective” rape is yet another grotesque manifestation of violence against women, the most widespread human-rights violation in the world today.” It was reported that in the past decade at least 31 lesbians have been killed incident to such rapes, although only one of the cases led to a conviction.

Spain — The Spanish Armed Forces has modified its Medical Exclusion List so that transsexuals can join the Forces. The change nullifies a 1989 provision that had upheld exclusion of a transsexual due to his lack of a penis and both testicles, presumably on the ground that these body organs are vital weapons in the defense of the country. (Talk about Latin Lovers!) Henceforth, “missing” genitals will be taken into account on a case-by-case basis, and considered a ground for exclusion only if it “alters the normal exercise of the military profession.” We are fascinated to observe the military mind at work when confronted with the phenomenon of transsexuality... El Pais (English language edition), March 7. The individual who had been denied enlistment under the former exclusion may now apply again, although he will have to hurry because he is rapidly approaching the military’s age limit for enlistment.

Uganda — Anti-gay propaganda in the Ugandan press: On March 23, the periodical “New Vision” published an article titled “Homosexual Admits Recruiting Students.” It seems that a “born again Christian ex-gay” named George Oondo told a meeting of parents that in his prior life he had embarked on a mission to “recruit” Ugandan school children to be homosexual, funded by the Gay and Lesbian Coalition and pro-gay international human rights organizations. Oondo stated that he only abandoned this activity after being born again as a Christian, at the Inter-Faith Rainbow Coalition Against Homosexuality based at Makerere University in Kampala. He claimed that he had been a “renewed gay and lesbian activist” under the aegis of an umbrella group named “Sexual Minorities Agenda,” or SMUG for short. One may be permitted to question the veracity of this report.

United Kingdom — A same-sex couple is suing the owners a private hotel under the Equality Act, claiming that the refusal to rent a room to a same-sex couple due to the owner’s moral disapproval of non-marital sexual relationships is unlawful discrimination, reported the Daily Telegraph on March 23. Martyn Hall and Steven Preddy reserved a room at the Chyminorah Private Hotel in Marazion, Cornwall, for their holiday, but upon arriving were refused the booking, implementing the owner’s policy in line with his “Christian beliefs.” They ban all unmarried couples from renting rooms together. The owners, Peter and Hazelmary Bull, claim they are not discriminating based on sexual orientation. “I have had people clearly involved in affairs and I have refused them the same as I refused these gentleman,” said Mrs. Bull, “be-
cause I won’t be party to anything which is an
affront to my faith under my roof.”

United Kingdom — As the House of Commons continues to debate legislation that would criminalize incitement to hatred over sexual orientation, members voted 328–174 against an attempt to halt the measure on grounds that it would introduce an impermissible restriction on free speech. The Sun, March 25. A.S.L.

Professional Notes

A lavender barrier of sorts was broken in New York State on March 5, when Governor David Paterson announced the appointment of two openly-LGBT state trial judges to the Appellate Division of the Supreme Court, Rosalyn Richter and Elizabeth Garry will be the first openly LGBT people to sit as appellate judges in New York State. The governor’s designation of elected Supreme Court justices to sit in the Appellate Division, an intermediate appellate court, does not require legislative confirmation. Justice Richter will sit in the 1st Department, in Manhattan, and Justice Garry in the 3rd Department, in Albany.

On March 23, the White House announced that President Obama had designated Emily C. Hewitt, an openly-LGBT judge of the U.S. Court of Federal Claims, to be chief judge of the court. Hewitt was originally appointed to the court by President Clinton in 1998. She is a 1966 graduate of Cornell and a 1978 graduate of Harvard Law School. She also earned a degree in religion and educational studies from Union Theological Seminary in New York, and was one of the first eleven women ordained to the Episcopal priesthood in 1974 before going to law school. Judge Hewitt had served as general counsel to the U.S. General Services Administration prior to her appointment to the court, and practiced law in Boston at Hill & Barlow (attaining partnership there in 1985) before entering government service in the Clinton Administration. The Court of Federal Claims is an administrative court that hears claims against the federal government, constituted by Congress under Article I of the Constitution, and is not a formal part of the federal court system created under Article III.

President Obama also announced, on March 24, that he was nominating Marisa Demeo, an openly-LGBT magistrate judge in the criminal division of the D.S. Superior Court, to a Superior Court judgeship. According to a report in the Washington Blade, Demeo’s work history includes positions at the AIDS Service Center of Lower Manhattan and at Lambda Legal, and she had also worked as a paralegal in the civil rights division of the Justice Department and as a prosecuting attorney for the U.S. Attorney for the District of Columbia.

