SOUTH CAROLINA SUPREME COURT AWARDS $10 MILLION TO HIV-POSITIVE TEEN FOR WRONGFUL CANCELLATION OF HIS HEALTH INSURANCE

Jerome Mitchell, Jr., then a 17–year-old South Carolina teenager, purchased health insurance because his parents’ insurance would not cover him once he entered college. He truthfully answered his insurer’s query as to whether he had been diagnosed or treated for an immune deficiency disorder; the then answer was “no.” However, a year after obtaining insurance from Fortis Insurance Co., he tried to donate blood, and was then informed that he was HIV+. When he submitted his first claims for HIV-related diagnosis and treatment, Fortis investigated the claim and found a note on his medical chart mistakenly showing that his first treatment for HIV occurred before he filled out the insurance application. Despite overwhelming evidence that the notation on the medical chart contained the wrong date, Fortis terminated Mitchell’s insurance, and then refused to reconsider its decision. On these facts, the jury found for Mitchell on claims of breach of contract and bad-faith rescission. It awarded Mitchell $186,000 in actual damages, and $15 million punitive. Mitchell Jr. v. Fortis Insurance Co., 2009 WL 2948558 (Sept. 14, 2009).

The evidence raised at trial was damning. For example, Mitchell’s insurance expert testified that it was Fortis’s practice to “shut down” an investigation when a single piece of evidence supported rescission of coverage. Managers at Fortis would not admit to having a responsibility to find out the truth regarding those who are covered; however, Fortis’s expert conceded that an insurance company must investigate and find information that may lead to payment of a claim. Fortis was shown to have tried to conceal evidence of its bad faith. All of this led the jury to award $15 million in punitive damages based on the bad faith rescission of its insurance contract.

The South Carolina Supreme Court did not even discuss whether punitive damages were justified; that was a given. The only questions were whether the award was so large as to violate Fortis’s due process rights, and whether certain evidence was properly admitted. The court reviewed standards for punitive damages at the low end of the single-digit range. However, the court stated, “The conduct in this case was reprehensible enough to merit an award toward the outer limits of the single-digit range.”

Fortis raised various objections to evidence admitted at trial, which the court dismissed with brief explanations. The court further found that the jury did not act out of passion, caprice, or prejudice so as to invalidate its awards. Alan J. Jacobs

LESBIAN/GAY LEGAL NEWS

Texas Judge Finds Same-Sex Marriage Bans Unconstitutional

In a surprise move, Texas District Judge Tena Callahan, who was elected to the bench in the 302nd Family District Court in Dallas in 2006, ruled on October 1 that a male same-sex couple who married in Massachusetts and subsequently moved to Dallas can get a divorce from the Texas Family Court. In the Matter of the Marriage of J.B. and H.B., No. DF–09–1074 (302nd Judicial District, Dallas County, Texas, October 1, 2009).

Judge Callahan issued a brief, one-page order, which technically was responding to an attempt by Attorney General Greg Abbott to intervene in the case. Abbott had filed his Intervention a week after the divorce petition was filed last January, arguing that the court did not have jurisdiction to decide the divorce case because of the state’s constitutional and statutory bans on performing or recognizing same-sex marriages.

In her Order, Judge Callahan provided no explanations or legal reasoning, merely asserting that the constitutional and statutory provisions violate “the right to equal protection” and therefore violate “the 14th Amendment of the United States Constitution,” and so, she continued, “the Court FINDS that it has jurisdiction to hear a suit for divorce filed by persons legally married in an-
recognize same-sex couples as family members when the courts issue orders of protection in domestic violence cases, which would be inconsistent with an argument that the state marriage amendment precludes the courts from recognizing same-sex couples as married for any purpose.

Judge Callahan’s decision ignores all of this argumentation, merely stating her conclusions. Those conclusions are at the heart of another case that has received extensive national media coverage, Perry v. Schwarzenegger, filed in San Francisco Superior Court earlier this year by Ted Olsen and David Boies on behalf of two California same-sex couples challenging the constitutionality of California Proposition 8, which enacted a more limited anti-gay marriage amendment in that state. (The Texas marriage amendment forbids civil unions as well as same-sex marriages, while the California amendment has no effect on the state’s Domestic Partnership law, which provides virtual civil unions for registered partners.) In Perry, the plaintiffs are arguing that Proposition 8 violates the 14th Amendment’s equal protection clause by embedding in the California Constitution a facially discriminatory definition of marriage. Similarly, in Gill v. Office of Personnel Management, filed last winter by Gay & Lesbian Advocates & Defenders in Boston, an equal protection claim based on the 4th Amendment is asserted against the federal Defense of Marriage Act on behalf of married same-sex spouses from Massachusetts who have been denied federal benefits to which they would otherwise be entitled.

