California Supreme Court Rejects Challenge to Prop 8, But Upholds Existing Same-Sex Marriages

The California Supreme Court ruled in *Strauss v. Horton*, 2009 Westlaw 1444594 (May 26, 2009), that Proposition 8, the measure approved by California voters on November 4, 2008, to amend that state’s constitution to provide that only marriages between a man and woman would be “valid or recognized in California,” was not subject to attack as an improper constitutional “revision,” and thus was properly enacted through the initiative amendment process. Only one member of the court, Justice Carlos Moreno, dissented from this conclusion.

However, the court unanimously ruled that those couples who married in reliance on its May 15, 2008, marriage decision, between June 16 and November 4, had “vested rights” in their marital status that could not be retroactively invalidated without raising serious due process concerns. Therefore, those marriages remain valid in every respect. The result is to create three classes of couples with respect to marriage under California law: different-sex couples, who are or can be married; same-sex couples who married between June 16 and November 4, 2008, who remain married but who may not remarry if they divorce or a spouse dies; and all other same-sex couples, who may not marry.

Chief Justice Ronald George wrote for the majority of the court, producing a decision signed by five judges of the seven-member bench. Justice Kathryn Mickle Werdegar wrote a separate opinion, agreeing with the court’s conclusion that Prop 8 was validly enacted, but differing from the majority’s formulation of the appropriate test for determining whether a proposed amendment is a revision.

Under the California Constitution’s amendment process, a proposal to amend the constitution by initiative can be placed on the ballot through petitions signed by a number of voters equaling at least eight percent of those who voted in the last election for governor. However, a proposal to revise the constitution may only get to the ballot through one of two procedures: either the legislature placing the proposed revision on the ballot through a process requiring a two-thirds vote in each house of the legislature, or through the mechanism of a state constitutional convention. Anything placed on the ballot, either an initiative amendment or a revision, requires only a majority of those voting to be enacted.

Proposition 8 was certified for the ballot shortly after the state supreme court ruled last May 15 that same-sex couples are entitled to marry, because the right to marry is a fundamental right, the exclusion of same-sex couples discriminates based on sexual orientation (held by the court to be a suspect classification), and the state could not provide a compelling reason to withhold from same-sex couples the right to marry. The court rejected the state’s argument that providing domestic partnership for same-sex couples, carrying almost all the rights of marriage, was sufficient to meet the state constitutional standard.

The proponents of Proposition 8 petitioned the court to delay implementing its marriage ruling until the election, but the court turned them down. On the other hand, opponents of Proposition 8 petitioned the court to throw the measure off the ballot as a revision rather than an amendment, but the court dismissed their petition as well. After Prop 8 passed with about 52% of the vote, several lawsuits were filed challenging it. Although the court refused to block the implementation of Prop 8 pending a decision, it did agree to expedite its consideration of the challenge, and heard arguments in March.

Chief Justice George’s opinion, although spanning 135 pages and engaging in extensive discussion of the initiative amendment process, essentially boils down to the assertion that in order to be a revision, a proposition must either significantly affect a large number of constitutional provisions (the quantitative test), or must produce a substantial (or “far-reaching”) change in the basic plan of California government (the qualitative test). George found that Prop 8 affected only a handful of constitutional provisions by adding a 14–word definition of marriage to the constitution, so the measure would not be deemed a revision under the quantitative test. As to the qualitative test, he found that Prop 8 did not substantially affect the basis plan of California government.

George reached this conclusion after asserting, as he had suggested in questioning during the oral argument, that Prop 8 had little effect on the provision of substantive legal rights to same-sex couples in California, where the legislature had previously provided for domestic partnerships that carry almost all of the rights, benefits and responsibilities of marriage under state law. While the *Marriage Cases* ruling in May 2008 made much of the significance of withholding the term “marriage,” the new ruling implicitly minimized its significance, while claiming not to be doing so.

This conclusion was premised on George’s interpretation of Prop 8 as doing no more than eliminating some terminology. He asserted that Prop 8 left intact the balance of last year’s decision, including the court’s holding that same-sex couples are entitled to all the rights and benefits of marriage. Thus, he insisted, the Domestic Partnership Law, which survives Prop 8, is not a matter of “legislative grace” but, after the *Marriage Cases* decision, a matter “of state constitutional right.”

George indicated that in the wake of Prop 8, the substantive right to marry identified by the court last year should be re-characterized as the right to have legal recognition for a couple’s relationship that carries all the rights and benefits that are associated with marriage, but without using that term. George wrote that all that Prop 8 did was to “carve a narrow exception” out of the privacy, due process, and equal protection principles that the court had relied upon to decide *Marriage Cases* last year, and that the exception did not have a substantial enough impact to constitute a change to the basic plan of government.

“Quantitatively, Proposition 8 unquestionably has much less of an effect on the preexisting state constitutional scheme than virtually any of the previous constitutional changes that our past decisions have found to constitute amendments rather than revisions,” George asserted, citing past rulings upholding amendments on the death penalty, local government taxing authority, and other significant policy issues.

George found Attorney General Jerry Brown’s separate challenge to Prop 8 as an improper attempt to modify an “inalienable right” as “flawed” and based on long-discredited 19th century natural law theories. George found no support for the contention that rights identified in Article I, Section 1 of the state constitution as “inalienable” were somehow insulated from the initiative amendment process, pointing out several past occasions on which
the court had upheld amendments modifying rights derived from that part of the constitution. The court also rejected the argument that Prop 8 violated separation of powers by in effect overruling the court’s interpretation of the constitution and thereby usurping its function as the document’s definitive interpreter. Instead, said the court, the people had exercised their power to change the constitutional language.

In her concurring opinion, Justice Joyce Kennard, who had been part of the majority in *Marriage Cases*, stressed the limited role of the court and the broad right of the electorate to amend the constitution. Denying any inconsistency with her vote last year, she said that the *Marriage Cases* court was interpreting the constitution as it stood then, but the people had a right to change the language of the constitution, making the prior interpretation obsolete. Justice Werdegar, also part of the 2008 majority, disagreed with Chief Justice George’s conclusion that the court’s prior cases on the amendment/revision issue had clearly established a qualitative test that was limited to the impact of a proposition on the structure of government. She pointed out that past decisions had intimated that a significant impact on a fundamental right could also be deemed a revision, and she was unwilling to approve the proposition that the people could always and in every circumstances alter fundamental rights through the ordinary initiative amendment process.

However, in this case she agreed with George’s contention that Prop 8 did not have such an impact on the rights of same-sex couples to enjoy legal recognition for their relationships. And, she noted, inasmuch as the court held that Prop 8 did not overrule the court’s conclusion in 2008 that same-sex couples are entitled to all the same rights and benefits as opposite-sex couples, the legislature remains constitutionally bound to revise the domestic partnership law to remove any remaining distinctions between domestic partnership and marriage. One that she highlighted was the requirement under the domestic partnership law that the couple share a common residence, which, she noted, could be construed to designate such partnerships as unequal to marriage. Additionally, she suggested the excluding opposite-sex couples from the domestic partnership law left the implication that domestic partnership was an inferior status to marriage, implying that the domestic partnership law, as it stands, is vulnerable to constitutional attack by excluded straight couples. (If this suggestion is carried to its logical conclusion, the enactment of Prop 8 may do more to damage traditional heterosexual marriage in California than to bolster it, since it is likely that given the option, some different-sex couples would prefer to get all the rights without marrying. At least, that has been the experience in France, where the “pact civil” alternative has lured significant numbers of different-sex couples away from marriage.)

Justice Moreno seized upon the same prior cases as Justice Werdegar to dispute the court’s holding that the qualitative test extended only to the basic plan of government, but found that the court’s ruling had significantly undermined the guarantee of equal treatment by the government, and thus was actually a revision of the state’s equal protection clause, which he argued could not be accomplished through the initiative amendment process. He disagreed whollyheartedly with the court’s conclusion that Prop 8 did not in fact do much of substance by ruling out particular terminology to describe a recognized legal relationship for same-sex couples.

“I conclude that requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our Califor-nia Constitution and thus represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a ‘revision’ of the state Constitutional rather than a mere ‘amendment’ thereof,” Moreno wrote. He went on to argue that the ruling was not just a defeat for same-sex couples, but for all minority groups who relied on the court to protect their right to equal treatment under the law.

He continued, “Denying the designation of marriage to same-sex couples cannot fairly be described as a narrow’ or limited’ exception to the requirement of equal protection: the passionate public debate over whether same-sex couples should be allowed to marry, even in a state that offers largely equivalent substantive rights through the alternative of domestic partnership, belies such a description... Describing the effect of Proposition 8 as narrow and limited fails to acknowledge the significance of the discrimination it requires. But even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment that has pervaded the California Constitution since 1849. Promising equal treatment to some is fundamentally different from promising equal treatment to all. Promising treatment that is almost equal is fundamentally different from ensuring truly equal treatment. Granting a dis-favored minority only some of the rights enjoyed by the majority is fundamentally different from recognizing, as a constitutional impera-tive, that they must be granted all of those rights. Granting same-sex couples all of the rights enjoyed by opposite-sex couples, except the right to call their officially recognized, and protected family relationship a marriage, still denies them equal treatment.”

Surprisingly, in light of the 5–4 vote last year, the court was unanimous in concluding that Prop 8 could not be read to retroactively invali-date the estimated 18,000 marriages of same-sex couples that had been performed prior to the passage of Prop 8. Actually, this result may have been signaled at oral argument by some of the troubled questioning concerning this issue from justices who had dissented in *Marriage Cases* last year. Chief Justice George invoked the principle that enactments are presumed to be prospective unless there is some clear indication in the language of the proposition or its legislative history that would have communicated to the voters that they were being asked to invalidate existing marriages, and found such clarity lacking in Prop 8.

In this case, the proponents of Prop 8 argued that they had made clear in their election arguments that the measure was intended to deny recognition to same-sex marriages, “wherever and whenever” they were performed, but George found this inadequately clear, and pointed out that the proponents had never specifically argued during the election campaign that Prop 8 would invalidate existing same-sex marriages in California. He also rejected the argument that the present-tense phrasing of the amendment clearly communicated retroactive application.

Perhaps more significantly, the court was troubled by the idea that couples who had relied on its past decision and the state of the law at that time could be retroactively stripped of their marital status. According to George, upon a legal marriage taking place the participants acquire “vested rights,” and such rights cannot be taken away without due process of law. An election campaign and an initiative vote is not due process of law in this context. Taking together the disposition against retroactive application and the concerns over constitutional due process, the entire court united around the proposition that the same-sex marriages performed before Prop 8 was enacted must continue to be treated in California as valid marriages.

The court took no position about whether the state would have to continue to recognize marriages performed elsewhere during that window period of June 16–November 5 2008, stating in a footnote that none of the petitions presented to the court had raised the question.

Meanwhile, days prior to the court’s decision, prominent (non-gay) appellate attorneys Theodore V. Olson of Gibson, Dunn & Crutcher and David Boies of Boies, Schiller & Flexner jointly filed a lawsuit in the U.S. District Court for the Northern District of California, *Perry v. Schwarzenegger*, CV 09 2292, which was assigned to District Judge Vaughan Walker, assuming that Prop 8 would be upheld and challenging its validity under the 14th Amendment of the federal constitution. Their plaintiffs were two same-sex couples, Kristin M. Perry and Sandra B. Stier, and Paul T. Katami and Jeffrey J. Zarrillo, who alleged that the refusal of the
Dramatic Same-Sex Marriage Developments in New England and Elsewhere

In the wake of enactment of same-sex marriage laws in Vermont and Connecticut in April, the ferment to open up the institution of marriage to gay people proceeded apace during May in Maine and New Hampshire.

In Maine, Governor John Baldacci, who was on record as being opposed to same-sex marriage, surprised virtually everybody by quickly signing the same-sex marriage bill just minutes after it was sent to him by the legislature on May 6. The measure had passed the Senate by a vote of 21–13 and the House by 89–57, comfortable margins but not sufficient to override a veto, had Baldacci determined to stop the measure. In a telephone interview with the New York Times published on the 7th, Baldacci said, “It’s not the way I was raised and it’s not the way that I am. But at the same time I have a responsibility to uphold the Constitution. That’s my job, and you can’t allow discrimination to stand when it’s raised to your level.” But the immediate impact of signing the bill was blunted by the political reality that in Maine legislation can be blocked by a determined foe with the money and other resources to collection petition signatures.

Under Maine procedures, laws normally go into effect 90 days after the adjournment of the legislature that adopted them. The Maine legislature was expected to adjourn for this session on June 17, which would put the effective date in mid-September. However, the filing of 55,087 valid voter signatures calling for a referendum on the measure would delay it from going into effect pending the vote, and the Maine Marriage Alliance, a group formed to “defend” traditional marriage, vowed to undertake the effort. Members of the Alliance include the Roman Catholic Diocese of Portland, the Maine Family Policy Council (formerly known as the Christian Civic League, the organization that had delayed enactment of the state’s sexual orientation discrimination law through its referendum activities), and the Maine Marriage Initiative.

On May 19, state election officials approved the language of the proposed referendum: “Do you want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?” Petitioning was expected to begin late in May, with the goal of gathering sufficient signatures quickly enough to force the measure onto the general election ballot in November. To meet this deadline, the signatures would have to be submitted by August 1, in order for state officials to verify that the threshold necessary for a “people’s veto” had been met in time to print up the ballots for November. If the Aug. 1 deadline is not met, the proponents of the referendum would have until mid-September to submit the signatures, and the law would be delayed until the next scheduled elections in June or November of 2010. An article in the May 20 issue of the Bangor Daily News is our primary source for the information in this paragraph.

Thus, it seems like Baldacci’s decision to sign the bill quickly, while accompanied by pronouncement of constitutional principle (on a question that has not been addressed by the Maine Supreme Court), may have been intended pragmatically to give those opposed a fair shot at getting the measure on the ballot in November, putting the “onus” for enactment of same-sex marriage on the voters rather than the governor.

The bill that Baldacci signed, LD 1020, was titled “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom.” It repeals the state’s Defense of Marriage Act, substituting for it a “codification” of marriage in 19–A MRS, sec. 650–A, as follows: “Marriage is the legally recognized union of 2 people. Gender-specific terms relating to the marital relationship or familial relationships, including, but not limited to, “spouse,” “family,” “marriage,” “immediate family,” “dependent,” “next of kin,” “brides,” “groom,” “husband,” “wife,” “widow” and “widower,” must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law.”
The statute specifically provides that same-sex marriages performed in other jurisdictions will be recognized as marriages in Maine. At the same time, the law shelters religious actors from having to comply with its requirements, stating: “This Part does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition as guaranteed by the Maine Constitution, Article I, Section 3 or the First Amendment of the United States Constitution. A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.” Thus, in addition to giving religious institutions a pass on compliance, the law effectively removes those who are authorized to perform marriages from the status of “public accommodations,” given them absolute freedom to refuse to perform any marriage that they do not wish to perform. Despite its inclusion in the religious freedom section, this sentence is not on its face limited to religious objections to performing particular marriages.