Western State University College of Law in Fullerton, California, has announced that Wil- liam E. Adams, Jr., now the associate dean at Nova Southeastern University Shepard Broad Law Center, a Florida school, will be the next dean of the College of Law. Adams, an openly-gay legal scholar, is a past chair of the Association of American Law Schools’ Section on Sexual Orientation and Gender Identity Issues, and co-author of a casebook on AIDS law published by Carolina Academic Press.

Lambda Legal announced that Paul Smith, a part in the Washington, D.C., office of Jenner & Block and an experience Supreme Court appellate advocate who argued Lambda’s successful challenge to the Texas sodomy law, Lawrence v. Texas, has been elected as co-chair of the organization’s board of directors. Also elected to the board as new members are Robbin Burr, of Rockford Illinois, and Michelle Peak, of Mansfield, Texas. Burr is the Diversity Relationship Manager for Prudential Financial’s MidAmerica Territory. Peak is a senior labor attorney at American Airlines.

The American Bar Association reported that almost half of the nation’s larger law firms have extended their non-discrimination policies to gender identity, and that about three-quarters of the large firms (the top 200 law firms) prohibited sexual orientation discrimination and provided domestic partnership benefits. However, only a tiny proportion of firms include coverage for gender reassignment procedures under their health care plans. A.S.L.

AIDS & RELATED LEGAL NOTES

Idaho Supreme Court Awards New Trial and Expands Liability in HIV Negligence Case

In a complicated multi-part decision announced on March 5, the Idaho Supreme Court ruled that Rebecca Cramer, the surviving spouse of Curt E. Cramer, an HIV+ man who committed suicide, was entitled to a new trial on various of her claims, and that the district court erred in granting summary judgment against her on a claim against the Idaho Center for Reproductive Medicine for negligently failing to inform Curt that he had tested HIV+. Cramer v. Slater, 2009 WL 540706. Justice Warren E. Jones wrote for the unanimous court.

In March 2003, Rebecca and Curt went to the Idaho Center for Reproductive Medicine (ICRM) for an in vitro fertilization. Prior to the procedure they were both tested for HIV and informed that they were negative. In fact, Curt was actually positive — as was later discovered. Their attempt at in vitro failed. A year later, Curt applied for a life insurance policy and was tested for HIV again. He was rejected for the policy and directed to consult his doctor. Dr. Swanson. Swanson told Curt that he had tested positive and should undergo a confirmatory test to rule out a false positive. Curt was puzzled, since he had been told a year earlier that he was negative and could not imagine how he might have been exposed to HIV in the interim. He was told that a negative test result would be known within a few days, but a positive result would take longer to determine. He called the doctor’s office a few days after taking the test, but was told they did not have a result yet. After the call, he failed to return home. A few days later, a search turned up his body at the base of a cliff in Owyhee County. The coroner’s office classified it a suicide. This was contested at trial, but the jury concluded that it was a suicide based on the evidence presented.

Rebecca sued for wrongful death and negligent infliction of emotional distress. The trial court granted summary judgment against her on the wrongful death claim against ICRM and the testing lab, and various parties were dismissed by stipulation prior to trial. At trial, the negligent infliction of emotional distress claim proceeded against Dr. Swanson, ICRM, and two members of ICRM’s staff, and the wrongful death claim continued against Dr. Swanson. The jury returned a verdict in favor of Rebecca on the negligent infliction of emotional distress claim, awarding $27,000 for economic damages but nothing for non-economic damages. Rebecca appealed the summary judgments and the damage awards, criticizing the jury charge and claiming the special verdict sheet had produced inconsistent results.

Perhaps the most significant point of the Supreme Court’s ruling was its determination that summary judgment was improperly granted to ICRM and its staff on the wrongful death claim. The issue of proximate cause was heavily disputed. The Supreme Court ruled that the trial court had misapplied Idaho concepts of contributory fault in absolving ICRM and its staff of any liability for Curt’s suicide based on their negligent failure in performing and communicating the results of his HIV test. The theory of the case, a bit novel, was that had Curt been properly notified of his HIV + status by ICRM, he would have been referred for counseling and treatment and never been subjected to the subsequent negligence of Dr. Swanson. (The court assumed for purposes of deciding Rebecca’s appeal that Dr. Swanson was negligent in his dealings with Curt concerning the HIV testing.) There was also the issue of whether Curt’s suicide was a supervening event that would relieve ICRM of liability.