State trial court decisions are interesting in themselves and may affect the rights of the parties if not reversed on appeal, but otherwise have no precedential value. Only appellate courts can issue decisions that are binding on other courts, if not reversed on appeal, but otherwise have no precedential value. Only appellate courts can issue decisions that are binding on other courts, and only the highest court of a state can issue decisions binding on all the courts of the state, so it will be a while before we can know how important this ruling is. But for now it has created quite a sensation in Texas, to judge by the local media reports. Undoubtedly anticipating how much it would disrupt her day, Judge Callahan arranged to issue the ruling late on Thursday, October 1, and then took off to attend a full-day meeting on Friday with her clerk, leaving behind a message on her chambers phone asking callers not to leave voice-mails. This writer, frustrated at not being able to find the opinion, communicated with attorney Schulte, who sent out a copy together with his papers responding to the A.G.’s intervention, for the increased frustration and risk of violence by the Claimant was prevented from achieving the declared gender “for all purposes.” Although Claimant had a certificate proving that she was a female, Judge Elvin stated, the Act does not require that the prison officials ignore Claimant’s physical characteristics, such as her male genitalia. This recognition of Claimant’s physiology, however, still must be within the bounds of Section 8 of the ECHR, which decrees that “everyone has the right to respect for his private and family life, his home and his correspondence.”

Section 8 is thus understood to protect “the personal autonomy of every individual,” including those who are transsexual. Judge Elvin noted that Claimant was prevented from achieving the full expression of her gender while remaining in a male prison. While Section 8 imposes both positive obligations and negative prohibitions, the case at hand was found to overwhelmingly affect Claimant in the negative. The Secretary’s decision was viewed as a “significant restriction on her autonomy and her wishes” to seek surgery—a goal of Claimant’s “goes to the heart of her identity.”

After finding that Section 8 safeguarded the particular rights at issue in this case, Judge Elvin then turned to the Secretary’s justification, noting that a proportionate justification for the invasion of Claimant’s rights could excuse the violation. The Secretary’s justification, however, was found to be insufficient. The Secretary failed to consider the increased frustration and risk of violence by the Claimant as a result of restricting her from pursuing surgery. The Secretary also assumed that Claimant would have to be in segregation permanently at the female facility, ignoring both that...
the Claimant was already in segregation at the male facility as well as the possibility that segregation after transfer would only be temporary. Further, opinions by experts were largely ignored unless they supported the Secretary’s position. Accordingly, Judge Elvin held that the Secretary’s decision was in violation of Section 8 of the ECHR.

Judge Elvin also noted that the Secretary’s decision was unlawful on common law grounds because it was unreasonable and failed to consider relevant factors, as detailed in the Section 8 discussion. Judge Elvin also turned to Section 14 of the ECHR, guaranteeing equal protection of the law, and noted that Claimant’s argument here would likely fail. Though explicitly not ruling on the argument, as the Section 8 claim had already carried the case, Judge Elvin opined that, at some point, “actual physical characteristics of a post-certificate, but pre-operative, female may remain relevant…” Since the Claimant could not prove that females with male sexual organs were treated differently, her Section 14 claim would likely fail.

Chris Benecke

Federal Judge Dismisses Tort Claims Against Florida Hospital and Staff Who Disrespected Lesbian Relationship

What is one to make of U.S. District Judge Adalberto Jordan’s decision of September 29 in Langbehn v. The Public Health Trust of Miami-Dade County, No. 08–21813–GIV-JORDAN (U.S.Dist.Ct., S.D.Fla.)? Perhaps that there is not necessarily a legal remedy for every wrong, for Judge Jordan’s conclusion says that what the hospital did in disrespecting the relationship of a lesbian couple in a time of medical emergency “exhibited a lack of compassion and was unbecoming of a renowned trauma center,” but, on the other hand, that no legal relief was available for these failings.

This case involves the sad and now-much-publicized story of Janice Langbehn and Lisa Marie Pond, longtime partners who in their twentieth-anniversary year, 2007, went with their children to Miami to embark on a Caribbean cruise. They never made it to sea, because Pond collapsed aboard ship and was rushed to Ryder Trauma Center at Jackson Memorial Hospital in Miami. Thence began the nightmare for Langbehn and the children, as they were at first treated as virtual strangers to Pond, denied access and information on her condition. Langbehn claims that Pond’s social worker said to her that she should not expect any information or access because they were in an “anti-gay city and state.”