The Act also revises the statutes on prohibited marriages, not only removing same-sex marriages but rewording the consanguinity provisions to achieve gender neutrality in describing the prohibited degrees of relationship for marriage.

In New Hampshire, Governor John Lynch, previously identified as an opponent of same-sex marriage, prolonged the suspense after the legislature sent him the bill that had been approved by both houses to allow same-sex couples to marry. On May 15, he released a statement to the Concord Monitor, the state’s leading daily newspaper, explaining that he would be willing to sign a same-sex marriage bill into law only if it was accompanied by a broadly-phrased exemption for religious organizations.

Florida Bound to Recognize Gay Co-Parent’s Out-of-State Adoption

The Florida 2nd District Court of Appeal announced on May 13 that Lara Embry, the adoptive co-parent of her former partner’s biological child, was successful in appealing the dismissal of her petition to be granted parental rights. Embry v. Ryan, 2009 WL 1311599. The circuit court had found that recognizing Embry’s adoption of the child, which occurred in Washington state, would run contrary to the policy of Florida that prohibits “homosexuals” from adopting children.

According to May 14th’s Fort Lauderdale Sun Sentinel, in February of 2000, while residing in Washington state, Embry’s partner Kimberly Ryan gave birth to a child. Embry promptly adopted the child with Ryan’s permission, to become the co-parent. After moving to Florida, the couple’s relationship deteriorated and they reached child custody and property settlements in 2004. Following the split, Ryan embraced a conservative Christian lifestyle and became engaged to a man, and by late 2007 refused to allow Embry any visitation with the child, feeling that the child should not be exposed to a gay lifestyle.

Attending to enforce the couple’s 2004 custody agreement, Embry filed a petition for declaratory relief and a petition to determine parental authority and visitation with the circuit court in Sarasota County. Ryan moved to dismiss the petitions, arguing that Florida’s public policy, as evinced by its ban on same-sex adoption, exempted the state from having to enforce Embry’s Washington adoption decree. Judge Donna Berlin agreed with Ryan, but the Florida Court of Appeal, in a rather scornful opinion by Judge James W. Whatley, reversed based on well-settled interpretations of the U.S. Consti-
tution's Full Faith and Credit Clause and Florida's own adoption-recognition statute.

The circuit court had determined that Florida's unusually explicit aversion to homosexual adoption (it is the only state in the whole of the U.S. to have an express statutory ban on adoptions by homosexuals) outweighed any interest in uniformity of law or recognition of other states' decisions. Ryan succeeded with her policy argument that because of the statutory ban, with Judge Berlin holding that Florida was not required to give full faith and credit to the Washington adoption based on a public policy exception. On appeal, however, the court noted that the U.S. Constitution, as well as Florida's own statute on out of state adoption-recognition, ran contrary to this reasoning.

The Full Faith and Credit Clause of the U.S. Constitution reads: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” The Court of Appeal cites Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998), for its interpretation of the Clause, that “[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” While the court does not discuss the significance of the Clause’s interpretation to the case at hand, a straightforward analysis finds that because the Washington adoption was legally granted by a court that had the authority to do so, Florida is constitutionally bound to recognize it.

As if this weren’t enough, the Court of Appeals then turns to Florida’s own statute, which provides that a judgment establishing a parental relationship “by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state, and the rights and obligations of the parties on matters within the jurisdiction of this state shall be determined as though the judgment were issued by a court of this state.” (Emphasis added). In another straightforward application of the law, the court stated that “regardless of whether the circuit court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the circuit court to refuse to give the Washington judgment full faith and credit.” and further noted that the Florida statute required that Embry be granted the same rights as any other adoptive parent in the state of Florida. Accordingly, the court reversed the dismissal of Embry's petitions and remanded the case.

In a concurring opinion, Judge Carolyn Fulmer disposed of an alternative argument of semantices advanced by Ryan on appeal, that while the Florida court was bound to recognize the Washington adoption, to enforce the adoption would be more or less granting an adoption in Florida, which would run counter to the state's policy. Fulmer pointed out that the child was already legally adopted in Washington state, so there was no question of adoption itself before the court in the first place. She noted that because the issue revolves around recognition of an adoption rather than a review of the merits of the adoption decision, Florida's policy and Embry's homosexuality are irrelevant to the case.

This case represents a limited but important win for gay adoptive parents, in that a state’s conservative policy cannot override adoption orders legally granted elsewhere. John Blue, representing Embry for the National Center for Lesbian Rights, noted that this decision ensures stability of adoptive relationships across state lines. While litigation is pending on the question of whether Florida's gay adoption ban violates the equal protection rights of children and gay parents, gay adoptive parents may travel to and settle in Florida with the knowledge that their parental rights will be recognized, for now at least. Unsurprisingly, Ryan’s attorney, Matthew Staver, the founder of a conservative Christian group called Liberty Counsel, plans to appeal the decision to the state Supreme Court, voicing concern for the religious liberty of Ms. Ryan.

Currently both Arkansas and Utah ban co-habiting non-married couples from adopting within those states, so it will be interesting to see if similar cases arise in those jurisdictions.

Stephen Woods

Mass. Appeals Court Affirms New Trial Ruling for Bernard Baran

Finally, fifteen months after oral argument, the Appeals Court of Massachusetts issued a detailed ruling affirming the decision by now-retired Superior Court Judge Francis R. Fecteau that Bernard Baran did not receive a fair trial in 1985 on charges that he had raped and abused pre-schoolers in his care at a western Massachusetts day care center. Commonwealth v. Baran, 2009 Westlaw 1333025 (May 15, 2009).

Baran, then 19, was apparently the victim of a homophobic plot, incompetent legal representation, prosecutorial misconduct, and judicial malpractice as well. Although Judge Fecteau premised his ruling solely on a finding of incompetence in the defense presentation, the appeals court ruling suggests that alternative grounds also exist in the allegations of prosecutorial misconduct, implicit in the defense incompetence finding, as well as the denial of a public trial in the court's unilateral decision to close the courtroom to public and press during the objectionable testimony of the child witnesses. As such, the unanimous three-judge panel affirmed Judge Fecteau's decision to reverse the judgment of the original criminal trial and set aside the verdicts and sentence.

Now the local prosecutor in Berkshire County, David Capelless, will have to decide whether to seek an appeal to the Supreme Judicial Court, to retry the case — now more than twenty years old — or to drop the matter and release Baran from all constraints. (At present he is free on bail and subject to onerous monitoring conditions.)

The opinion for the court by Judge Barbara Lenk reveals in searching detail the unfortunate miscarriage of justice to which Baran was apparently subjected. One family, unhappy that a gay man was involved in the care of their child, seems to have fabricated charges against him and then enlisted other families in their crusade against him. Suggestive questioning of the pre-schoolers, ages 3 and 4, documented on interview tapes that were carefully edited for presentation to the grand jury and then the trial jury to omit all exculpatory material — and never revealed in their unedited state to defense counsel — combined with improper testimony and argument by the prosecutor (who is now a judge, undoubtedly a complicating factor in Baran’s attempt to win vindication), led to a hysterical stampede and the conviction of Baran on several counts of child rape and sexual abuse, leading to the imposition of life sentences.

Baran served more than twenty years in prison — enduring mistreatment at the hands of other prisoners, who can be merciless to inmates convicted on such charges, and ultimately spending extended periods in protective custody — before the ruling by Judge Fecteau finally led to his release on bail in 2006 while the prosecutor's appeal was pending.

Judge Fecteau’s ruling was based solely on the incompetence of trial counsel, who provided ineffective representation in every sense of the word. The original trial counsel’s records are incomplete, so Baran’s new counsel had to reconstruct what happened from the incomplete records. Baran’s mother, with limited resources, selected a defense attorney for him from the phone book, mistaking the lawyer she selected for a criminal defense attorney of some repute with a similar name. The lawyer hired to represent Baran had little criminal trial experience, and appears to have spent little time preparing the case.

According to the Fecteau and Lenk decision, trial counsel failed to object to all kinds of objectionable testimony and argument, failed to demand pretrial access to the unedited tapes of the interviews with the children, unnecessarily and prejudicially introduced the subject of Baran’s homosexuality into the trial — inappropriately because Baran was accused of assaulting both girls and boys, making his sexual orientation irrelevant to the charges, and preju-
“In particular, defense counsel’s apparent failure to engage in any meaningful preparation for what was indisputably a complex, high-stakes trial represented a more or less complete abandonment of his professional obligations to the defendant. While trial counsel may have had some good ideas, he failed utterly in developing and implementing them. The strategic choices trial counsel made were not informed choices, made after investigation of the law and facts. His inability to undermine the credibility of the Commonwealth’s witnesses speaks both to his lack of preparation and his quite limited trial skills. Ultimately all these factors converged, resulting in cascading and pervasive error, with zealous advocacy yielding to acquiescence and accommodation. In the end, we need not consider whether any single instance of nonfeasance meets the standard required to obtain a new trial on the basis of attorney error. It is enough to say that, in the aggregate, trial counsel’s performance, followed by appellate counsel’s, unquestionably fell below the minimum constitutional requirements imposed by art. 12 of the Massachusetts Declaration of Rights and the Sixth Amendment of the United States Constitution, and that ‘better work might have accomplished something material for the defense.”...To the extent that the standard of review is whether counsel’s errors gave rise to a substantial risk of a miscarriage of justice, we are satisfied that the errors prejudiced Baran, materially influenced the verdict, and were not reasonable tactical decisions. The motion judge did not abuse his discretion in allowing the defendant’s motion for a new trial based on the ineffective assistance of counsel.”

The court also noted that the totally unsubstantiated and unexplained decision by the trial court to exclude the public during the testimony of the children deprived Baran of a public trial as guaranteed in the constitution, and could alone serve as a basis for invalidating the verdict.

Judge Lenk extensively discussed the suggestions of prosecutorial misconduct, and any fair reading of her summary of the evidence would support a finding that the prosecutor crossed the line of appropriate behavior in many respects, but Judge Fecteau had made no specific findings on prosecutorial misconduct, leaving the appellate court in the position of having to remand to a trial judge for findings if it was to reach a conclusion on this ground. Since the ineffective assistance ground was sufficient to sustain Fecteau’s ruling, the court decided not to go there — once again exhibiting the elaborate courtesy the courts may show to fellow judges who once were prosecutors. Actually, it seems to us that the prosecutor’s misconduct should be referred to the appropriate disciplinary authorities for further investigation, as a prosecutor who perpetrated the kind of miscarriage of justice described in this opinion shouldn’t be sitting on the bench.

The court concluded that setting aside a trial verdict should not be done lightly, and emphasized that it had taken pains in reviewing the trial record and the evidence. “The charged offenses are grave and we are mindful that the passage of so much time will impose heavy burdens on all concerned in the event of a retrial,” wrote Judge Lenk. “At the same time, it cannot be said that the defendant received anything close to a fair trial. Preserving public confidence in the integrity of our system of justice must be our paramount concern notwithstanding the costs our decision today might occasion.”

This case is an example of the hysterical prosecutions of day care and nursery employees that swept the country during the Reagan era of the 1980s, when gay people were being demonized as child molesters and worse by public officials. It was during this time, for example, that the New Hampshire legislature sought to enact a ban on gay people working in day care centers — a ban that the New Hampshire Supreme Court deemed unconstitutional in an advisory opinion, while at the same time pre-clearing a bill that barred gay men from adopting children. (That law was repealed decades later around the time that New Hampshire passed a law against sexual orientation discrimination.) Juries were prompted by fake experts to believe extraordinary tales of satanic rites described by heavily coached preschoolers, resulting in the imposition of draconian prison sentences on seemingly innocent individuals who could not afford to retain competent counsel or engage effective expert witnesses in their behalf. The Baran case is the tip of a disgraceful iceberg of injustice, and he was the first of many who were railroaded in such prosecutions during the 1980s.

The amazing thing is that current-day prosecutors remain invested in defending those convictions, despite all evidence that they were wrongfully obtained. This is the case in Berkshire County, where Capeless, the local prosecutor, perhaps out of misguided loyalty to his predecessor, determined to appeal Judge Fecteau’s extraordinarily detailed opinion, thus needlessly subjecting Baran to years of unnecessary and inappropriate suspense and invasive supervision of his release on bail. It is time for some common sense in Berkshire County. The prosecutor should accept the conclusion that Baran was wrongly convicted, graciously confess error on behalf of his predecessor, drop the prosecution and release Baran of all restrictions. The record of his conviction should be expunged so that he can continue life with a clean slate. Indeed, the state should compensate him for the theft of more than two decades of his life, if there truly be justice. A.S.L.
Legal Formalists Triumph in N.Y. Appellate Division Defeat for Lesbian’s Child Support Claim

A sharply divided panel of the New York Appellate Division, 2nd Department, ruled 3–2 on May 26 that a lesbian mother could not seek a child support order against her former partner in the Rockland County Family Court, because there is no specific statutory authorization for a proceeding to determine that a woman is a child’s parent. The ruling in H.M. v. E.T., 2009 WL 1477264, 2009 N.Y. Slip Op. 04240, reversed a ruling by Rockland County Court Judge William P. Warren, who had ordered a hearing to determine whether E.T. should be precluded from denying a support obligation to the child whose birth she had planned with her partner.

The court’s opinion, by Justice Joseph Covello, drew a vehement dissenting opinion from Justice Ruth C. Balkin, joined by Justice Steven W. Fisher. The other judges in the majority were Justices Daniel D. Angiolillo and Cheryl E. Chambers.

According to the dissent, which provided a much more detailed and expansive statement of the facts than the majority, the parties were same-sex partners living in New York State for more than five years. Beginning with the first year of their relationship, they planned to have a child. E.T. had previously been married to a man and had two children from that relationship. Their plan was that H.M. would become pregnant through anonymous donor insemination, and would stay home to care for the children while E.T. worked towards her chiropractic degree.

It took numerous attempts at the fertility clinic, but H.M. finally got pregnant, with E.T. injecting the sperm specimen, and gave birth in September 1994 at home with a midwife’s assistance. For the first five months of their son’s life, the women and children lived together as a family, but E.T. decided to end the relationship in January 1995, and gave H.M. a check for $1,500 to help her cover the costs of moving out and finding a home for herself and the child. Although E.T. gave some gifts over the ensuing years, she never paid child support, H.M. cared for the child on a minimal income while completing her own education and earning a master’s degree in social work.