The Supreme Court, contrary to the trial court, found that there were jury questions as to whether ICRM should be held liable. Wrote Justice Jones, “This Court finds that genuine issues of material fact exist as to whether
ICRM’s negligence proximately caused Curt’s suicide. Rebecca produced affidavits at the summary judgment phase which stated that suicidal ideations are reasonably foreseeable after a person is informed of their HIV positive status. It was this evidence that precluded summary judgment in favor of Dr. Swanson on the issue of whether his alleged negligence proximately caused Curt’s death. In accordance with Restatement (Second) of Torts Sec. 457, subsequent medical negligence is generally foreseeable, including instances where the jury complained of stems from an original negligent act failing to properly diagnose and treat. However, the district court’s conclusion that no genuine issue of material fact existed was based on Rebecca’s failure to produce any testimony as to whether a person would have suicidal ideations by being informed that s/he is HIV negative. Although this analysis is valid, it leaps over a few factual issues which create genuine issues of material fact. Rebecca’s primary contention is that by negligently misinforming Curt that he is HIV negative and thereby not providing him with counseling and treatment, ICRM leaves open the possibility that Curt would later be negligently informed of his correct HIV status. Dr. Swanson’s subsequent medical negligence is foreseeable in accordance with Restatement (Second) of Torts Sec. 457. Therefore, this Court cannot say, as a matter of law, that Curt’s suicidal ideations were unforeseeable when he was negligently misinformed by ICRM that he was HIV negative and subsequently subjected to the medical negligence of Dr. Swanson.

The court found that the puzzling situation into which Curt was placed by the sequence of events could support a theory of causation leading back from the suicide to ICRM’s actions. “ICRM was in a position to prevent the ultimate result in this case by properly diagnosing and treating Curt; ICRM breached its duty to Curt and should not be relieved of its responsibility for that breach merely because Dr. Swanson subsequently engaged in foreseeable negligent conduct.”

The court also found that issues of material fact needed to be resolved by the jury regarding whether Curt’s suicide was a superseding act, cutting the causation chain back to ICRM. The trial court had, in the view of the Supreme Court, failed to properly apply principles of comparative negligence. Wrote Justice Jones, “All the actors contributed to some degree, and the jury is charged with the factual determination of which actors will be held liable. Rebecca is asserting that Curt’s suicide was the foreseeable consequence of all the parties’ alleged negligence. This issue would have been properly left for the jury. This Court finds summary judgment inappropriate in favor of ICRM.”

The court also found puzzling the jury’s decision to award Rebecca damages for economic injury, but no compensation for the emotional distress she suffered, evidence for which was presented at trial and not rebutted, and this was attributable, at least in part, to the confusing special verdict sheet, as to which the court found the jury’s responses to be irreconcilable.

The bottom line is that Rebecca will get a new trial against Dr. Swanson, and a first crack at a jury against ICRM and its staff members. A.S.L.

AIDS Litigation Notes

U.S. Supreme Court — The Supreme Court denied certiorari on March 2 in Deupree v. California Workers’ Compensation Appeals Board, No. 08-815, declining to review an unpublished California Court of Appeal ruling from August 19, 2008, which in turn refused to upset the California Workers’ Compensation Appeals Board’s decision to uphold an award of workers compensation benefits to an actress who claims to have become infected with HIV during the course of her employment as a result of sexual contact with an HIV+ actor. The question posed by the cert petition: “Does administrative adjudicatory system that allows large awards of money to be made based solely on unsubstantiated double and triple hearsay, unsupported by another other evidence, comport with fundamental constitutional requirements of due process and equal protection?” According to the cert petition, there was no evidence, other than hearsay, that the actor who was alleged to have infected the actress was actually infected with HIV.