At about the time that Ryder doctors diagnosed an aneurysm as the cause of Pond’s trouble, a fax arrived at the hospital containing Pond’s power of attorney designating Langbehn to act as her guardian and to make medical decisions, and this was filed in Pond’s hospital record, but nobody informed Langbehn that it had arrived. It was not until almost an hour later that doctors first consulted with Langbehn, who consented on Pond’s behalf to the placement of a brain monitor, and more than a half hour later, Langbehn received her first real briefing from the doctors, with Pond’s parents on speaker-phone. At that time the doctors learned that Pond’s condition was inoperable, and Langbehn told them that Pond was a designated organ donor. She also asked if she and the children could see Pond now that medical efforts were being abandoned, but they continued to be excluded for forty more minutes, when they were finally allowed to accompany a priest who was there to administer last rites of the church to Pond. They were hurried back out after five minutes. Langbehn kept asking to be able to see Pond, but all her requests were denied until after Pond was transferred from the trauma center to the intensive care unit hours later, and finally Langbehn and the children were allowed to visit. Pond passed away soon thereafter. Langbehn asserts that relatives of other patients were given access to their loved ones in the trauma unit while she was forced to sit without any information or access to her life partner for prolonged periods of time. Surely, a legal spouse would not have been treated in this way.

Langbehn was distraught at the loss of her partner and at the way she was treated, went to Lambda Legal with her grievances, and the lawsuit eventuated. The problem for Lambda Legal was to somehow fit into the categories of civil liability the harms that Langbehn had suffered (and that Pond and the children suffered as well) from the hospital’s failure to recognize their relationship in this time of extreme emergency.

Judge Jordan found that these attempts to fit the various claims into the categories recognized by law were unsuccessful. Part of the problem is that claims for harm have to fit into the formulas of tort law that are particularly demanding of the plaintiff, especially a plaintiff who is not in a direct contractual relationship with the parties she is suing. In order to recover in a tort proceeding the plaintiff must show that the defendant has violated some duty to the plaintiff, and that the violation caused an injury to the plaintiff. In the context of a hospital, it is common to find a duty to patients, but much more difficult to establish any sort of legal duty to the family and friends of plaintiffs.

Langbehn argued that the response of the hospital and various individual employees – the social worker, the doctors – was negligent, inflicting emotional distress on Langbehn, Pond and the children, and Langbehn presented allegations that this distress manifested itself, at least in her case, in physical symptoms. In addition, she tried to allege “per se tort,” a claim that the hospital’s conduct should subject it to liability without meeting any of the more specific tort theories, on the argument that it was harmful conduct that does not meet acceptable social standards.

While Judge Jordan professed sympathy in his final lines, the bulk of the opinion is devoted to a decisive repudiation of every theory for relief that Langbehn advanced. The hospital has no duty to relatives of patients to afford access, wrote Jordan, and he could find no basis in Florida tort law for characterizing the relationships in this case as fiduciary relationships. Neither did he find that the conduct of the hospital and its employees was so extreme and outrageous by comparison to other Florida cases that the demanding test for “intentional infliction of emotional distress” could be met in this case.

While acknowledging that Langbehn, as the designee of a medical power of attorney that was promptly faxed to the hospital, did have rights that must be respected under Florida law, the court found that those rights had, at least minimally, been respected. Although certain personnel were callous and unfeeling and blocked Langbehn from the degree of access that would have been humane and compassionate, the court found that doctors did consult Langbehn more than once, and that the complaint failed to specify what decisions Langbehn could have made that would be any different from the care that was provided.

Jordan observed that although Florida has a patient bill of rights statute, it is not applicable to this lawsuit because there was no plausible allegation of violation of Pond’s rights, and as the “patient” in this case, she was the only one with rights under the statute. Jordan also noted that these Florida statutes specifically do not authorize private law suits for their enforcement.

Reading this opinion is a heart-sinking experience. Some of that is because it shows the limitations of tort law in dealing with realities of modern life. At the same time, one can imagine a judge more inclined to find some theoretical basis for redress when the hospital’s conduct is, in the judge’s few, censurable but not legally actionable, but even if such a friendly trial judge were to be found, any sizable damage award would be subject to appeal.

Langbehn and her lawyers, having suffered dismissal of the case, have a few weeks to decide whether to seek appellate review of this ruling. A.S.L.

Another Chapter in the Sex Toys Wars: Alabama Supreme Court Rejects Constitutional Challenge