A reconciliation was attempted in 1997, but was unsuccessful, and eventually H.M. moved with her son to Canada to live with her parents. In 2006, she filed for bankruptcy, and also filed a “support application” with a local court in Ontario, Canada. Under the Uniform Interstate Family Support Act (UIFSA), the matter was referred to the Rockland County Family Court to assert jurisdiction over E.T., but E.T. objected to the court’s jurisdiction, arguing that the family court lacked authority to determine that a woman who is not legally or biologically related to a child is subject to a parental support obligation.

The matter was referred to a Support Magistrate, Rachelle C. Kaufman, who agreed with E.T., but H.M. filed objections to the magistrate’s report, and Family Court Judge Warren was persuaded by her arguments that she was entitled to a hearing, at which she could attempt to prove through the doctrine of equitable estoppel that E.T. should be precluded from denying her parental obligation, and E.T. appealed.

The majority of the court agreed with the Support Magistrate that the family court lacked jurisdiction over the matter. The court pointed out that support proceedings arise under Article 5 of the Family Court Act, which authorizes a court upon the application of a child’s mother to determine paternity for purposes of determining parental child support obligations, but that the heavily gendered language of the statute does not specifically authorize the court to determine that a woman might have such a support obligation.

Justice Covello wrote that “as the Support Magistrate recognized, Family Court Act article 5, entitled ‘paternity proceedings,’ only provides a vehicle for resolving controversies concerning a male’s fatherhood of a child. At common law, the father of a child born out-of-wedlock had no duty to support that child. Family Court Act article 5, providing for paternity proceedings, represents the most recent legislative effort to mitigate the harsh effects of that rule. Consistent with that goal, the plain language of numerous provisions of Family Court Act article 5 clearly and unambiguously indicates that a proceeding thereunder will only involve a controversy concerning a male’s fatherhood of a child.”

In dissent, however, Justice Balkin noted that other provisions of the Family Court Act suggest that gender-neutral interpretations can be adopted when necessary to protect the best interests of a child, and that courts in many other states — most notably the California Supreme Court — have interpreted similarly gendered family law statutes to be gender neutral in order to meet the needs of modern-day “non-traditional” families.

But the majority insisted that as the family court is a court of limited, specific jurisdiction, it does not have power to determine an issue that is not specifically assigned to it by a statute or the state constitution, “H.M. has demanded certain relief the Family Court is not specifically authorized by the Constitution or statute to grant,” wrote Covello. “Under these circumstances, the Family Court cannot apply the doctrine [of estoppel], and necessarily cannot reach the issues of whether E.T. should be estopped from denying her parentage of the subject child, and whether estopping E.T. from denying her parentage of the child would be in the child’s best interests. If the Family Court applied the doctrine as a means of granting relief not specifically authorized by the Constitution or statute, that would be tantamount to the Family Court granting equitable relief.” The court pointed out that the family court has not been granted authority to award equitable relief, a power reserved to the supreme court, the court of general trial jurisdiction in the state.

The majority suggested that H.M. should have brought an action in the supreme court, but the dissent pointed out that under the state’s family law statutes, only the family court was authorized to issue a child support order pursuant to the Uniform Interstate Family Support Act, so the supreme court might itself be powerless to act.

Criticizing the majority’s unduly literal interpretation of the statute, Justice Balkin pointed out that under this view two gay men who used a surrogate to have a child would be deprived of the family court’s jurisdiction to resolve a child support dispute between them, and, even more to the point, a man who discovered a foundling on his doorstep would be deprived of the family court’s assistance in seeking to prove that a particular woman with whom he had a past sexual relationship was the child’s mother. She also suggested that in our modern era of equal protection jurisprudence, interpreting the statute to apply to one sex and not the other would raise serious constitutional issues that could be avoided by a gender-neutral interpretation of the statute.

“Regardless of how a child enter this world, a child is born in need of support,” wrote Justice Balkin. “As a matter of public policy, a determination should be made as to whether E.T. is responsible for the support of the child, given that H.M. has already declared bankruptcy, and E.T.’s support obligation could otherwise fall to the public fisc. We would, therefore, affirm the order appealed from, which did little more than allow H.M. to attempt to demonstrate, at a hearing, that E.T. should be equitably estopped from asserting a right not to support the child whose conception and birth she so strongly encouraged.”

The court’s opinion dramatically illustrates the inadequacy of New York’s archaic family law statutes, which our dysfunctional state legislature has never seen fit to revise to accommodate the realities of family life in modern New York. And, as the dissent points out, the ruling is out of step with developing precedents in other states, and inconsistent with recent New York appellate rulings, including a case in which the highest court used equitable estoppel to impose a child support obligation on a man who was not legally or biologically related to a child on the ground that he had held himself out as the child’s father.
As H.M. is represented by pro bono counsel from the prominent New York City firm of Proskauer Rose LLP, it is likely that permission to appeal to the Court of Appeals will be sought.

Gay Salvadoran Wins New Hearing on Asylum Claim

The U.S. Court of Appeals for the 9th Circuit has ruled that an Immigration Judge applied an incorrect legal standard in evaluating the petition for asylum or withholding of removal by a gay man from El Salvador. The court remanded the claim back to the Board of Immigration Appeals, which had rubber-stamped the IJ’s decision, for reconsideration, Ponce v. Holder, 2009 WL 1353771 (9th Cir., May 15, 2009) (not officially published). The memorandum opinion for the three-judge panel provides few of the specifics of Ponce’s claim, addressing the legal issues mainly in abstract language.

At the outset, the court denied Ponce’s request to give judicial notice to the U.S. State Department’s 2007 Country Report for El Salvador, as this document evidently post-dates the hearing before the IJ and, said the court, “our review is limited to the administrative record.” Apparently this Country Report would support Ponce’s claim about the dangers faced by gay people in his home country.

Ponce sought asylum on alternative grounds of political opinion and sexual orientation. He had evidently been the object of unwanted attention from “guerrillas,” but the court found he had presented no evidence that this attention was on account of Ponce’s political views, rather than their eagerness to find another recruit and anger at his refusal to join them. On the other hand, the court found that the Immigration Judge had mishandled Ponce’s claim “related to his membership in a particular social group — gay people in El Salvador.” The IJ found that Ponce had proven his subjective fear of persecution, but not an objective fear of persecution — i.e., the requirement to show that in fact he actually faced danger of persecution if he were to be returned to El Salvador.

“The IJ... applied the incorrect legal standard by requiring that Ponce show ‘a real chance that his life or freedom would be in jeopardy in El Salvador,’” wrote the court. This was erroneous, since the standard is “well-founded fear of persecution,” and although the courts set a high bar for proving this, it is not necessary to show more than a ten percent chance that the individual would be persecuted because of his membership in a “particular social group.” “Persecution, according to, Ninth Circuit law, is an ‘extreme concept, marked by the infliction of suffering or harm...in a way regarded as offensive,’” the court continued. “This definition is broader than a threat to ‘life or freedom.’” That is, Ponce need not show that his life would be in danger to win asylum, he need merely show that he would be subjected to harm or suffering — not merely discrimination — on account of his sexual orientation.

In a footnote, the court noted that the IJ had commented that the case was a “close call” on this point, in light of the evidence concerning treatment of gay people in El Salvador that Ponce had submitted. In that case, of course, the application of a more demanding standard than required could have been outcome-determinative. “On remand,” said the court, “the question for the IJ is whether Ponce has demonstrated a ten percent chance of persecution based on his sexual orientation. The IJ is advised to consider the entire record, including the numerous articles submitted by Ponce but not referenced by the IJ. Additionally, we note that ‘if the perpetrator is motivated by his victim’s protected status — including sexual orientation — he is engaging in persecution, not random violence.’” (This intimates that the IJ had mischaracterized the evidence that was presented by Ponce.)

Having decided that the asylum petition must be reconsidered, the court also remanded as to the withholding of departure claim, but denied the appeal as to the Convention Against Torture, since it found that the IJ’s determination that Ponce had failed to show it was more likely than not he would be tortured if returned to El Salvador was supported by the record in the case.

It seems odd that an Immigration Judge, presumably appointed because of expertise in asylum law and presumably given some training before being set loose to make life or death decisions about asylum applicants, would make such an elementary mistake — but then, again, the failings of IJs as documented by various studies over the past few years are manifest and widely attributed to the politicization of the IJ appointment process during the Bush Administration. One hopes that something can be done to drastically improve the quality of the IJ corps during the new administration. A.S.L.

Connecticut Court Says Gay Rights Law Covers Workplace Harassment

In a case of first impression, Connecticut Superior Court Judge Elliot D. Prescott ruled in Patino v. Birken Mfg. Co., Docket No. CV 05 401612OS (Conn. Superior Ct., Hartford, May 15, 2009), that the state’s law banning employment discrimination on the basis of sexual orientation extends to hostile environment workplace harassment of gay employees. Prescott’s memorandum opinion rejected a post-trial motion by Birken Manufacturing Company to set aside a jury verdict in favor of former employee Luis Patino. Judge Prescott reaffirmed the jury’s award of $94,500 in damages to compensate Patino for the emotional harm he suffered as a result of being subjected to harassing language by co-workers on an almost daily basis over a period of many years. Lambda Legal filed an amicus brief in the case, and provided us with a copy of the unpublished decision.

Judge Prescott noted that Connecticut courts have generally tracked Title VII of the federal Civil Rights Act of 1964 in determining the extent of substantive coverage, and federal courts have held that the hostile environment theory extends — contrary to Birken’s argument — to all protected “classes” under Title VII, not just to women. Although Title VII does not explicitly cover sexual orientation claims, and gay employees have won only limited relief under Title VII in cases where the hostile environment could be tied to gender non-conformity rather than sexual orientation, Connecticut’s addition of “sexual orientation” to its own workplace discrimination law makes that category eligible for the same treatment as sex or race, and there is no good reason why a hostile environment premised on the victim’s sexual orientation should not be actionable.

In this case, plaintiff Patino had been subjected to a string of hostile name-calling that went on virtually unabated, experiencing only brief relief as a result of relatively ineffectual actions by the company in response to his complaints. (Indeed, one supervisor advised him to see a psychiatrist, instead of taking decisive action against abusive co-workers.)

Prescott rejected Birken’s argument that Patino had not proved any actual injury sufficient to sustain the award of damages. The jury was instructed that it could award damages for “any emotional distress and mental anguish” that Patino suffered during the period allowed under the statute of limitations. The harassment described in this case stretched back many years, but of course the company’s liability would be limited to the statutory period leading up to the filing of Patino’s legal charges. “At trial, Patino testified that the harassment he suffered over this period made him feel angry, sad, humiliated and diminished,” wrote the judge. “He left work feeling depressed and had difficulty sleeping. Yet Birken management’s response to Patino’s complaints was to diagnose him as having a paranoid delusion and to advise him to obtain psychiatric care. We assume that the $94,500 award constituted the jury’s common sense evaluation of Patino’s emotional distress.”

Prescott found that the amount of damages was reasonable in light of prior damage awards under the state’s human rights law.

Given the amount of money involved, and the “first impression” nature of the case, Birken may decide to appeal this verdict. But perhaps saner heads will prevail, as Judge Prescott’s well-reasoned decision is likely to be affirmed on appeal, creating a published appellate precedent, and Birken, if being competitively
advised, might decide it is not worth their additional litigation expenses to create such a precedent. A.S.L.

Secretary of State Hillary Clinton Announces Partner Benefits for Diplomats

The New York Times reported on May 24 that Secretary of State Hillary Clinton sent a memorandum to the association of LGBT foreign services officers, informing them that the Department would respond affirmatively to a long-standing request to treat same-sex partners of foreign service officers the same as legal spouses for purposes of various departmental policies. Clinton’s memorandum justified the extension of benefits (which could be said to violate the Defense of Marriage Act) on the utilitarian ground of recruitment of foreign service officers, and the moral ground of being “the right thing to do.” The announcement did not include a firm date for implementation.

The benefits involved include diplomatic passports, use of medical facilities at overseas posts, medical and other emergency evacuation, transportation between posts, and training in security measures and relevant languages. In the past, the Department had withheld these benefits in reliance on DOMA, but the association of LGBT foreign services lobbied hard, pointing out that the current policy imposed real hardships on LGBT foreign service personnel and their partners. For example, if there is emergency need to evacuate foreign service personnel from a posting that suddenly becomes unacceptably dangerous, a same-sex partner who was living in the location with the foreign service officer would be denied the transit out routinely extended to recognized family members of diplomats.

The foreign service officers sought to get Congress to enact an exception to DOMA to allow for this extension of policy, but Clinton’s memorandum implies that the Department believes it can extend these benefits without such Congressional authorization. It will be interesting to see whether the usual right-wing anti-gay litigation groups will attempt to block the policy through the courts. A.S.L.

Fighting Back Against Police Entrapment

A man who was arrested after rebuffing the attempts of an undercover cop to get him to violate a sexual solicitation law will get his day in court, as U.S. District Judge Thomas L. Ludington rejected most of the qualified immunity assertions made by the undercover cop in defending the man’s subsequent civil rights lawsuit, McCumons v. Marougi, 2009 WL 1470332 (E.D.Mich., May 26, 2009).

Contested facts underlie Judge Ludington’s decision to deny Officer Marougi’s motion for summary judgment as to many of Eugene McCumons’ constitutional claims. The case stems from McCumons’ arrest on August 10, 2007, charged with accosting, soliciting or inviting “another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act,” in violation of Mich. Comp. L. Sec. 750.448. The criminal charges against McCumons were subsequently dismissed, and he filed suit against Officer Marougi and the police department under 42 USC 1983, alleging violations of his First, Fourth and Fourteenth Amendment rights. Judge Ludington granted summary judgment on qualified immunity grounds on the 14th amendment equal protection claim, but denied summary judgment on the 1st and 4th amendment claims.

The opinion includes extensive quotations from the complaint and motion papers, giving each man’s account of what happened. It appears that Hawthorne Park in Pontiac, Michigan, was known as an active gay cruising place, and Officer Marougi had staked out the park in plain clothes in his SUV, looking for action. McCumons drove into the park and conversation ensued between the two men, sitting in their respective vehicles with windows down. From both accounts, it appears that Marougi was working very hard to keep his comments opaque but inviting, that flirting was going on, but that McCumons decided not to go ahead with any kind of sexual activity and drove away. Nonetheless, Marougi signaled to fellow officers, who arrested McCumons, who also suffered impoundment of his car for several days, under a statute authorizing impounding of a motor vehicle that was used to commit any of various offenses, including sexual offenses. McCumons claims that some of what Marougi put in his official report was fabricated and provided the basis on which McCumons was charged.