Eleventh Circuit Court of Appeals — Affirming a district court decision to grant summary judgment to the defendant, the 11th Circuit found that an HIV+ inmate had failed to present any direct evidence in support of his contention that a corrections officer had violated his constitutional right by revealing his HIV+ status to other inmates. Burgest v. United States, 2009 WL 511571 (March 3, 2009) (not officially published). The trial judge had granted summary judgment on the grounds that Burgest failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act before filing in federal court. But the circuit court, ruling per curiam, preferred to rest the case on the lack of evidence. The defendant had argued that she should enjoy qualified immunity in any event, since there was no well-established privacy right for an inmate to keep his HIV+ status secret. But the court decided to assume that Burgest would state a constitutional claim if he could show that defendant had spread word about Burgest’s HIV+ status to other inmates. However, the most that Burgest had offered was a rumor reported to him by another inmate that the CO had been telling inmates about Burgest’s HIV status. Burgest also argued that prison authorities stood in the way of his presenting the evidence by denying him contact with another inmate who could swear to the deputy’s actions. The court commented that Burgest could have asked for a continuance to secure testimony from the inmate through discovery. As Burgest was suing pro se, one wonders how this would have been accomplished. The 11th Circuit has shown scant regard for HIV+ prison inmates over the years, and this decision is just one more feather in their cap.

Georgia — Noting 11th Circuit precedent on point, U.S. District Judge J. Randal Hall (S.D. Georgia) accepted a magistrate’s recommendation to dismiss a claim by an HIV+ inmate challenging the Georgia prison system’s residential segregation of HIV+ inmates. Brown v. Strength, 2009 WL 691181 (March 16, 2009). However, Hall decided to allow inmate Brown to file an amended complaint adding named defendants in response to the magistrate’s recommendation to dismiss his complaint of deliberate indifference to his medical needs. The recommendation resulted from Brown’s failure to allege the necessary personal involvement of defendants in his medical care (or lack thereof), and Brown’s attempt to amend his original complaint to add the necessary names and allegations.

Kentucky — The Kentucky Supreme Court ruled in Harbin v. Commonwealth of Kentucky, 2009 WL 735877 (March 19, 2009) (unpublished opinion), that it was unnecessary for a jury to hear about whether the victim of a sexual assault was actually HIV+ in order for the male defendant to receive a fair trial. The defendant claimed that he had not committed the offenses charged, which included raping and forcing oral sex on the 17-year-old daughter of the defendant’s female domestic partner. He sought to show that it was highly unlikely he would have committed these offenses, because the victim was HIV+. Testimony was presented at trial that the defendant had been told the victim was HIV positive prior to the alleged sexual assault, and the court concluded that for the purposes of making his defense argument, it was not necessary for the jury to receive proof on the question whether the victim was HIV+, since her actual HIV status was irrelevant to the question of whether the defendant did the deed. His belief might be relevant, and his evidence on that point was received and apparently not believed by the jury, in light of his conviction.

Louisiana — U.S. District Judge Robert G. James awarded $50,000 in damages to Enitan Lijadu, an HIV+ man who was denied any treatment while being held at Tensas Parish Detention Center pending his removal to Nigeria. Lijadu v. Immigration and Naturalization Service, 2009 WL 508040 (W.D. La., Monroe Div., Feb. 26, 2009). Lijadu alleged a variety of medical problems, and complained that Pam Poole, the Medical Administrator, displayed deliberate indifference by denying him various
kinds of treatment, including meds for his HIV infection. A magistrate judge agreed with Li-
jadu, and Judge James endorsed the recom-
mendation and awarded damages. However, he
rejected the request for punitive damages
against Poole, on the ground that she “is no
longer employed at TPDC, so punitive damages
assessed against her in her individual capacity
are unlikely to deter future misconduct.”

Louisiana — A pro se HIV+ Louisiana prison inmate’s 8th Amendment suit concern-
ing the institution’s negligence in administ-
ring inappropriate medication to him must be
thrown out, concluded U.S. Magistrate Judge
James D. Kirk in Tassin v. River Correctional
Center, 2009 WL 482290 (W.D.La., Jan. 28,
2009), because the 8th Amendment does not
provide a cause of action for medical malprac-
tice. Only deliberate indifference to an in-
mate’s serious medical condition would pass
the constitutional threshold to impose liability
for a medication screw-up. Blundering will not.
Thus our HIV+ inmates are left to their fate in
the face of medical incompetence.

New Jersey — The N.J. Appellate Division
upheld a trial court decision to terminate the
parental rights of an HIV+ mother and her hus-
bands to their children, one of whom is also
HIV+, in New Jersey Division of Youth And
Family Services v. K.V.N. and D.D., 2009 WL
614492 (March 12, 2009). The court provided
a detailed summary of the evidentiary record
that was before the trial court, finding that it
showed that the parents were not capable of
providing a safe and healthy home for the child.
The mother was not compliant with her own
HIV treatment regimen, and the court con-
cluded that the parents responded to the stress
of caring for an HIV+ child by retreating into
drug abuse. The family suffered from home-
lessness, and the parents were shown to be in-
capable of administering medication to the
child in accordance with his needs.