In J568 Montgomery Highway, Inc. v. City of Hoover, 2009 WL 2903458 (Sept. 11, 2009, the Alabama Supreme Court ruled, 7–2, that Alabama Code sec. 13A–12–200.2(a)(1), the “sex toys” sale prohibition, violates neither the federal nor the Alabama Constitution. The ruling opens up the possibility that the U.S. Supreme Court may finally visit the issue, by creating a new opportunity to get to the Court to resolve a significant split among the lower courts about the meaning of Lawrence v. Texas as a precedent.
The case arose from litigation by the City of Hoover against a business known as Nancy’s Nook or Love Stuff, a store located in a stand-alone building where the portion devoted to “hard core” adult material is sectioned off with access restricted to adults, and another part of the store, open to all customers, has some sexually-oriented materials. Sex toys are part of the inventory. The city claimed that the location of the store violated the local adult zoning ordinance because of its proximity to various other institutions, including some churches, and sought to shut the place down as a nuisance. Defendant counterclaimed, alleging the zoning ordinance was unconstitutionally ambiguous in its definition of an adult business, and that the state law ban on sale of sex toys was also unconstitutional. The trial judge agreed with the defendant on the ambiguity point and rejected the city’s request to shut the place down, but felt constrained by recent 11th Circuit case law upholding the sex toys ban to do so as well. The issue before the Alabama Supreme Court on appeal is the constitutionality of the sex toys provision.

In his opinion for the court, Justice Michael Bolin described in detail the extensive litigation about the Alabama sex toys provision in the federal courts, culminating in Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007), upholding the challenged provision, as well as the Texas sex toys litigation, Reliable Consultants v. Everline, 517 F.3d 738 (5th Cir. 2008), in which the 5th Circuit disagreed with the 11th Circuit’s interpretation of Lawrence v. Texas and held the Texas law unconstitutional. The Alabama Supreme Court stated its agreement with the reasoning of Williams, finding that Lawrence could not be construed to extend federal constitutional privacy protection to public commercial activity, and that the state could rely on moral disapproval of sex toys to sustain its criminal statute. The court also rejected the state constitutional challenge, finding that the argument based on due process provisions of the state constitution had not been adequately presented below.

Writing for himself and Chief Justice Sue Bell Cobb in dissent, Justice Thomas A. Woodall contended that the 5th Circuit got it right in Reliable Consultants. “In my opinion,” wrote Woodall, the challenged statute “by generally bann[ing] the sale of sexual devices, ‘impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.’” citing Reliable Consultants. He continues, “In my opinion, the majority’s focus is unduly narrow and ignores the burden the statute places on private sexual activity.”

So far, the U.S. Supreme Court has avoided ruling on the sex toys controversy, first by denying certiorari in Williams, and, second, because the state of Texas decided not to seek certiorari in Reliable Associates. The majority opinion in this case seems to throw down the gauntlet to the Court, by extensively discussing the two circuit cases, emphasizing their sharply disparate views of the precedent effect of Lawrence, and then firmly declaring for one side in the dispute, leaving the dissent to argue for the other. This sets up an ideal circumstance for obtaining U.S. Supreme Court review, as the difference in approach is starkly presented, should the plaintiffs seek to go that route. Since it seems unlikely they would have pursued this case to the Alabama Supreme Court were they not serious in seeking invalidation of the statute, one can expect that a certiorari petition will follow soon, A.S.L.

DADD: A Crack in the Facade?

In a surprise move that may signal willingness by senior military officials to cooperate in replacing the existing “Don’t Ask, Don’t Tell” policy on military service by LGBT people with a new nondiscrimination, Joint Forces Quarterly, a publication of the Joint Chiefs of Staff office in the Pentagon, has published the winning essay in the 2009 Secretary of Defense National Security Essay Competition, The Efficacy of “Don’t Ask, Don’t Tell,” by Colonel Om Prakash, an Air Force officer who wrote the piece while a student at the National War College. See ndupress.ndu.edu.

Contrary to what the title might suggest, the article concludes that the policy is not efficacious; indeed, that perpetuating it does not make sense. Although some activists might find statements that induce winces here and there, overall the essay broadly endorses the major criticisms of the policy: that it has been costly in the loss of valuable personnel, that it is based on unproven premises about the impact on unit cohesion and moral if openly gay people were allowed to serve, and that it is out of sync with social trends in the United States towards more acceptance of openly gay people as co-workers.

According to press reports when advance copies of the essay got into the hands of The Boston Globe and the New York Times on September 30, the essay was published after review by and with the approval of the office of the Chairman of the Joint Chiefs of Staff. Since that office, then headed by Colin Powell, was a major proponent of maintaining a ban on gay military service back in 1993 when DADD was adopted, this may represent an important sign of changed attitudes in that critical office, which carries great weight with Congress on military personnel issues. A.S.L.

Federal Court Issues Second Ruling in Stern-Cosby Defamation Case

Last month, U.S. District Judge Denny Chin determined that falsely calling somebody a homosexual is not per se defamatory under New York law, so a plaintiff suing for such a statement would have to allege special damages (i.e., pecuniary injury) in order to survive a motion to dismiss. In his deposition in the case at hand, Stern v. Cosby, plaintiff Howard Stern, former lawyer and intimate partner of Anne Nicole Smith, did not allege special damages, as he was pursuing the case on a defamation per se theory. Responding to the court’s ruling that Stern would have to show special damages and Stern’s failure to make the necessary allegations, defendant Rita Cosby, author of the book that is the basis for the lawsuit, moved for reconsideration of the ruling. A logical move, but one that seems to have backfired, as Judge Chin has now issued a new ruling on the motion, finding that the statements in the book that Stern is challenging relative to this point are actually libelous per se under New York law! Stern v. Cosby, 2009 WL 3049550 (S.D.N.Y., Sept. 25, 2009).