McCumons alleged that Marougi’s actions violated his right to free speech, and that the arrest and the impoundment of his car involved his right to be free of unwarranted seizure of himself and his property. Marougi’s s.j. motion relied on the doctrine of qualified immunity, under which a public official cannot be sued for the discharge of discretionary functions unless his actions violated a clearly established legal right of the plaintiff. The burden is on the plaintiff to show that the defendant is not entitled to qualified immunity. If the existence of the established right depends on how disputed facts are resolved, then summary judgment can’t be granted.

In this case, Judge Ludington found that McCumons had sufficiently demonstrated that based on his version of the facts Marougi had violated clearly established constitutional rights involving speech and seizure of the person and property of the plaintiff. If Marougi’s version of the events was believed, however, the qualified immunity defense could apply. In light of that, a trial is necessary to determine the facts, and McCumons survives the motion for summary judgment.

However, Judge Ludington found that McCumons had not shown selective enforcement that would invoke an equal protection claim. Ludington observed that 6th Circuit precedent required a plaintiff to demonstrate three things in a selective enforcement case: “First, [the state actor] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the group which the defendant belongs to.”

“Here, Plaintiff has not identified someone from outside of the class that Defendant decided not to prosecute,” wrote Judge Ludington. “Rather, Plaintiff argues that this requirement is irrelevant in this context because the record is replete with evidence of anti-homosexual animus.” Ludington concluded this was not enough under circuit precedent, and concluded that McCumons could not establish an equal protection claim, so Marougi was entitled to immunity from that portion of the complaint.

Most people caught up in anti-gay police entrapment activity will do anything to avoid publicity and put the case behind them, so this kind of activity usually has little risk for the police officer who, as McCumons alleges in this case, falsifies a factual report to support an arrest in a situation where the arrested person has not actually violated the law. (Marougi stated in his report that McCumons had told Marougi that he wanted to “feed him his load” and had requested permission to enter Marougi’s vehicle for the purpose of engaging in oral sex, while McCumons denies both of these allegations which were undoubtedly central to the prosecutor’s determination to prefer charges against him.) Thus, it is refreshing and exciting to see a victim of this kind of set-up step forward to file a constitutional suit against the police officer to seek vindication of his rights. A.S.L.


U.S. District Judge Shira Scheindlin (S.D.N.Y.) has granted plaintiffs’ petition for class certification in a suit brought against the City of New York for claims stemming from continued enforcement of an anti-loitering law (Penal Code sec. 240.35(3)) that targeted gay men and was held to be unconstitutional by the New York
Court of Appeals in 1983. *Casale v. Kelly*, 2009 WL 1159187 (April 28, 2009). The plaintiffs claimed that — besides continuing to arrest and prosecute people under the law — the City also had failed to expunge criminal records of those convicted under the law, failed to implement training programs for police officers, and refused to refund fees and fines collected pursuant to the prosecutions. Plaintiffs brought claims under the Fourth, Fifth, and Fourteenth Amendments as well as under common-law false arrest and malicious prosecution claims. Plaintiffs sought three forms of relief: 1) declaratory judgment establishing that enforcement of the law was unconstitutional; 2) expansion of criminal records; and 3) compensatory and punitive damages.

*Lesbian / Gay Law Notes* reported the good news of the Court of Appeals decision in *People v. Uplinger*, 58 N.Y.2d 936 (1983), long ago in March of 1983. The court held that the loitering law was a “companion” statute to the similarly unconstitutional New York state sodomy law, previously struck down in *People v. Onofre*, 51 N.Y.2d 476 (1981). Notwithstanding the high court ruling, from 1983 to 2007, 4,750 individuals were prosecuted under the unconstitutional loitering law, of which 2,185 prosecutions involved only the defunct law, while the balance also included charges under other statutes. Following the plaintiffs filing suit in March 2008, the New York Police Department ordered all precincts to inform officers of the unconstitutionality of the provision and to re-vamp the computer system so that charges under the law could not be processed. But even after these steps were taken to curb enforcement of the unconstitutional law, thirty-six summons were issued charging violations under the long-dead measure.

The court held that the plaintiffs’ proposed class met all five prerequisites for class certification. The thousands of potential class members were listed in the NYPD database system (numerosity); the plaintiffs shared common questions of law and fact (commonality); the named plaintiffs shared claims with the unnamed class members (typicality); the members of the class could be readily identified (ascertaintability); and the named plaintiffs adequately represented the class (adequacy). Defendants attempted to challenge the named plaintiffs’ ability to represent the class on the basis of their mental health, prior incarceration and low education level. The court rejected the attacks as an “assault” on the plaintiffs that was both “disrespectful and blatantly self-serving.”

In certifying the class, the court found that “it is likely that many individuals previously arrested or prosecuted” under the law “are unaware that the provisions were unconstitutional and may have accepted plea bargains to terminate criminal proceedings as quickly as possible. Perhaps most importantly [plaintiffs’] economic disadvantage renders it improbable that large numbers of class members are capable of litigating individually.”

Plaintiffs are represented by Emery Celli Brinckerhoff & Abady, LLP; Earl S. Ward, Esq.; J. McGregor Smyth, Jr., Esq. and the Bronx Defenders. Daniel Redman

---

**Divided Pennsylvania Panel Restores License to Homophilic CPA**

A panel of Pennsylvania’s Commonwealth Court divided 2–1 over whether to affirm a decision by the state’s Bureau of Professional and Occupational Affairs — State Board of Accountancy to revoke a man’s license as a certified public accountant due to his prior hate crime conviction in Illinois of placing two weeks worth of anti-gay harassing phone calls on the answering machine of a lesbian YMCA director who had evicted him from his residence at the YMCA and the Board’s conclusion that he was not of sufficiently good moral character to be allowed to practiced as a CPA under Pennsylvania’s standards. The majority overturned the Board’s decision to revoke the license, over a strong dissent. *Ake v. Bureau of Professional and Occupational Affairs*, 2009 WL 1393428 (Pa. Cmwlth., May 20, 2009).

According to the opinion for the court by Judge Mary Hannah Leavitt, Kevin Ake earned his accounting certification in Pennsylvania in 1995 and worked for various accounting firms before moving to Illinois in 1998 and subsequently allowing his Pennsylvania CPA license to lapse. According to Ake’s testimony at the hearing on revocation of his restored Pennsylvania CPA license, he had worked for an accounting firm in Chicago for a few years, then moved to the Cook County YMCA in August 2000 in order to assist an elderly member of his church who lived there.

Ake identifies himself as a Christian who strongly disapproves of homosexuality on moral grounds. It appears that Ake made a pest of himself to the director of the YMCA, a lesbian, by engaging insistently for the establishment of Bible classes there, and after several months of this she evicted Ake and his elderly church member. Ake responded by leaving messages on her answering machine over a two week period, giving her a piece of his mind about homosexuality. She contacted the police, and the matter was referred to the Cook County prosecutor’s office, where it was assigned to a gay assistant D.A.

Ake was indicted under Illinois’s hate crime law, which makes it a felony, inter alia, to harass somebody “by telephone” on account of their sexual orientation. Ake was convicted and received a brief prison sentence and a fine, as well as a requirement for psychological counseling, community service, and refraining from contacting the Y director. As a result of being convicted of a felony, he lost his Illinois CPA license. He complied with all of the court’s requirements, although he complained that he was sent to a gay counselor, and in his Pennsylvania CPA hearing testimony, he intimated there was some sort of gay network in Chicago set up to persecute people with his views.

By February 2005, Ake had completed all conditions of his sentence and probation and sought to find a new accounting job in Illinois. He received an offer that was contingent on getting his Illinois CPA license reactivated. When he applied to the Illinois authorities, he was told he would first have to reactivate his Pennsylvania license and then seek licensing in Illinois by reciprocity. He did that, but in the process disclosed his conviction to the Pennsylvania authorities, and an action was initiated to revoke the newly-reinstated Pennsylvania license. The State Board of Accountancy ruled against him and ordered the license revoked.

On appeal, Ake argued that the conduct for which he was convicted in Illinois would not have subjected him to prosecution in Pennsylvania under the law at the time, and that revoking his license permanently was excessive. At the hearing, Ake articulated one of those “I’m sorry if I’ve hurt anybody or offended somebody” apologies, but said “I stand on my firm religious conviction, beliefs.” Ake’s argument was basically that he was an honest accountant, had never been accused of any misconduct related to his work, and was being persecuted because of his religious beliefs.

The Board apparently concluded that he was unrepentant about his crime and thus not of good character. Wrote Judge Leavitt, “The Board reasoned that a revocation of Ake’s CPA credentials would eliminate the risk of harm to those with whom he may have professional dealings as a certified public accountant if he returns to Pennsylvania; deter other Pennsylvania certified public accountants from committing felonious acts outside of the practice of public accounting; and assure the public that only individuals of good moral character are permitted to practice as certified public accountants in Pennsylvania.”

A majority of the court found that the Board had gone too far. Judge Leavitt wrote, “When we consider [the disciplinary rule] in its entirety, it is apparent that the General Assembly drafted the disciplinary provisions of the CPA Law with an eye toward ferreting out the types of misconduct that are anathema to the accounting profession” such as fraud or deceit in obtaining a CPA certification, or dishonesty, fraud or gross negligence in the practice of accounting, for example. “Ake’s harassing conduct in Illinois was certainly deplorable,” wrote Leavitt, “However, it does not relate to any of the character qualities the legislature has identified as central to holding a CPA certificate,
i.e., honesty, integrity and being able to practice accounting in a non-negligent manner. ... the Board did not have a basis to impose the maximum penalty upon Ake for his harassment conviction.”

Leavitt also faulted the Board’s premising of its ruling on the failure to Ake to be “rehabilitated,” as evidenced by his lack of genuine contrition and failure to recognize that what he had done was wrong. “The problem with the Board’s analysis,” she wrote, “is the lack of any objective standard for what constitutes rehabilitation’ in this context. The Board does not attempt to provide one and, instead, pins its entire analysis on its disagreement with Ake’s beliefs and opinions. Ake’s testimony does indeed reveal that he believes his conduct was not felonious, and that he was somehow targeted by the district attorney and his first psychological counselor for his religious beliefs about homosexuality. It is not for the Board or this Court to decide whether Ake’s beliefs are objectionable. The Board is not vested with authority to look into the hearts of those licensees who appear before them. The Board members may not assume the role of the proverbial thought police and require Ake or any other accountant to change his beliefs to conform to those of the Board’s members.”

The court found that Ake had fulfilled all the requirements of the Illinois court’s sentence, which was objective evidence of rehabilitation, and that he had “apologized” for his actions at the hearing, at which “he clearly expressed the need to respect the beliefs of others in a professional setting and not to advance his own beliefs in that context. Ake did all that the State of Illinois demanded of him as punishment for his conduct, and he expressed remorse for violating the law. The Board erred in finding that Ake was not rehabilitated because he refused to apologize for his religious convictions.”

Dissenting, Judge Doris A. Smith-Ribner contended that “the majority has substituted its judgment for that of the Board in reversing its decision to revoke Ake’s CPA credentials.” The legislature gave the Board discretion to decide whether someone is qualified for licensure as a CPA, and, Smith-Ribner argued, its ruling should be overturned “only if there has been an arbitrary exercise of the board’s duties or a flagrant and manifest abuse of its discretion,” which she did not find in this case. In her dissent, Smith-Ribner rehashed in some detail Ake’s hearing testimony about the gay conspiracy against him in Cook County, and that he “didn’t feel” that he was guilty.

“The Board was unimpressed with Ake’s testimony but did not render its decision because it found his views on homosexuality objectionable,” wrote Smith-Ribner. “Rather, it concluded that Ake’s view that his harassment of a victim because of her sexual orientation should not have resulted in criminal sanction, coupled with his attitude about the sexual orientation of the prosecutor and the mental health counselor, powerfully suggest that Responder has not reformed his ways. The Board stressed the need for a CPA to be of good moral character and noted that a felony conviction evidences bad character. Contrary to the majority’s view, the Board did not require Ake’s rehabilitation; instead, it concluded that his testimony did not contradict the finding of bad character implied by his conviction.”

Smith-Ribner also pointed out that the court majority premised its ruling on a misunderstanding of the rules governing such cases. Although the revocation of Ake’s license by the Board was stated as permanent, under the CPA law he could re-take the CPA exam and apply for a new license after five years. “Accordingly, the fact that Ake received a revocation isn’t a suspension should have no bearing on whether the Board abused its discretion in finding that Ake’s moral character, or particular character trait, remained unchanged.” A.S.L.

Federal Civil Litigation Notes

Supreme Court — The Obama Administration does not want the Supreme Court to take up the question of gays in the military, at least not now. This was the clear message from two actions. First, after asking for an extension of the deadline to decide whether to file a petition for certiorari in Witt v Department of Air Force, 527 F.3d 806 (9th Cir. 2008), petition for en banc review denied, 548 F.3d 1264 (Dec. 4, 2008), the Justice Department allowed the extended deadline to pass without filing a petition. A Justice Department spokesperson stated on May 4 that the department decided not to file a petition because there was no final ruling in the lower court. “It’s a procedural decision, this case in mid-stream, [and] it’s not uncommon in this kind of interlocutory position that a case is not appealed because more will be done on the case on remand,” explained Tracy Schmaler to the Washington Blade. In Witt, the 9th Circuit said that the application of DADT in any particular case is subject to heightened scrutiny, reversed the trial court’s dismissal of Witt’s lawsuit, and remanded for discovery and trial. Second, the Solicitor General’s office filed a brief opposing a grant of certiorari in Pietrangelo v. Gates, No. 08-824, in which one of the individual plaintiffs in the 1st Circuit challenge to DADT, James E. Pietrangelo, IL, had filed his own pro se certiorari petition, seeking review of the decision in Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), in which the circuit court agreed with the 9th Circuit that DADT should be subjected to heightened scrutiny, but decided that in the context of a facial challenge to the policy, the legislative record accompanying enactment of the policy provided sufficient justification to meet that test in light of Supreme Court precedents instructing federal courts to give substantial deference to the political branches in matters of national security and military personnel policy. While asserting that the circuit court’s ruling was correct on the merits, Solicitor General Kagan’s office, noting that the other plaintiffs in Cook had filed a brief opposing the cert. petition, urged the Court to refrain from taking the case, pointing out that a full trial record developed in the Witt case would make a more appropriate vehicle for the Court’s consideration of the issue of gay military service. Both actions can be seen as seeking to buy time for a political solution to the DADT problem, as to which President Obama has expressed support for ending the policy, but Defense Department officials have indicated that they have other priorities at present. In a May 22 interview in the Washington Blade, U.S. Rep. Barney Frank predicted that Congress would take up DADT during its 2010 session. Meanwhile, advocates for gay military service were highlighting several recent egregious discharge decisions under the policy involving highly decorated personnel with Middle East service and important skills, Daniel Choi and Victor Fehrenbach, at a time when the Defense Department is struggling to staff simultaneous warfare in Iraq and Afghanistan, and media pressure was mounting to end the current discriminatory policy.