Oklahoma — Ruling on pretrial motions in
Hardeman v. Sanders, 2009 WL 590738 (E.D.
Okla., March 5) (not officially published), U.S.
District Judge Ronald A. White found that sev-
eral named defendants were not personally im-
plicated in the particular actions being chal-
enged by HIV+ inmate Johnny L. Hardeman,
and thus had to be dismissed from the case, and
that some of Hardeman’s claims failed to state a
cause of action. Hardeman claims that a cor-
rectional officer forced Hardeman to perform oral
sex on him, and that when he complained about
this to the Unit Manager, he suffered retaliatory
assignment to administrative segregation. He
also charges that an officer assigned to investi-
gate his complaint improperly told everybody
that he interviewed that Hardeman was HIV +,
vioating his “medical confidentiality.” Prison
officials contend, however, that Hardeman’s com-
plaints led to an investigation that uncov-
ered allegations that he had engaged in volun-
tary sexual relations with many inmates without
disclosing his HIV status to them, and that he
had been moved to segregated housing to pro-
tect him as news of this spread through the fa-
cility. Believing the prison authorities, Judge
White decided that Hardeman “has failed to
show the defendants’ retaliatory motive and
that there is a genuine issue for trial” regarding
the segregated housing claim. Hardeman had
included an Americans with Disabilities Act
claim based on his HIV status, but White found
he had failed to allege the necessary facts to es-
tablish that he was an individual with a disabili-
ity under the Act, because he never described
how his HIV infection limited any of his major
life activities. However, the court refused to dis-
pose of Hardeman’s 8th Amendment claim
against the corrections officer who allegedly
forced him to have sex, finding that there was a
disputed fact issue requiring a credibility reso-
lution at trial.

Oklahoma — In a ruling that may be sup-
seded doctrinally by the ADA amendments
passed last year, U.S. District Judge Robin J.
Cauthorn ruled that an HIV+ man did not have
a disability within the meaning of the Ameri-
cans With Disabilities Act and thus could not
maintain a discrimination claim against his
former employer. Fanning v. Washita Freight
Systems, 2009 WL 536660 (W.D. Okla., March
3, 2009). Fanning was discharged shortly after
telling his supervisor that he was HIV+. He
then applied for work at another company.
When the new employer called his old em-
ployer for a reference, the old employer dis-
closed that Fanning was HIV+. The company
maintained that Fanning was discharged be-
cause it discovered he had obtained unauthor-
ized access to the email accounts of various
company officials and was searching those ac-
counts to find evidence that they were discuss-
ing his HIV status, and denied that it had dis-
charged him because he is HIV+. Judge
Cauthorn found that Fanning failed to show that
he was substantially limited in a major life ac-
tivity, or regarded as such by the employer, and
thus was not qualified for ADA protection.
However, the court did allow some of Fanning’s
supplementary tort claims to survive the dis-
missal motion, finding that under Oklahoma
law the employer may be found to have violated
a duty to Fanning by disclosing his HIV status
to the prospective employer. A.S.L.

Social Security Disability Cases

Arkansas — In Conway v. Astrue, 2009 WL
692198 (W.D. Ark, March 13, 2009), U.S. Dis-
trict Judge Jinn Larry Hendren adopted a re-
commendation by Magistrate Judge James R.
Marschewski to reject an appeal of a denial of
disability benefits to the HIV+ plaintiff, find-
ing that the agency ALJ had conducted a care-
ful review of the complete medical record in
concluding that the plaintiff had the residual
functional capacity to work despite her various
medical problems, which ranged beyond HIV
infection.

District of Columbia — In Dunham v. Astrue,
2009 WL 764311 (D.D.C., March 24, 2009), Dis-
trict Judge Richard W. Roberts reversed in
part a denial of disability benefits to an HIV+ man,
and remanded for further factfinding.
Roberts determined that the conclusion of the
ALJ that Phillip Dunham was not eligible for
benefits was not supported due to contradic-
tions between the record and the ALJ’s deci-
sion. Most significantly, the ALJ found that
Dunham did not suffer from any opportunistic
infections associated with HIV, when the record
clearly indicated that he was being treated for
skin conditions that are considered opportunist-
inc infections related to HIV. Judge Roberts
ended his opinion with a detailed discussion of
the factual issues that needed to be developed
on remand in order to determine whether com-
lications flowing from Dunham’s HIV+ status
were sufficiently disabling to qualify him for
benefits.