In the new opinion, Judge Chin commented that in reaching the conclusion that Stern would have to allege special damages to maintain his claim regarding the homosexuality allegations, “I focused solely on the issue of whether calling a person a homosexual is libelous per se, and I held that it was not.” On this new motion, however, Stern argued that the actual statements in the book that he was contesting were themselves libelous per se, “even assuming statements imputing homosexuality are not libelous per se,” and Judge Chin agreed with him.

The analysis begins with the question whether the per se defamation categories apply only to slander (spoken defamation), or also to libel (written defamation), and whether the per se categories are limited to the traditional four categories generally identified by the New York Court of Appeals in past cases. Under traditional old common law rules, all written statements that could be considered injurious to the reputation of the person about whom they were made were considered per se defamatory, but spoken statements were not unless they fell into one of a handful of categories that were deemed particularly harmful. Stern argued that because the statements he challenged were written in a book, they should be presumed defamatory. But, as Judge Chin notes, the New York courts have more or less disregarded the distinction between spoken and written defamation in their modern analysis, and have restricted per se defamation to the most egregious cases, regardless whether spoken or written, so Stern’s argument on this point was not accepted.

However, Chin accepted Stern’s argument that the per se designation should not be restricted to the four traditional categories, summarized by Chin as “(1) those that accuse the plaintiff of a serious crime; (2) those that ‘tend to injure’ another in his or her trade, business or profession; (3) those that accuse the plaintiff of having a ‘loathsome disease’; or (4) and those that impute ‘unchastity to a woman.’”

Chin points out, for example, that lower New York courts have routinely over recent decades ruled that a false imputation of homosexuality was defamatory per se, even though it has not fit into any of those categories since 1980, when the New York Court of Appeals declared the state’s sodomy law unconstitutional. Furthermore, he ruled, “limiting libel per se to these four categories is in-
The parties, Angel Chandler and Joseph Barker, divorced in 1998 after approximately 6 years of marriage. They had two children during the marriage: a son born in 1993 and a daughter born in 1995. At that time, the parties' parenting plan designated Chandler as the primary residential parent of the daughter, and Barker as the primary residential parent of the son. Each parent had regular parenting time with the child who lived with the other parent. The parenting plan did not include a “paramour” provision which would otherwise restrict the parents from having any person present overnight while the child resided with the parent.

In 1999, Chandler began a relationship with a same-sex partner, M.C., with whom she now lives. In January 2001, upon agreement of the parties, the trial court modified the parenting plan designating Chandler as the primary residential parent for the son as well.

In August 2002, Chandler moved to North Carolina with M.C. At that time, the parties agreed that Barker would be the primary residential parent for both children. The court indicated, however, that Chandler disputes this agreement, writing in a footnote that “at the time [Chandler] moved, the parties had agreed that the children would join her when she was settled in North Carolina, but that [Barker] had gone back on his word”. Meanwhile, Barker remarried in or about 2004.

Several years later, Chandler moved to Trenton, Tennessee, where Barker and his wife resided with the children. On May 22, 2007, Barker filed a petition to modify the parenting plan. Chandler filed a counter-petition for modification. On November 19, 2007, the trial court required the parties to submit to a psychological evaluation.

On May 1, 2008, Dr. Pickering submitted a report detailing the result of his evaluation of the parties, the children, the stepmother and M.C. The report indicated that both Chandler and M.C. each had a positive relationship with the children. The son seemed to get along with both sets of parents, but the daughter “suffered from depression stemming from her difficult relationship with [Mrs. Barker]”. Dr. Pickering also found that Barker “disapproves of Mrs. Chandler’s sexual orientation and living arrangements and voices his disapproval openly and frequently ... Further, Mrs. Barker tends to join in the criticism and may at times initiate it.”

Dr. Pickering recommended that Barker be the primary residential parent of the son and that Chandler be the primary residential parent of the daughter. On the issue of the daughter’s “exposure” to Chandler’s paramour, M.C., Dr. Pickering wrote: “It will be for the court to decide [issues] concerning [M.C.], due to the paramour clause in most visitation orders. However, current results do indicate [M.C.] is a positive parent surrogate for both children.” Dr. Pickering also cited research that “children raised in homes with same-sex parents/parent surrogates tend to develop normal social relationships, and are no more likely to display same-sex orientation than children raised in more traditional homes.”