6th Circuit — In Graysee v. Drury, 2009 WL 1479017 (May 28, 2009), the 6th Circuit affirmed the district court’s denial of summary judgement to two police officers who are being sued by a gay man for having used excessive force against him in arresting him after a bar fight. The police officers claimed that their use of pepper spray and other tactics against the plaintiff were protected by qualified immunity, but the 6th Circuit panel agreed with the trial judge that material factual disputes would have to be resolved before the legal issues could be determined. If the plaintiff’s version of the facts prevails, he will have stated a valid constitutional claim of excessive force and battery.

9th Circuit — The Board of Immigration Appeals is frequently accused of incompetence. Now they’ve been spectacularly caught out by the 9th Circuit in a gay-related case, Contreras v. Holder, 2009 WL 1311795 (May 12, 2009) (not officially published, of course, as we mustn’t embarrass the government unduly). Contreras had filed a timely motion to reopen his application for asylum, withholding of removal, and protection under the Convention Against Torture, “arguing that he is eligible for asylum due to past persecution based on his sexual orientation, which he was previously unable to present because of the overwhelming nature of the childhood sexual abuse he experienced in Mexico and his chronic Post-traumatic Stress Disorder.” Rather than address this issue, the BIA denied the motion in a decision that “cited
an inapplicable section of the federal regulations... and asserted that Cabrera had not demonstrated that the condition in [his] native Mexico have changed so that he now has a well-founded fear of persecution on account of a protected ground” — despite the fact that Cabrera’s motion did not allege, and was not based on, changed country conditions. Thus, the ruling on the motion was an abuse of discretion. “Because the BIA failed to provide a reasoned explanation for its actions or to indicate with specificity that it heard and considered Cabrera’s claims,” wrote the court, “we conclude that it abused its discretion.” The ruling was reversed and remanded “for a full consideration of Cabrera’s motion to reopen.” Sitting on the panel were Circuit Judges Reinhardt, Noonan, and McKeown.

California — In a lengthy opinion scrutinizing in detail numerous statements made in advanced placement European History class by a high school history teacher that were evidently taped by “religious” students to document their case against him, U.S. District Judge James V. Selna (C.D. Calif.) ruled on May 1 that the teacher, James C. Corbett, violated the First Amendment rights of religious students by referring to the teaching of creationism by another teacher as “religious, superstitious nonsense.” *C.F. v. Capistrano Unified School District*, 2009 WL 1202532. Judging by the extended discussion of his classroom remarks, Corbett was rather uninhibited in his attempts to lead his students to question received wisdom based on religious teachings, and to inculcate scientific standards of evaluating facts, and various students holding intense religious sensibilities were upset and offended. C.F., suing through his students, claimed that Corbett and the school district had violated his First Amendment rights under the Establishment Clause. Selna found that all the challenged remarks could be defended against this charge except the characterization of creationism, which appeared to the judge to have no secular purpose and to have been stated solely as a disparagement of religion. In the context of a public school, a teacher’s disparagement of religion raises Establishment Clause issues. The court granted summary judgement in favor of the school district on all claims, but ruled in favor of the plaintiff-student concerning this one comment. The opinion does not specify a remedy, but merely grants summary judgment against Corbett. Selna’s analysis of Corbett’s in-class statements includes comments he made about the Boy Scouts’ anti-gay policies, and homosexuality recurs as a subject a few times.

California — U.S. Magistrate Judge Gary S. Austin has approved a settlement in *M.D. v. Rosedale Union School District*, 2009 WL 1357440 (E.D.Cal., May 13, 2009). According to the complaint, M.D., while attending Free-
dom Middle School, was deprived of a safe and equal educational environment because of harassment by other students after a rumor started that she was a lesbian. She claims the school took no effective steps to deal with the ostracism and harassment she suffered as this rumor spread. Under the terms of the settlement, the defendant will pay $9,999.00 into an escrow account for the minor plaintiff, against which she can draw with court authorization. The court has authorized purchase of a laptop computer.

Montana — U.S. District Judge Richard F. Cebull adopted a report by a U.S. Magistrate Judge finding that defendant University of Montana Law School had not violated the First Amendment by denying official recognition and funding to a chapter of the Christian Legal Society at the school. *Christian Legal Society v. Eck*, 2009 WL 1497909 (D. Mont., May 19, 2009). The Christian Legal Society requires voting members to be adherents to Christianity who disapprove of and refrain from engaging in homosexual activity. The law school has a non-discrimination policy that includes religion and sexual orientation, and denies recognition and funding to student organizations whose membership policies discriminate on these grounds. Judge Cebull noted that the 9th Circuit had ruled in a “strikingly similar, if not identical suit against the University of California, Hastings” after the magistrate’s report was issued. The ruling in *CLS v. Kane*, 2009 WL 693391 (9th Cir. 2009), addressed the issues raised in this case, and “this Court will rely on Kane for its precedential value.” Cebull concluded, in harmony with the magistrate, that the law school’s non-discrimination policy was administered in a viewpoint neutral fashion and did not violate the 1st Amendment rights of CLS and its members.

Tennessee — U.S. District Judge Robert L. Echols denied a post-trial motion to set aside a verdict acquitting two doctors of malpractice in their performance of sex reassignment surgery on the plaintiff, who was transitioning gender from male to female. *Wiehe v. Zimmerman*, 2009 WL 1457148 (M.D. Tenn., May 21, 2009). Plaintiff contended that Judge Echols’s decision to allow the defendants to refer to the operation as transgender surgery, and to deny in part his motion in limine seeking to avoid the transsexual issue becoming the center of the case, had resulted in a flawed trial. But Judge Echols pointed out that it was virtually impossible to litigate this case without telling the jury what kind of a surgical procedure was being performed. Among other things, they would be very curious about why a gynecologist would be participating in the surgical team if what was involved was “complex pelvic surgery” on a man, and why a gynecologist would be called as an expert witness. Plaintiff also urged as evidence of jury bias that the deliberations lasted less than an hour, contending that the jury had become enflamed against plaintiff due to the frequent references to transgender surgery during the trial. Judge Echols also noted that plaintiff had requested voir dire inquiries that would clearly signal to the jury that the plaintiff was transsexual. Both sides had posed voir dire questions seeking to get at possible juror bias concerning transsexuality. Judge Echols determined to let the verdict acquitting the doctors stand.

State Civil Litigation Notes

California — Long Beach City Council Member Gerrie Schipske has reached a $136,000 settlement with the Long Beach teachers union, for which she worked as general counsel from 2005 to 2008, concerning her allegations that she suffered unlawful discrimination, defamation and harassment as an openly lesbian employee of the union. Schipske threatened to sue the union in a June 2008 letter to the union’s president, but no lawsuit was ever filed and negotiations ensued. The settlement agreement has a confidentiality clause, but a local newspaper obtained a copy of the agreement with names redacted. *Long Beach Press-Telegram*, May 16.

California — On April 29, Los Angeles County Superior Court Judge Helen I. Bendix rejected a defense motion for summary judgment in the case of *Andrade v. Western University of Health Sciences*, No. BC383801, a sexual orientation discrimination case brought by Derek Andrade, a gay man who had been discharged as a public relations official by the University. Judge Bendix found that there were contested issues of material fact concerning the motivation for Andrade’s discharge, which stemmed from an incident where he was falsely charged with having gotten another male university employee drunk at a public event and then taken him to a hotel room to engage in homosexual activity. The other employee in question has denied the allegations, as has Andrade, who produced evidence that the university official to whom he reported had referred to him as a “faggot” and expressed unhappiness about having a “faggot” as the university’s publicist. The case was put down for trial on May 20. Attorney James A. Otto represents Andrade.

Kentucky — A Christian academy did not violate contractual or due process rights of a student who was suspended after the headmaster’s investigation of reports that she was involved in a lesbian relationship with another student, the Kentucky Court of Appeals ruled in *Bentley v. Trinity Christian Academy*, 2009 WL 1491351 (May 29, 2009). Melissa Harp had a variety of disciplinary problems during her junior year at the school, but things came to a head “when several students reported that Harp had been talking about ane engaging in inappropri-
ate sexual conduct with another female student, L.E."

The headmaster, James Armstead, called in Harp and her mother to discuss the matter after interviewing several students and meeting with L.E. “Armstead contends that L.E.'s story,” wrote Judge Dixon. “Further, Armstead claims that Harp was disrespectful and would neither take responsibility for her actions nor acknowledge that such was disruptive to other students,” so he concluded that she should be suspended for the remainder of the school year for violating the guidelines in the academy’s handbook, and she was not offered admission for senior year. In the lawsuit, brought by her mother on her behalf, Harp contended that she had been defamed by Armstead and that her due process rights as spelled out in the handbook were violated. The court found that even though the specific procedures spelled out in the handbook had not all been followed to the letter in her case, to the degree she had any due process rights in the situation they had been satisfied. Furthermore, the court found that Armstead’s communication of the results of his investigation and his disciplinary recommendation to the school’s board were privileged communications that did not give rise to a defamation claim. Armstead never referred to Harp as a “lesbian” in that communication. After the lawsuit was filed, the school sent a letter to parents setting out its version of what happened. The court upheld the Fayette Circuit Court’s grant of summary judgment against Bentley and Harp on all her claims: denial of due process, breach of contract, libel and slander, and invasion of privacy. The privacy claim was focused on the letter sent to parents. The court found that the letter contained less detailed information than the complaint filed in the case, which was a matter of public record, and noted that Harp published the complaint on her MySpace page, thereby waiving any privacy claim she might have.

Kentucky — A McDonald’s restaurant in downtown Louisville has agreed to pay $2,000 each to a group of gay customers who endured anti-gay slurs when they attempted to patronize the restaurant on July 26, 2008. They asked to speak to a manager when employees referred to them as “faggots” in front of other customers. The supervisors refused to refund their purchase, and local and corporate officials were unresponsive when one of the customers tried to follow up on the matter. With the assistance of the ACLU of Kentucky, they filed a public accommodations complaint with the city human relations commission, which has jurisdiction over sexual orientation discrimination claims. The commission helped to negotiate the settlement, under which McDonald’s agrees to train staff on their obligations to serve the public without discrimination. Kentucky ACLU Press Advisory, May 6.

Maine — The Bangor Daily News (May 20) reported that on May 18 the Maine Human Rights Commission had issued a decision concluding that a Denny’s Restaurant in Auburn violated the state’s human rights law by barring a transgender woman from using the restaurant’s ladies room facility. The 3–2 ruling in the case of Brianna Freeman v. Realty Resources Hospitality LLC, stemmed from an incident on October 25, 2007, when Freeman used a locked stall in the ladies room while in female garb, according to an investigator’s report. Another customer complained to the manager and threatened to call the police. As a result, management decided to inform Freeman that she would not be allowed to use the ladies room in Denny’s unless until she had sex reassignment surgery. Freeman, a regular customer of the restaurant, filed a complaint with the Commission on April 17, 2008. The Commission took thirteen months to investigate the complaint and issue its decision. The respondent argued that forcing it to allow Freeman to use the ladies room was a violation of the privacy rights of its other female customers, and would pose a health and safety risk to other customers, especially children. By contrast, argued the executive director of Equality Maine, forcing Freeman to use the men’s room would create an unsafe situation for her.

New York — Rejecting an appeal by Hampton Bays Union Free School District, the Appellate Division, 3rd Department, backed up a finding by the Public Employment Relations Board that the school district committed an improper practice by refusing to provide documentation on the discharge of a probationary teacher to the Hampton Bays Teachers’ Association. Hampton Bays Union Free School District v. Public Employment Relations Board, 878 N.Y.S.2d 485 (May 7, 2009). Normally the union has nothing to say about the discharge of a probationary teacher, but the collective agreement does prohibit discriminatory discharges, even of probationers, and the union was concerned after learning that administrators had questioned teachers about the probationer’s sexual orientation. It seems the administration was acting on a report that the teacher was seen accompanying an underage student of the same sex to a bar where the student consumed alcohol in the teacher’s presence. The student later denied that such an incident occurred. The union wanted documentation supporting the discharge, since the teacher had received only positive evaluations during her first two probationary years of teaching. The school district took the position that it was not obligated to provide any information on a probationary teacher, but PERB ruled to the contrary, finding that the collective bargaining agreement entitled the union to receive the information so it could determine whether to grieve the discharge under the collective agreement. Writing for the panel, Justice McCarthy stated, “We note that the failure to provide an employee organization with information relevant and material to the investigation or prosecution of a potential grievance constitutes an improper practice. Under the circumstances here, substantial evidence supports PERB’s finding that the Association’s requests were reasonable, relevant and necessary to its investigation of a potential grievance on behalf of the teacher and that petitioner violated Civil Service Law ss. 209–a(1)(a) and (d) by refusing to comply with the requests.”

Washington — A tenured university faculty member who was suspended for two semesters without pay has won a new hearing from the Court of Appeals of Washington on the ground that his disciplinary hearing was improperly closed to the public. Mills v. Western Washington University, 2009 WL 149048 (May 26, 2009). Professor Perry Mills was, to judge by Justice Dwyer’s opinion, the scourge of women, minorities and gay students. Among those who complained about his conduct was a junior gay professor whom Mills called “a stupid faggot,” and who was referred to by Mills “behind his back” as “Precious.” Mills seems to have been an equal opportunity offender, and finally as complaints mounted the school got fed up, preferred charges against him, held his hearing and disciplined him. However, under the state’s governing statutes, such a hearing cannot be held behind closed doors. Although the court rejected all of Mills’ other substantive and procedural objections to what happened, it found that the right to a “public trial” was violative, and remanded the case to the University for a re-run, this time in public.

Wisconsin — The Wisconsin Supreme Court has agreed to a request from the state’s court of appeals to by-pass the intermediate appellate step and take up the case of McConkey v. Van Hollen (Wis. Cir., Dane County, May 30, 2008) directly. The Dane County Circuit Court ruled last year against a claim by William McConkey that the state’s anti-marriage constitutional amendment was wrongly placed on the ballot because it presented two distinct questions to voters: whether to ban same-sex marriage and whether to ban civil unions or similar non-marital legal statuses for same-sex couples. The court of appeals expressed the view that the case had important statewide significance and should be addressed quickly by the highest court. A briefing schedule has been set and arguments are expected to be held in the fall. Desert Morning News, May 15. A.S.L.