Florida — In McMillan v. Astrue, 2009 WL
651144 (M.D. Fla., March 12, 2009), U.S.
Magistrate Judge Howard T. Snyder reversed a
decision to deny disability benefits to an HIV+
applicant, finding that the ALJ’s decision was
too general in discussing the medical evidence
and did not show the necessary analysis of the
applicant’s records to determine whether his
condition met the requirements of the statute.
In addition, the ALJ was faulted for giving too
much weight to the opinion of a non-examin-
ing physician who was not privy to a substantial
volume of medical evidence that was intro-
duced at a later stage in the proceeding.

750061 (E.D.N.Y., March 17, 2009), U.S. Dis-
trict Judge Doris Izriarry found that the ALJ’s
decision that the HIV+ plaintiff was not eligi-
able for disability benefits was supported by the
record. Among other things, the plaintiff’s doc-
tor indicated that his HIV infection was asym-
ptomatic. The ALJ had gone through the pre-
scribed five-part factual analysis regarding all
of the plaintiff’s physical conditions, and con-
cluded that he was capable of performing a full
range of light work tasks associated with jobs
available in the national economy. A.S.L.

International AIDS Notes

The Holy See — The head of the Roman Catho-
lic Church, Pope Benedict XVI, stirred world-
wide consternation while speaking to the press
on a flight from Rome to Cameroon for a
planned African tour, by insisting that condoms
would make the AIDS epidemic worse, not bet-
ter. To avoid quoting out of context, press re-
ports indicated that the pope said that AIDS “is
a tragedy that cannot be overcome by money

Lee, Yvonne C. L., “Don’t Ever Take a Fence Down Until You Know the Reason It Was Put Up” — Singapore Communitarianism and the Case For Conserving 37TA, [2008] Singapore J. Leg. Studies 347–394 (argument against repeal of colonial era sodomy law that was retained in the penal law of Singapore when it attained independence).

Long, Scott, British Sodomy Laws Linger in Former Colonies, 16 Gay & Lesbian Rev. No. 2, at 5 (March 1, 2009), (summarizing the evidence that sodomy laws in former British colonies are not a codification of indigenous laws, but were rather superimposed by the British colonial rulers, thus discrediting the argument raised in defense of such laws that their maintenance is essential to preserving distinctive cultures of the former colonies).

Lorillard, Christine Metteer, Placing Second-Parent Adoption Along the “Rational Continuum” of Constitutionally Protected Family Rights, 30 Women’s Rts. L. Rep. 1 (Fall 2008).


Moore, Derrick, “Crimes Involving Moral Turpitude”: Why the Void-for-Vagueness Argument is Still Available and Meritorious, 41 Cornell Int’l L.J. 813 (Fall 2008).

Norton, Scott, What’s Sex Got to Do With It? A Cinematic Critique on the Arguments Against Same-Sex Marriage, 31 Hastings Comm. & Ent. L.J. 321 (Winter 2009).

O’Hanlon, Stephen, Justice Kennedy’s Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology, 7 Cardozo Pub. L., Pol’y, & Ethics J. 1 (Fall 2008).

Pugh, Catherine, What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law...
That Prosecutors Will Actually Want to Use, 45 Cal. West. L. Rev. 179 (Fall 2008).


Russell, Gabrielle, Pedophiles in Wonderland: Censoring the Sinful in Cyberspace, 98 J. Crim L. & Criminology 1467 (Summer 2008).


Specially Noted:

We were not expecting to see this opinion on Westlaw: In the Matter of Brad Levenson, 2009 WL 709199 (9th Cir., Jud. C., Reinhardt, J., 2009). This is the internal grievance ruling from the 9th Circuit in which Circuit Judge Stephen Reinhardt found the Defense of Marriage Act, Sec. 3, unconstitutional as applied by court administrators to deny spousal benefits to the same-sex spouse of a federal public defender employed by the circuit court. Reinhardt’s decision directing the Administrative Office of the Courts to grant the benefit ran into a contrary directive from the federal Office of Personnel Management, which ordered that, true to DOMA, the courts not implement Judge Reinhardt’s decision.

AIDS & RELATED LEGAL ISSUES:


Kantor, Leslie M., Abstinence-Only Education: Violating Students’ Rights to Health Information, 35 Hum. Rts. (ABA) No. 3, 12 (Summer 2008).


EDITOR’S NOTE:

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