On May 15, 2008, a hearing was conducted on the parties’ motions for modification of the parenting plan. The parties agreed to the recommendations contained in Dr. Pickering’s report. The parties were directed to complete a standard form permanent parenting plan developed by Tennessee’s Administrative Office of the Courts. This form contained a paramour provision, which was required by Rule 23:00 of the Rules of Chancery Court for the 28th Judicial District, (“Local Rule 23”).

Chandler objected to the inclusion of the paramour provision in the parenting plan. The trial court, however, overruled her objection, stating that the paramour provision would be part of the parenting plan “like all the rest of [parenting plans] in the state of Tennessee.” The trial court noted that it was not making a “distinction between paramours of one sex or the other.” Interestingly enough, however, the Court of Appeals noted in its decision that the parenting form did not include an alcohol and drug provision which was also mandated by Local Rule 23.

As a result of the paramour restriction, severe strains were placed on Chandler and her children’s relationships with M.C. M.C. initially moved back to North Carolina. Shortly thereafter, Chandler moved to North Carolina as well, but the couple moved into a duplex in order to abide by the parenting plan.

Chandler filed an appeal to remove the paramour restriction, arguing that the trial court is not precluded as a matter of law from altering or eliminating the paramour provision. She also argued that Local Rule 23 was invalid, that the paramour provision was not in the best interest of the children, and if required, the paramour provision violated her constitutional rights to equal protection, privacy and due process. Chandler’s appeal was unopposed by Barker.

In an opinion written by Judge Holly M. Kirby, the appellate court concluded that a trial court cannot be bound by local rules in a custody determination. Judge Kirby wrote: “Tennessee statutes and public policy dictate that the children’s best interest is the paramount consideration, and thus the court must have the discretion to alter or eliminate the paramour provision in a parenting plan if the court finds that doing so is in the children’s best interest.” The court did not reach any other issues, such as whether the inclusion of a paramour provision was in the best interest of the children in this case. The appellate court remanded the case for the trial court to reconsider the mother’s arguments in light of its decision.

Eric Wursthorn
Federal Civil Litigation Notes

5th Circuit — A 5th Circuit Court of Appeals panel rejected an attempt by a man convicted of importing a person into the U.S. for immoral purposes to challenge the constitutionality of the federal statute using Lawrence v. Texas. United States v. Clark, 2009 WL 2883519 (Sept. 10, 2009). “The Lawrence majority, at the end of its opinion, 539 U.S. at 578, in explaining the limited breadth of the right it was recognizing, carefully pointed out that the case did ‘not involve public conduct or prostitution’ or ‘persons who might be injured or coerced.’” The court found that the federal statute involved in this case was intended to deal with just such situations.

7th Circuit — In Annex Books v. City of Indianapolis, 2009 WL 2853813 (Sept. 3, 2009), a three-judge panel of the court found that the trial court should have required a more extensive inquiry into the factual basis for a new adult zoning ordinance before sustaining it against constitutional attack. The City of Indianapolis had amended its adult zoning ordinance, extending it to any business that devoted 25% or more of its space or inventory, or obtained at least 25% of its revenue, from “adult” merchandise — basically sexually-oriented media or sex toys. This was an expansion from the 50% standard previously used. Four bookstores that sold such items brought this declaratory judgment action challenging the ordinance, which requires that such businesses comply with various licensing requirements and close on Sundays and between midnight and 10 am on other days. In an opinion by Chief Judge Easterbrook, the circuit panel found that the city could not just rely on general studies linking crime and decline in property values associated with adult bookstores to support this ordinance, since those studies did not relate the particular restrictions imposed here and thus did not meet the test of heightened scrutiny to be applied when materials protected by the 1st Amendment are involved.

District of Columbia — U.S. District Judge John D. Bates ruled that three disappointed applicants for positions in the Justice Department’s Honors Program for recent law school graduates could continue their suit for damages for ideological discrimination when their applications were being considered in 2006. Gerlich v. Department of Justice, No. 08–1134 (D.D.C., Sept. 16, 2009). The allegations, which surfaced in the press shortly thereafter when disgruntled career employees at DOJ went public, was that the selection of applicants was given over to a political panel that vetted people based on their ideological convictions, as reflected in news reports on their political activities. The screening panel members allegedly undertook internet searches to uncover information about the political activities of applicants. One of the plaintiffs in the case, Matthew Faiella, is an openly gay attorney who is now on the staff of the New York Civil Liberties Union.

Judge Bates dismissed several plaintiffs form the case in response to government motions, but Faiella, James Saul and Daniel Herber continue as plaintiffs. No injunctive relief will be available, however, since Judge Bates noted that the public uproar led to the ending of political screening and the remaining plaintiffs would no longer be eligible for the program, since it was intended for recent graduates and they are now all practicing lawyers.