Criminal Litigation Notes

Military — The U.S. Court of Appeals for the Armed Forces concluded that a Navy woman’s 6th Amendment confrontation right was violated when the court martial was not presented with evidence that a witness against her on
charges of larceny and obstruction of justice was a disaffected former lesbian lover. U.S. v. Collier, 2009 WL 1393445 (May 18, 2009), Judge Ryan wrote for the court in the 2–1 decision to reverse the conviction. “In this case,” wrote Ryan, “the military judge’s ruling prohibited all cross-examination and extrinsic evidence regarding a sexual or romantic relationship between Appellant and HM2 C. This did not allow Appellant to expose the alleged nefarious motivation behind HM2 C’s allegations and testimony. The Government argues that Appellant was able to conduct sufficient cross-examination without revealing whether the relationship between the two women was a romantic one. However, it is intuitively obvious that there is a qualitative difference between the breakup of a friendship and a badly ended romantic relationship, whether that relationship was sexual or not. As has long been recognized, Heav’n has no Rage, like Love to Hatred turn’d.’ William Congreve, The Mourning Bride 39 (Jacob Tonson 1703) (1697). We have no doubt that the romantic nature of a relationship has a special relevance to motivation such that allowing additional cross-examination in that area is not a mere opportunity . . . to hammer the point home to the jury.” Dissenting, Judge Baker argued that the military judge “made a reasonable decision to exclude the evidence of Appellant’s alleged sexual relationship with HM2 C, certainly a decision that was within his discretion. This Court should not reverse that decision because it would have reached a different result.”

California — The 1st District Court of Appeal upheld the second degree murder convictions of Jose Antonio Merel and Michael William Magidson in the notorious Gwen “Lida” Araujo murder case. People v. Merel & Magidson, 2009 WL 1314822 (May 12, 2009). The jury’s decision to find against the prosecution on the hate crimes count in each case was controversial. The trial court sentenced the defendants to prison terms of 15 years to life. The lengthy opinion by Justice Rivera rejecting the appeal of the convictions and sentences contains detailed discussion of all the testimony and rejects various arguments raised on appeal about errors at trial, including as to the jury charge. The defendants do not deny involvement in the death of Araujo, but give conflicting accounts of the circumstances. It seems clear from the summation of the testimony that the two men were freaked out at discovering that a person to whom they had been relating as a teenage girl (and with whom they had shared drugs and sex — oral sex, that is) was anatomically male, and much of the controversy on appeal centered the degree to which the jury instructions would let the jurors excuse some of their culpability because of their shock and the belief of one of them that having derived enjoyment from oral sex with Araujo marked him as gay, a conclusion that he found devastating. The court of appeal found that some errors were made at trial — few big trials are perfect — but that none of the errors were sufficiently severe to justify setting aside the verdicts and sentences, which were affirmed.

California — In In re Clifford Stanley Bolden, 2009 WL 1175536 (May 4, 2009), the California Supreme Court denied a petition for habeas corpus by Bolden, who was sentenced to death in the murder of Henry Michael Pedersen, a gay man. Pederson was found stabbed to death in his apartment, and was in Bolden’s company when last seen alive. Bolden was arrested in possession of some of Pedersen’s property, and also had a knife stained with blood consistent with Pedersen’s blood type. Bolden claimed ineffective assistance of counsel, alleging that one of the jurors in his case, Jose S., was acquainted with the victim and was predisposed to seek the death penalty against Bolden. Bolden, who had advertised his services as a model or escort in the Bay Area Reporter, had two prior manslaughter convictions, both involving stabblings. The California Supreme Court appointed Superior Court Judge Mary Morgan as a special referee to conduct an inquiry into Bolden’s allegations and report to the court. Morgan’s report, compiled after lengthy hearings involving many jurors, witnesses and others, concluded that Jose S was not personally acquainted with the victim, did not prejudice the penalty issue, and engaged in deliberation with the other jurors. Bolden raised various objections to the report, including arguing based on juror testimony that Jose S had persuaded the other jurors to go for the death penalty, and that Judge Morgan’s report gave insufficient weight to the testimony of some jurors who recalled Jose S mention that he knew the victim’s roommate. Ultimately, the court rejected Bolden’s argument in this regard, in this May 4 opinion, but indicated that other claims in Bolden’s petition are being dealt with separately.

Colorado — Weld District Judge Marcelo Kopcow imposed a sentence of life plus 60 years on Allen Andrade, convicted of the murder of Angie Zapata, a transsexual. The jury convicted on a first-degree murder charge, which makes life imprisonment a mandatory part of the sentence. The enhancement came through the hate crimes law, and the jury conclusion that the defendant’s sexual orientation had something to do with the outcome. Denverpost.com, Ma 8, 2009. This was believed to be the first use of the Colorado hate crimes law in an anti-transsexual context.

Pennsylvania — Affirming a Superior Court ruling that we have previously criticized, the Pennsylvania Supreme Court held in Commonwealth v. Diodoro, 2009 WL 1449366 (May 26, 2009), affirming 939 A.2d 290 (Dec. 2007), that the state’s law making it a crime to “knowingly possess or control” applies to the act of searching for a viewing such material on the internet, even though the individual does not download, retransmit or print out the offending images. Possession is accomplished by the computer’s automatic storage in a cache file of any image viewed on the screen, but the prosecution of Anthony Diodoro, sparked by the discovery of hundreds of such cached images on his personal computer, actually turned on the allegation that he had “control” of such images while he was viewing them, as he professed ignorance of computer technology and thus could not credibly be charged with having “knowingly” possessed the images. The court decided that for the moments when the images were displayed on his screen, he had “control” of them since he possessed the capability to print them out or download them at that time. The court justified its result by reference to the purpose of the statute: to prevent the sexual exploitation of children by attacking the market for child pornography. The court found that this purpose would be subverted if people were free to search for and view the stuff on-line with no consequence. It also found that Diodoro had not properly preserved for appeal the question whether the statute violated due process by being insufficiently clear in communicating to the public that it would be considered a criminal offense to search for and view child pornography on-line.

Texas — The Court of Appeals of Texas, Texarkana, rejected a self-defense argument by a man who was convicted and sentenced to life in prison for murdering a gay man. Smalley v. State of Texas, 2009 WL 1423551 (May 22, 2009). The court decided the appeal three days after it was submitted. Smalley, who was taken in by Moore after becoming homeless as a result of a family crisis, claims that the openly-gay Moore had sexual designs upon him and forced himself upon Moore in a violent manner, resulting in a struggle that led to Moore’s death. The court found that based on the evidence presented at trial the court could reasonably conclude that Moore’s self-defense argument had not been proved, and that the physical evidence better accorded with the prosecution’s theory of intentional homicide. A.S.L.

Legislative Notes

Federal — In a May 22 interview in the Washington Blade, U.S. Rep. Barney Frank (D.-Mass.), the senior openly-gay member of Congress, reviewed the various bills pending or to be introduced in Congress on LGBT issues. Frank opined that the Hate Crimes Bill, approved by the House, might pass this year, indicating that House leaders on this issue were urging the Senate to consider it as a stand-alone bill rather than trying to attach it as an amendment to the Defense Appropriations Bill, a
strategy used in the previous Congress that failed to achieve enactment of the Hate Crimes measure. Frank indicated his belief that Congress will address the issue of the Don’t Ask—Don’t Tell military policy during 2010. He did not hold out much hope for passage this year of a measure to extend recognition to same-sex partners for immigration purposes, the Unitig American Families Act, opining that the volatile mix of gay couples and immigration policy would make it a difficult sell. Frank was more optimistic about the passage of the Employment Non-Discrimination Act, which was slated to be introduced in June in the “inclusive” version that would cover ban employment discrimination based on both sexual orientation and gender identity, although he was not fully convinced that the votes would be there for a bill that includes gender identity. He urged supporters of the measure to get to work lobbying on it, and said they should be concentrating their efforts on their own Representatives and Senators, where they would have the most impact. The article also mentioned a new measure that was introduced jointly by Rep. Jim McDermott (D-Wash.), and Sen. Charles Schumer (D-N.Y.), to exempt domestic partner health benefits from income tax on the same basis that spousal health benefits are currently exempted.

Federal — U.S. Representatives Tammy Baldwin, Steven Israel, Barney Frank and Jared Polis have sent a letter to Peter Orszag, director of the Office of Management Budget, asking that plans for the U.S. Census be altered so as to count legally married same-sex couples as married during the enumeration to take place in the spring of 2010. When the last Census was conducted in 2000, same-sex marriages were available nowhere in the world. Since then, they have become available in several other countries, including Canada, and in several states, beginning with Massachusetts in May 2004. As a result, there are thousands of legally married same-sex couples in the United States, but the Census Bureau has taken the position that because of the federal Defense of Marriage Act, it is forbidden to recognize them by counting them as such. Census officials have indicated that if households submit data indicating that two adults of the same-sex in the household are married to each other, they will be identified as unmarried partners in the data input to the Census database, so the Census will be useless in terms of documenting the number of same-sex couples residing in the United States who have married. Presumably this result can be accomplished by the Bureau’s computer program because the census form asks for sex identification of each individual in the household, and can be programmed to reject the status of “married” for two individuals of the same-sex who fill in that box, automatically reclassifying them as “unmarried partners,” a category that existed in the 2000 Census. The representatives urged Orszag to take steps to alter this policy, in order to provide a statistically accurate picture of the U.S. population. “We are deeply concerned about the implications of this policy for same-sex couples and for the integrity of the census as a whole and firmly believe the Bureau’s primary objective should be to collect data and report it, not collect data and alter it,” they wrote. They also opined that collecting and reporting data did not constitute federal recognition of the marriages, but merely reporting on state recognition of the marriages, inasmuch as all marriages in the U.S. are conducted pursuant to state laws. The letter calls with Orszag to work with Secretary of Commerce Locke and the Census Bureau to preserve “the accuracy and integrity of the Census.”

California — The Alameda School Board voted 3–2 to adopt an elementary school curriculum with lessons intended to discourage bullying and to teach respect for gay and lesbian families and students. San Francisco Chronicle, May 27.

Louisiana — Down here in Louisiana, we pay no heed to the Supremacy Clause of the U.S. Constitution. After all, we know who really should have won the Civil War. That seems to be the attitude of Governor Bobby Jindal and members of a state House committee, who agreed on May 5 with a proposed bill, H.B. 60, to mandate non-compliance with a federal court order that Louisiana issue a new birth certificate for a child born in the state who was adopted in New York by a gay male couple. The committee voted 12–3 for the bill, sending it to the full House. U.S. District Judge Jay C. Zainey ruled in Adar v. Smith, 591 ESupp.2d 857 (E.D.La. 2008), that Louisiana was required by the Full Faith and Credit Clause to honor the N.Y. adoption and issue a new birth certificate listing the adoptive parents, as routinely provided under state law. The Full Faith and Credit Clause has no public policy exception when it comes to recognizing court orders and decrees from another state, where the court had subject matter and personal jurisdiction of the parties, held Judge Zainey. The state of Louisiana has filed an appeal, and the 5th Circuit stayed Judge Zainey’s order pending the outcome of the appeal. H.B. 60 would provide that the Registrar can issue birth certificates that list either a single adoptive parent or the married adoptive parents of a child born in Louisiana, but no other parental arrangement, such as an unmarried same-sex couple, would be recognized. New Orleans Times Picayune, May 6.

Missouri — Shelby County Commissioner members voted 5–4 to approve a measure that would adopt a non-discrimination policy in county employment, after having rejected a more extensive proposal that would have applied the non-discrimination policy to county contractors. The measure has yet to go before the full council, where it would have to pass on multiple readings before it could be enacted. Memphis Commercial Appeal, May 28.

Nevada — Both houses of the Nevada legislature approved a domestic partnership bill that, in line with similar laws in Oregon, California, and Washington State, would make available to same-sex partners virtually all the state law rights that go with marriage. The margin of passage in each chamber (Senate 12–9; Assembly 26–14) was too slim to confidently predict an override of the veto that Governor Jim Gibbons exercised on May 25, but the Senate quickly voted to override, with two Republicans changing their position. A House vote was scheduled to take place during the first week of June. In addition to providing rights to partners, the bill would prohibit businesses from discriminating against domestic partners in any of their policies. Gibbons criticized the bill as contravening the will of Nevada voters, who just a few years ago amended their constitution to ban same-sex marriages, using almost identical language to California’s Proposition 8. News reports indicated some hope that additional support could be found for an override vote in each house. Meanwhile, lobbying was heavy by major business interests, especially hotel and casino owners, who voiced fear that if Nevada became known as hostile towards gays, their resort and tourism business could slack off considerably. They pointed to the experience of Colorado after the passage of anti-gay Amendment 2. Reportedly, the state’s businesses took a hit when gay activists stimulated a tourist boycott of the state and influenced several major national conventions to relocate their annual meetings to other states. Spokespeople for such major operations as MGM Mirage and Harrah’s Entertainment told the media that they were campaigning for an override vote. BNA Daily Labor Report, 99 DLR A–7 (May 27, 2009); Los Angeles Times, May 29.

New Mexico — On April 7, Governor Bill Richardson signed into law HB 428, prohibiting profiling practices by state law enforcement agencies. The new law prohibits profiling on the basis of ethnicity, race, language, disability, sexual orientation and political affiliation, and directs law enforcement agencies to develop policies, procedures and training programs to prevent profiling from occurring. U.S. Federal News, May 16.

North Carolina — The North Carolina House Education Committee has given approval to a Senate bill that would require schools to adopt anti-bullying policies. The measure specifically lists personal characteristics that are implicated in bullying, including sexual orientation and gender identity. The inclusion of this list has sent opponents of the bill into a frenzy, charging that it is part of the “homosexual agenda.” Well, yes, getting schools to...
take action to protect kids against homophobic and transphobic bullying is actually part of the “homosexual agenda.” What’s wrong with that? Oops, we forgot, an important part of the Republican Party agenda in North Carolina is to punish gay and gender-non-conforming kids for their deviation from the norm by subjecting them to bullying from fellow-students, teachers, and school staff. As Rep. Mark Hilton, a Republican from Conover stated, “This is nothing about bullying. It’s about pushing that agenda. It’s an attack on traditional family values.” He’s absolutely correct, of course. Bullying of gay and transgender kids is very traditional, and we understand why a traditionalist like Rep. Hilton would not want the state to do anything to attack this very traditional way of keeping sexual minorities in their place. But in North Carolina the Democrats control the House, and Committee Chair Larry Bell of Clinton has successfully resisted attempts by Republicans to either delete sexual orientation and gender identity from the list, or to deep-six the list or the bill in its entirety. The bill now goes to the House Judiciary Committee. Fayetteville Observer, May 29, 2009. The measure was previously approved in the Senate on a narrow vote. During Senate consideration, two Roman Catholic bishops urged congregants to oppose the bill, claiming that it could lead to same-sex marriage in North Carolina. We are wondering where they studied logic, as that seems rather strained even for a slippery-slope argument. Charlotte Observer, May 6.

Pennsylvania — LGBT rights loom as a major topic of debate in the Pennsylvania legislature, where proposals are pending to amend the state’s antidiscrimination law to include sexual orientation and gender identity. Republicans are pushing a measure to put a constitutional amendment banning same-sex marriage on the ballot, and now a Democratic state senator has introduced a bill to allow same-sex marriages. The head spins.... Allentown Morning Call, May 28. As noted below, in mid-May state employees won domestic partnership health care benefits from the state government, by vote of the administrative board that oversees state employee benefits programs.

South Carolina — True to the traditions of the deep south, the South Carolina legislature voted overwhelmingly to prohibit any mention of same-sex relationships in a new program it was approving to counter violence in teen relationships through special programs in the public schools. The Republican-controlled House approved Rep. Greg Delleney’s amendment with acrimony. After all, Republican legislators in South Carolina have no objections to abusive relationships among gay people... oops, we didn’t mean that. As Delleney stated, in support of his amendment: “I do not want the Department of Education or School Districts teaching our children in grades six through 12 about same-sex relationships.” After all, such relationships are invisible in our popular culture (wink, wink, nod, nod...), and so as long as they are not mentioned by teachers in school, our blinkered youth can be kept in blissful ignorance and will all turn out to be heterosexual. And the South will rise again.... Rock Hill Herald, May 15.

Washington State — Governor Christine Gregoire signed into law a measure expanding the rights available to registered domestic partners in Washington State so that they will be virtually co-extensive with marriage. The law, signed on May 18, will go into effect on July 26, unless opponents who are seeking a repeal referendum are able to collect sufficient valid signatures to block it. They have 60 days to collect 120,557 signatures, according to a report in the Seattle Times, May 19. As of May 18, there were 5,395 registered domestic partners in Washington State, with at least one such couple in each county. A.S.L.

Law & Society Notes

Federal — President Obama’s nomination of Sonia Sotomayor, a judge of the 2nd Circuit Court of Appeals, to take the Supreme Court seat being vacated by David Souter, was greeted with approval by LGBT rights litigation groups, although her record as a court of appeals and district judge did not provide extensive insight into her views on LGBT legal issues. The 2nd Circuit has not been a hotbed of LGBT litigation over the past decade, and Judge Sotomayor did not attract many of the occasional LGBT-interest cases to come into the Southern District of New York when she was a trial judge during the 1990s. She was not on the panel that decided the gay military case, Able, which was probably the most significant LGBT case in the 2nd Circuit over the past decade. We have looked through those of her published opinions (or cases where she was on a panel) that appeared to have some LGBT connection, and saw nothing that would alarm us. We note that an early district court decision suggested a willingness to entertain gay equal protection arguments prior to the Supreme Court’s ruling in Romer v. Evans (1996), which is undoubtedly a positive sign. See Holmes v. Artuz, 1995 WL 634995 (S.D.N.Y.1995). In that case, Judge Sotomayor denied a defense motion to throw out a civil rights complaint brought by a gay prison inmate complaining about various kinds of discrimination. Not only did Judge Sotomayor suggest that the plaintiff’s allegations could state an equal protection claim, but she rejected any automatic application of qualified immunity for prison officials, writing: “The constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law. Here, in the absence of any record before the Court, it is not clear why inmates who are openly homosexual are barred from prison mess hall positions. This factual uncertainty compels denial of both defendants’ qualified immunity defense and defendants’ motion to dismiss for failure to state a claim.” She also suggested that holding off on deciding the case would be prudent in light of the pending U.S. Supreme Court argument in Romer. In addition, Judge Sotomayor was part of a panel that was willing to entertain a hostile environment sexual harassment claim by a gay man under Title VII of the civil Rights Act using the sexual stereotyping theory, in Miller v. City of New York, 177 Fed.Appx. 195 (2nd Cir. 2006)(not selected for publication in Fed.3d), vacating a summary judgment that had been granted to the City in a summary order not attributed to any of the individual judges on the panel. The case involved a “small, non-muscular man with a disability” who alleged that his supervisor made his life miserable by claiming he was not a “real man” or “manly man” and subjecting him to verbal harassment and discriminatory assignments. The trial judge granted summary judgment on the ground that sexual orientation discrimination was not actionable, but the panel vacated the judgment, finding that Miller had sufficiently alleged a gender-stereotyping case.

Movement — A group of self-appointed LGBT movement leaders gathered in Dallas and adopted a statement, which they are calling “The Dallas Principles,” and urging everybody in the LGBT movement to endorse these principles as the procedural and substantive way forward to gay equality. The Dallas Principles state an ambitious agenda and urge forward movement. Some activists immediately criticized them for failing to mention HIV/AIDS, or issues of race, gender and class, apart from a call for universal access to “affordable, high quality, and culturally competent health care without discrimination.” All the other goals they articulate are sharply focused on LGBT rights. As publicized, the Dallas Principles are tightly focused on LGBT rights. They begin with a list of eight truisms, follow with a list of seven civil rights goals, and conclude with a seven-part call to action. They are available for inspection and “signing on” on the internet.

Corporate Policy — Which is the only major corporation among the top 50, according to Fortune, that does not have its own policy forbidding anti-gay discrimination within the company? ExxonMobil, and that is not likely to change soon, since a shareholder proposal spearheaded by NYC Comptroller William Thompson, overseer of the city’s pension fund investments, went down to defeat on May 27, winning support from 39.3 percent of voting shares at the corporation’s annual meeting. ExxonMobil is also one of the minority of top corporations to be a holdout on domestic partnership benefits. While the corporation fre-
quarterly proclaims that it does not discriminate, management’s refusal to put that in writing stands by stark contrast to most of their competitors. According to a May 29 report on 365Gay.com, the shareholder resolution has been proposed at each annual meeting for several years, and each year it wins a slightly higher level of support. At the rate things are going, however, it would be several years until shareholders come close to winning approval. On the other hand, enactment of the federal Employment Non-Discrimination Act would make the issue largely academic.

College Policy — Somebody slipped? In 1998, trustees of Westmoreland County Community College in Pennsylvania approved a non-discrimination policy for the college that did not include sexual orientation or gender identity, but a staff member in human resources who was an advocate for inclusion of those categories added them to various university publications that included the institution’s non-discrimination policy. This discrepancy recently came to light when the school retained legal counsel to defend against a suit brought by a gay employee, Andrew Doherty, who has married his same-sex partner in Massachusetts and is now seeking spousal benefits for his husband. The lawyers examined university policies and discovered that the trustees had never enacted a sexual orientation policy. The university’s response: to depublish the sexual orientation policy, although the college’s president claims the one action has nothing to do with the other. The college president fell back on the rationale that college presidents are wont to evoke claims: “According to article 12 of the family codes, for a marriage to be sanctioned it is necessary to have the mutual and voluntary agreement of a man and a woman.”

Church Policy — The highest court of the United Methodist Church has ruled that clergy in the faith may not perform same-sex marriages or civil unions, even if their regional church district favors allowing such activities, because the top church legislative body voted to retain its ban on same-sex marriages and their performance by Methodist clergy. The Judicial Council said that local bodies cannot negate churchwide discipline. Long Beach Press-Telegram, May 2.

California — The San Francisco Chronicle reported on May 19 that the Vallejo City Unified School District has settled a claim of anti-gay harassment asserted by a lesbian student. The student, Rochelle Hamilton, contacted the ACLU to complain that teachers were harassing her due to her sexual orientation. The ACLU contacted the school seeking some solution to the problem. The school district agreed to pay Hamilton $25,000, and to bolster its anti-gay-discrimination training and complaint procedures for staff and students. The district agreed that the ACLU could monitor these efforts over the next five years. The school superintendent told the press that the district had not admitted any liability in its settlement agreement with the ACLU, but admitted that the district had not moved with sufficient speed to address the matter when it was raised by Hamilton.

Florida — By a 4–1 vote, the Lake Worth, Florida, city commission approved the appointment of Susan Stanton to be the new city manager. Stanton lost her previous job as city manager in Largo after revealing that she was undergoing gender transition from male to female. There had been no complaints about the quality of her work there, which was cited by several of the commissioners in explaining their affirmative votes. Palm Beach Post, April 7.

Pennsylvania — The Pennsylvania Employees Benefit Trust Fund voted unanimously in September that authorize medical benefits for domestic partners of state employees, opening up the benefits registration process on May 1, 2009, with benefits to go into effect with the new fiscal year on July 1. A spokesperson for the board indicated that this was about fairness and competitiveness, noting that every Fortune 500 corporation headquartered in the state provided such benefits for partners of employees. The benefits are available to both same-sex and opposite-sex partners of employees. The chair of the board, Dave Fillman, told the Philadelphia Gay News (May 14), “It’s just the right thing to do.” A.S.L.

International Notes

Australia — A ban on blood donations by gay men who engage in sex with other men was reaffirmed by the Tasmanian Anti-Discrimination Tribunal, rejecting an argument by Michael Cain of Launceston that he should not be refused as a blood donor just because he admitted being a sexually-active gay man. Cain argued that gay sex was legal in Australia, and safe-sex practitioners, such as himself, should not be excluded from giving blood, an important social act. But the Tribunal said that the Red Cross, which was administering blood collection, was “bound to keep risks to the blood supply as low as possible,” according to a May 28 report in the Herald Sun.

Greece — The New York Times reported on May 6 that a Greek court had invalidated two same-sex marriages that had been performed by the mayor of Tilos, a small Greek island, who had relied on the lack of specificity in an old law that failed to specify that partners to a civil union must be of the opposite sex. The prosecution had requested the court to annul the marriages “because the spirit of the Constitution defines marriage as matrimony between a man and a woman with the intent of forming a family.” We are puzzled at the idea that a “spirit” can “define” something...

Peru — As part of a reform of law enforcement in the country, Interior Minister Mercedes Cabanillas issued a regulation banning gay people from being police officers. The regulation states that any police officer who has sexual relations with someone of the same gender will be indefinitely suspended from the force. However, Minister Cabanillas is not singling out gays for her morality drive, as she also prescribed suspension for married officers found to have cheated on their spouses. BBC News, May 14, 2009.

Russia — For the fourth year in a row, local authorities in Moscow used riot police to break of a gay pride parade and arrest its leaders. The city has banned any public gay pride activities, which Mayor Yuri Luzhkov has labeled as “satanic” and “weapons of mass destruction.” This year’s attempted pride demonstration came as Moscow was preparing to host the annual Eurovision Song Contest, which has been won at various times by gay and transgender competitors. Several gay rights leaders from other countries who participated in the attempted parade were among those arrested, including UK gay rights leader Peter Tatchell.

*** The New York Times reported on May 13 that a lesbian couple’s attempt to obtain a marriage license had been rebuffed by the Moscow registration office, to nobody’s surprise. Irina Fedotova and Irina Shipitko are believed to be the first same-sex couple to have applied for a marriage license in Russia. The official response: “According to article 12 of the family codes, for a marriage to be sanctioned it is necessary to have the mutual and voluntary agreement of a man and a woman.” The women stated that they would attempt to appeal this ruling.

Thailand — Sensitive to complaints that blood donor rules have discriminated against gay men by classifying them as ineligible to give blood, the Thai Red Cross Society has revised its blood donor screening rules to ask generally about high risk sexual behavior by donors, in place of the rule adopted last year specifically asking about sexual orientation. At the same time, blood screening practices will be bolstered to take into account potential exposure to other blood-borne infections and travel to countries where such exposures might occur. Bangkok Post, May 30, 2009.

Uruguay — Uruguay has ended its ban on military service by gay people. A decree signed by President Tabare Vazquez and Defense Minister Jose Bayardi ends a ban that was officially imposed the military dictatorship in 1973–1985. A.S.L.
AIDS & RELATED LEGAL NOTES

Third Circuit Approves Deportation of PWA to India Despite Treatment Concerns

A U.S. Court of Appeals, 3rd Circuit, summary action panel ruled in Desai v. Attorney General, 2009 WL 1426760 (May 22, 2009) (not selected for publication in F3d), that a man from India with full-blown AIDS was not protected against deportation under the Convention Against Torture (CAT).

According to the per curiam opinion of the court, Desai has been living in the United States for almost three decades, having been admitted as a lawful permanent resident in 1980. On June 4, 2008, subsequent to his conviction on drug and theft charges, he received notice that he was subject to removal for engaging in criminal activity. At his hearing, he sought deferral of removal under the CAT, alleging that he faced persecution and discrimination if he were returned to India because he is living with AIDS and would not receive proper medical treatment there. He also claimed that his criminal history in the U.S. would subject him to detention and persecution by the government. The Immigration Judge denied relief, and the BIA upheld that determination.

On appeal, Desai renewed his argument that he would face hardship and inadequate medical care in India, but the court of appeals panel was not swayed. “The BIA correctly concluded that Desai filed to establish that the government of India had any specific intent or motive to torture him,” wrote the court. “The pain and suffering Desai claimed that he would experience as a result of either inadequate medical treatment or being detained upon return to India would not, as the BIA correctly noted, be the result of any specific intent to torture by the Indian government, but an unintended consequence of medical care that is deficient compared to what he is now receiving.” The court also found that Desai’s evidence did not suggest that the government would direct or encourage discrimination against him. The court characterized this as “general discrimination that does not constitute torture.” In short, deficiencies in treatment of people with AIDS in other countries are not considered by U.S. asylum and immigration law to justify granting relief against deportation, in the absence of evidence that foreign governments are deliberately targeting HIV+ people for extreme adverse treatment. A.S.L.

California Court of Appeal Rejects HIV Discrimination Claim

California Appellate Court Justice Richard Fybel has delivered a lengthy opinion affirming summary judgment against an HIV+ employee who sued his employer for disability discrimination. Scotch v. Art Institute of California-Orange County, Inc., 93 Cal.Rptr.3d 338, 2009 WL 1219956 (Cal. App. 4th Dist., m May 6, 2009). According to Justice Fybel, plaintiff Carmine Scotch failed to state a case of discrimination that a reasonable jury could believe. Key to the decision was Mr. Scotch’s failure to show, to the court’s satisfaction, that his employer’s decision to cut his workload was for any reason other than what the employer claimed, as well as Scotch’s failure to propose a reasonable accommodation that would meet the needs of both him and his employer.