Alabama — Lambda Legal announced a settlement in its federal lawsuit on behalf of Central Alabama Pride against the City of Birmingham and Mayor Larry Langford. Plaintiff claimed a violation of their free speech and equal protection rights when the mayor refused to allow city workers to attach Pride banners to city lampposts. Other public events publicized through such banners are routinely attached by city workers without incident. The city negotiated the settlement after losing a motion to dismiss the case in the Northern District of Alabama. Under the settlement, the city will pay legal costs and attorneys fees of more than $40,000 to Lambda Legal and its cooperating attorney, David Gespass, and will establish objective and non-discriminatory written banner-hanging regulations. Beth Littrell, a staff attorney in Lambda Legal’s Southern Regional Office in Atlanta, was co-counsel with Gespass.

California — In the pending Perry v. Schwarzenegger case challenging the constitutionality of Proposition 8 (which added an anti-gay marriage amendment to the state constitution in November 2008), U.S. District Judge Vaughan Walker denied a request by intervenor defendants, the proponents of Proposition 8, to block discovery of various internal campaign documents from last year’s initiative campaign. The court asserted that plaintiffs were seeking relevant information to support their argument that the initiative process was tainted with unconstitutional bias, and the case had not been sufficiently made by the defendants that limiting discovery was necessary to prevent harassment of individual proponents of the measure. Associated Press, Oct. 1.

California — A transsexual state prison inmate may receive her day in court, as U.S. Magistrate Judge Dennis L. Beck concluded that the inmate had stated 8th Amendment claims against several prison employees who allegedly deliberately assisted other (male) inmates in getting access to plaintiff in order to sexually assault her, and then refused to follow up on her complaints or to provide medical assistance to her afterwards. However, Magistrate Beck denied an application by the inmate to proceed anonymously in the case, rejecting a motion couched solely in terms of “avoiding confusion and chaos” that allegedly would result from requiring plaintiff to use her (male) name in the lawsuit. Incoe v. Yates, 2009 WL 3049267 (E.D. Cal., Sept. 18, 2009). The plaintiff had filed papers seeking to proceed anonymously apparently based solely on the fact that Magistrate Beck had granted a similar request by a transsexual inmate in another case. Beck pointed out that such requests are based on the facts of individual cases, and that plaintiff had failed to provide any particular reason why she should be allowed to proceed anonymously, other than the fact that a different transsexual in another case had been granted that option. Magistrate Beck also noted that the plaintiff’s complaint failed to describe any conduct by two of the named defendants that would link them to her 8th Amendment claims, so he ordered that she file an amended complaint if she wanted to proceed omitting those two defendants.

California — In Lee v. Wilkinson, 2009 WL 2824758 (E.D.Cal., Sept. 1, 2009), a gay state prison inmate brought various discrimination claims under a variety of constitutional theories, some of which survived the complaint screening process in an opinion by U.S. Magistrate Judge Sandra M. Snyder. Snyder rejected First Amendment claims, finding insufficient factual support in the complaint, and rejected the argument that the 4th Amendment was violated by the searching and “trashing” of the inmate’s cell, finding no legitimate expectation of privacy in a prison cell. However, Snyder found Lee might have a viable claim in connection with a body search of him performed by female corrections officers, based on his claim that the search was initiated in response to trumped up claims that he was stealing kitchen supplies. Generalized claims that prison conditions were more harsh for gay than straight inmates did not state an 8th Amendment claim, however, and Snyder found no viable due process claim in an allegation that prison procedures had not been strictly followed in response to Lee’s complaints. Snyder did find that Lee had stated a cognizable 14th Amendment equal protection claim for various instances of discriminatory treatment by officers, most particularly the claim that various charges against him had been fabricated in order to remove him from his job as a prison kitchen worker, due to the dislike of gays expressed by various staff. The court said it was not clear that the state prison was a “business establishment” within the meaning of California’s public accommodations law, so declined to exercise supplementary jurisdiction over state law claims concerning unlawful deprivations on the basis of sexual orientation.

Georgia — In Smith v. Pefanis, 2009 WL 2843830 (N.D.Ga., Aug. 31, 2009), U.S. District Judge J. Owen Forrester accepted a recommendation from a magistrate judge to deny an employer’s motion for summary judgment on a Title VII claim by a male employee alleging hostile environment harassment and retaliation due to the actions of a gay supervisor. The plaintiff claims the supervisor subjected him to numerous sexual solicitations and unwanted touching, and that the plaintiff suffered adverse employment consequences when he complained about this conduct. The complaint also asserted tort claims of negli-
gent hiring, assault and battery, intentional infliction of emotional distress, and failure to provide a safe workplace. On the magistrate’s recommendation, some of these were rejected, but the negligent hiring claim can go forward against the employer. The supervisor is a named defendant, and the claim of assault and battery against him was not contested in this motion for summary judgment.