Carmine Scotch was an instructor at the Art Institute of California-Orange County, teaching five course sections, which was considered a full-time workload. The Art Institute, in compliance with an accrediting agency’s standards, generally required faculty members to have graduate degrees, but made exceptions for faculty with work experience or other professional qualifications. In 2005, concerned about its accreditation, the Institute started pressuring its faculty to get advanced degrees, offering to pay most of the tuition. Scotch promised to look into getting his masters degree, but around the same time he asked not to be scheduled for morning classes because the medications he was taking for an unspecified ailment made it difficult for him to drive in the morning. In early 2006, Scotch started getting ill, missed some school events, and received a poor performance review. He told his supervisor that he was ill, and informed the HR director that he was HIV+. The HR director promised to keep the information confidential.

Over the course of several months in 2006, the Institute became adamant about Scotch and other instructors obtaining masters degrees, but Scotch started feeling that his poor performance review and the pressure to get the masters was retaliation for letting it be known that he was ill. The HR director tried to mediate between Scotch and management, urging him to come up with a plan to get his masters, and offering to allow him to get the degree in three years rather than the standard two. Scotch never presented a plan to get his masters.

Meanwhile, enrollment started to decline, and the Institute had to cut back on its classes. The school began allowing only those with advanced degrees to teach upper division classes. Scotch’s classes were cut back, and he went from full-time to part-time teaching and consequently lost his medical coverage. Scotch asked the HR director whether his status was changed to part-time because of his HIV status, and the HR director said, “Absolutely not,” that it was because of the accreditation problems. But Scotch was convinced that his demotion was because of his medical problems, and placed a letter to that effect in his personnel file. In July 2006, Scotch resigned, and filed a lawsuit.

Scotch sued under the California Fair Employment and Housing Act, specifically, under Cal. Gov. Code section 12940(a), barring discrimination based on disability or a medical condition. Among other claims, Scotch alleged that the Institute violated FEHA by (1) reducing his employment status to part-time because he was HIV+, (2) failing to make a reasonable accommodation, and (3) failing to engage in the required interactive process (essentially, face-to-face meetings between the employee and employer to work out an accommodation).

Scotch was unsuccessful in getting any of these claims before a jury. The trial court granted the Institute’s motions for summary judgment on all claims, which were affirmed by the court of appeal in Justice Fybel’s opinion.

The court of appeal held the Scotch did not show any causal link between his HIV status and the reduction in his teaching hours. Nor could Scotch show that the Institute’s stated reason for the cutback, the accreditation problem combined with declining enrollment, was false or pretextual. Scotch attempted to argue that because he was not told about the masters requirement until after he had revealed his illness, a jury could infer that the masters requirement was pretextual. However, at the point when the masters requirement was pressed, he had not revealed to anyone but the HR director that he was HIV+, and the court would not impute such knowledge to the employer. Nor would the court read the Institute’s implementation of the masters requirement as caused by Scotch’s illness, merely based on the timing of events, because the school applied the requirement to all teachers uniformly, and made course assignments based on the masters requirement. Scotch also claimed that even if he had gone
into a masters program, the school would have cut his teaching assignments; the court did not find substantiation for this claim. The court found that the Institute’s offer to pay for most of a masters program for Scotch, to allow him to finish it in three years rather than two, and to adjust his schedule so that he could attend school, was a reasonable accommodation. Scotch’s proposed accommodation, that he be given priority in teaching assignments to ensure that he maintained full-time status, was beyond anything that an employer is required to do, and amounted to a guarantee of full-time employment. The court defined “reasonable accommodation” as “a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.” The accommodation requested by Scotch was far more than this, said the court.

In order to recover on the charge of failing to engage in an interactive process, the employee must first have identified a reasonable accommodation available at the time of the interactive process. Scotch failed to identify an accommodation other than the one discussed above, which the court rejected as unreasonable as a matter of law. Thus, Justice Fybel wrote that Scotch had presented nothing to discuss, making an interactive process meaningless and, consequently, no damages were available for the Institute’s alleged failure to engage in such a process.

The decision boils down to three salient findings: (1) The Institute showed a nondiscriminatory basis for the plaintiff’s demotion, namely that instructors needed advanced degrees in order for the school to be accredited, Scotch had no such degree and had not applied to a degree program, and enrollment had decreased. (2) The accommodation proposed by Scotch, that he be given more classes to teach, was not reasonable. (3) Scotch could show no causal link between the revelation of his illness and his reduction to part-time status or that the Institute’s stated reason was a pretext. Alan J. Jacobs

ERISA Administrator’s Termination of Benefits for HIV+: Participant Upheld

In 2006, the insurance plan administrator for PricewaterhouseCoopers (PwC) cut off Charles Jenkins’s disability benefits. Jenkins had been on disability since 1994, when complications from HIV resulted in serious fatigue and nerve damage that prevented him from continuing work. Upon reviewing PwC’s decision, Judge Evans, writing for a unanimous panel of the Seventh Circuit Court of Appeals, held that the administrator’s decision was not in violation of law as it was rationed based on medical evidence. Jenkins v. Price Waterhouse Long Term Disability Plan, 564 F.3d 856 (7th Cir. May 4, 2009).

Jenkins worked for PwC for four years before HIV-related complications prevented him from being able to perform even sedentary tasks at work. Upon completion of a medical examination, Jenkins received benefits under the category of “total disability.” In 2004, PwC reopened Jenkins’ file and submitted him to another battery of tests, possibly as a reaction to hearing that Jenkins had taken a trip to London with a friend. After Jenkins’ file was reopened, two doctors declared that Jenkins’ condition was stable and would not keep him from working. These doctors, however, never met with Jenkins, but only reviewed his files and spoke with his current doctor. A further examination was given by another doctor, who noted that while Jenkins’ progression of AIDS was “moderately advanced,” he could at least attempt an 8-hour work day.

Judge Evans pointed out that this doctor’s opinion seemed to be based mainly on own Jenkins’ optimistic self-diagnosis. Jenkins’ longtime doctor disagreed heavily with any optimistic diagnosis and felt that the other doctors were ignoring the possibility of a further opportunistic infection should Jenkins return to work.

In beginning his analysis, Judge Evans stated that the standard of review for an ERISA plan administrator’s decision is highly deferential, simply inquiring as to whether the administrator’s decision had “rational support in the record.” Judge Evans held that there was such rational support, as multiple health professionals had concluded that Jenkins could attempt employment. Judge Evans seemed reluctant in his ruling, pointing out that this holding is “not to say the evidence compelled [the administrator’s] decision, just that it permitted it.”

Jenkins had argued that the administrator’s decision to cut off benefits was impossible to reconcile with its earlier decision placing him on “total disability.” In response, Judge Evans turned to the history of HIV/AIDS, pointing out that in the early 1990s, when PwC made its initial determination, HIV/AIDS was a death sentence. With the advent of new drugs to combat the disease, “[i]t was not downright unreasonable for [the administrator] to shift its position….” Chris Benecke

California Appeals Court Sustains Denial of Anti-SLAPP Motion by Producer of AIDS Film

A&E Television Networks produced a multi-part documentary called “The History of Sex” which has been broadcast and then released on DVD. During the chapter on the 20th century, there is a segment on the AIDS epidemic, during which a film clip is shown with the plaintiff, Miles Whitaker, standing on a street at night, holding a cup and nodding towards passers-by. While the clip is shown, a narrator is referencing the AIDS epidemic as having taken a deadly toll on gay men and IV drug users. The plaintiff, Miles Whitaker, who alleges he is neither HIV+, a drug user or gay, did not provide permission for his image to be used in the film. He sued A&E, asserting claims of defamation/libel per se, invasion of privacy-false light, and intentional infliction of emotional distress, and sought injunctive relief against further distribution of the documentary. A&E filed a special Strategic Lawsuit Against Public Participation Act (anti-SLAPP) motion, seeking to get the case dismissed. The trial court denied the motion and A&E appealed unsuccessfully in Whitaker v. A&E Television Networks, 2009 WL 1383617 (Cal. App., 4th Dist., May 18, 2009).

A&E argued that its documentary was on a topic of public interest and, as such, was not subject to this lawsuit and entitled to protection under the anti-SLAPP statute. Whitaker countered that he was not part of any discussion on the topic of the AIDS epidemic and his depiction could not be justified as somehow connected with that discussion. The court agreed with Whitaker.

A&E argued that the court should protect its First Amendment activity of distributing a documentary about the AIDS epidemic, as a matter of public interest, but the court found that no public interest attached to falsely labeling Whitaker as an IV drug user or a person living with HIV. (There was some uncertainty in the course of the litigation about whether Whitaker was also premising his lawsuit on being falsely labeled as gay, but ultimately he doesn’t seem to have gone there, although he denied being gay.)

Writing for the court, Justice O’Leary acknowledged A&E’s First Amendment interests. “However,” wrote O’Leary, “A&E’s act of speaking on the AIDS epidemic is not the principal thrust or gravamen of Whittaker’s complaint. The principal thrust or gravamen of Whittaker’s causes of action is the assertedly false portrayal of Whitaker as an intravenous drug user and HIV/AIDS sufferer. A&E does not suggest Whitaker is a public figure, an therefore, whether he is an intravenous drug user who is an HIV/AIDS sufferer is not a matter of public interest…. The issue is whether the showing of Whitaker, even briefly, while the narrator stated, AIDS had exacted a deadly toll on gay men and drug users’ implied Whitaker belonged to this group of people.”

While we agree courts should interpret section 425.16 broadly, wrote Justice O’Leary, “in a manner favorable to the exercise of freedom of speech, we are constrained by the legal principles applicable to a determination whether the anti-SLAPP statute applies. When section 425.16 applies is determined by the principal thrust or gravamen of plaintiff’s claim. Whitaker did not sue A&E because it produced, broadcasted, and released “The
HIV/AIDS Litigation Notes

Texas — Bobby Mitchell showed up at the Dallas County Jail facing criminal charges on September 24, 2009. He told the intake staff that he was HIV+, but presented no documentation, although the gave them the name of his physician. The jail officials contacted Mitchell’s health care provider, but it was difficult getting a timely response and the start of his medication was delayed at least two months. Mitchell sued jail administrators, alleging deliberate indifference to a serious medical condition, Mitchell v. Pavekka, 2009 WL 1159316 (N.D. Tex., April 28, 2009). Somewhat surprisingly, pretrial detains are not entitled to any more protection against medical negligence than convicted felons; the Supreme Court has mandated that the same “deliberate indifference” standard be used for both. In this case, Magistrate Jeff Daplan concluded that the jail authorities were trying to get the necessary information together to assemble drugs and make sure relevant policies and protocols for administering HIV meds were in place. The court found that the deliberate indifference standard could not be met, and accepted the magistrate’s recommendation to grant defendants’ motion for summary judgment.

Texas — In Smith v. State of Texas, 2009 WL 1493013 (Tex. App. — Dallas, May 29, 2009), a man who was convicted of aggravated sexual assault of a woman and sentenced to forty years in prison argued on appeal that the trial judge erred by granting the prosecution’s motion in limine to exclude any evidence that the victim was HIV+. Defendant Smith’s theory on the relevance of the victim’s HIV status was that he contended their sex was consensual, and that a woman who was not HIV+ would have insisted on the use of condoms for consensual sex to protect herself from infection, but an HIV+ woman would not do so. Since condoms were not used, Smith argued, this was evidence he could have used to prove consent. The court was not persuaded, Justice Kerry P Fitzgerald writing for the panel: “His theory seems to be that a person who is HIV positive is less likely to use a condom during consensual sex because she would feel no need to protect herself from HIV. We reject Smith’s argument as sheer speculation. We conclude that evidence Hubbar [the victim] was HIV positive would not have tended to make the State’s theory of non-consensual sex less probable. Thus, such evidence was neither relevant nor admissible.”

Social Security Disability Cases

New Jersey — In Font v. Commissioner, 2009 WL 900052 (D.N.J., March 31, 2009) (not officially published), U.S. District Judge Greenaway found that the administrative decision to deny disability benefits to the HIV+ plaintiff was not arbitrary or capricious, “since the ALJ determined that Plaintiff was capable of performing his past relevant work during the time period in question, and was not disabled during that period,” and there was sufficient evidence in the record to support that conclusion.

New Jersey — In Robinson v. Commissioner, 2009 WL 572038 (D.N.J., March 30, 2009), District Judge Greenaway vacated the Commissioner’s decision to deny benefits to the HIV+ plaintiff, finding merit to the plaintiff’s assertion that the ALJ in his case exhibited bias, suggesting that he had not had a fair hearing of his disability claim. The court specified that the case be remanded for rehearing before a different ALJ.

New York — In Edel v. Astrue, 2009 WL 890667 (N.D.N.Y., March 30, 2009) (not officially published), District Judge Lawrence E. Kahn approved a magistrate’s recommendation to deny the Commissioner’s motion for summary judgment and to remand for a new determination of the HIV+ plaintiff’s credibility by the ALJ. The magistrate found that the ALJ had relied on misstatements from the record in casting doubt on the plaintiff’s credibility concerning the side-effects he experienced from medication for his HIV and hepatitis C conditions.

Ohio — In Saine v. Commissioner, 2009 WL 891768 (S.D.Ohio, March 30, 2009) (not officially published), District Judge Walter Herbert Rice accepted a magistrate’s recommendation to uphold the denial of disability benefits to the HIV+ plaintiff, finding there was substantial evidence in the record to support the administrative determination. “Were this Court hearing this matter on a de novo basis, the result reached herein might well be different,” wrote Judge Rice. “However, the Court’s task in evaluating a decision of non-disability by the Defendant is not to determine whether the record as a whole contains substantial evidence of disability; rather, the Court’s task is limited to whether the Commissioner’s decision of non-disability is supported by substantial evidence. In this instance, the record is so supported.”

West Virginia — In Ford v. Astrue, 2009 WL 1437839 (W.D.Va., May 21, 2009) (not officially published), District Judge Glen E. Conrad found that substantial evidence in the record supported the administrative determination that the HIV+ plaintiff was not qualified for disability benefits. The ALJ had found that the plaintiff’s course of medication had rendered her virtually asymptomatic, and although she suffered from depression associated with her HIV status, it was not sufficiently severe to disable her from all gainful employment.

PUBLICATIONS NOTED

LESGIAN & GAY & RELATED LEGAL ISSUES:


Chemerinsky, Erwin, Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue, 17 Wm. & Mary Bill of Rts. J. 765 (March 2009).
Specially Noted:

Vol. 30, No. 1 of the Journal of Legal Medicine (Jan-March 2009) includes a symposium collection of articles about the issues presented by “dangerous” infected patients.

EDITOR'S NOTE:

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