Missouri — Various executive orders by U.S. presidents banning sexual orientation discrimination in the federal civil service do not modify Title VII so as to make discrimination on the basis of the plaintiff’s “perceived sexual orientation” actionable in federal court, ruled U.S. District Judge Charles A. Shaw in dismissing a complaint of discrimination on those grounds against the Department of Homeland Security in Logan v. Chertoff, 2009 WL 3064882 (E.D. Mo., Sept. 22, 2009). The Executive Order by Bill Clinton first extending such protect by the president was reissued by George W. Bush with an important addition, stating: “This Executive Order does not confer any right or benefit enforceable in law or equity against the United States or its representatives.” Thus, the executive order is enforceable only through administrative proceedings, not in court.

Puerto Rico — The lack of federal protection against sexual orientation discrimination is harmful to non-gay as well as gay employees, to judge by a dismissal granted in Soto-Martinez v. Colegio San Jose, Inc., 2009 WL 2957801 (D. Puerto Rico, Sept. 9, 2009) by District Judge Jay A. Garcia-Gregory. The plaintiff, a straight married man, alleged that he had been subjected to a hostile environment in the workplace in violation of the Title VII ban against sex discrimination. The hostile environment claim was based on the assertion that women in his workplace ridiculed him as a homosexual and made derogatory remarks along those lines. Well, too bad, says the judge, but Title VII does not cover such claims, because it does not prohibit discrimination on the basis of sexual orientation. A.S.L.

State Civil Litigation Notes

California — The Recorder (Sept. 8, 2009) reported a $4.95 million settlement of allegations about sexist and homophobic personnel decisions brought by 14 present and former female Hayward Police Department employees, at least five of whom were lesbians. The action in Alameda County Superior Court in Averiett v. City of Hayward, HGO7356121, centered on hostile work environment charges, but also took in promotions, denials of assignments, denial of advancement opportunities, and improper discipline.

California — Lambda Legal reported a settlement in the case of Benitez v. North Coast Women’s Care Medical Group, in which it represented a lesbian who was denied infertility treatment by the defendant clinic because doctors stated religious objections to providing such services to a single lesbian. Last year the California Supreme Court ruled in the case that the clinic and its doctors were not entitled to a religious conscience exception to the state’s public accommodations law and were required to provide medical services without discrimination, see North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court (Guadalupe T. Benitez, Real Party in Interest), 189 E3d 959, 44 Cal.4th 1145 (Sup. Ct. Cal. 2008). The parties reached an undisclosed financial settlement of the case. As a result of the defendants’ refusal to provide services, which would have been covered by the insurance plan provided by Benitez’s employer, she had to incur expenses obtaining services from an alternative provider. In a joint statement by Lambda and the North Coast Women’s Care Medical Group, the Group expressed sorrow that Benitez and her partner felt that they had suffered sexual orientation discrimination, and affirmed its commitment to provide service to all patients, including those who are lesbian or gay, with “equal dignity and respect.” The case was not actually tried, having gone up to the appellate courts as a result of pretrial motion practice.

Massachusetts — In a dispute between a biological father and his former different sex partner over custody of father’s son, the court ruled that the biological father was entitled to custody unless shown to be unfit, rejecting his former partner’s argument that as a de facto parent she could be awarded custody if the trial court found that to be in the best interest of the child. R.D. v. A.H., 2009 WL 2886030 (Sept. 11, 2009). Gay & Lesbian Advocates & Defenders filed an amicus brief on behalf of R.D., the appellant de facto parent. In a dispute between father and his former girlfriend, the child’s biological mother, the court had awarded the father custody. Subsequently, the court had appointed the father’s different-sex partner as a legal guardian of the child and had declared her a de facto parent, but when a dispute arose after the termination of that relationship, the trial court, finding father to be a fit parent, concluded that under Massachusetts law a fit parent would prevail over a de facto parent in a custody dispute. However, visitation was ordered for the de facto parent.

Oklahoma — The Oklahoma City School District is appealing a ruling by a state trial judge ordering the reinstatement of Joseph Quickly, a high school English teacher who was discharged, ostensibly for neglect of duty, negligence, instructional ineffectiveness, etc., but actually, he charges, because he stood up for the rights of LGBT students at the school where he was teaching. In a September 17 editorial supporting the district’s appeal, the Daily Oklahoman wrote: “Quigley’s case is somewhat complicated by the fact he’s gay and has long been an advocate of a more succinct discrimination and bullying policy that specifically covers sexual orientation. Inevitably, that history is intertwined with questions about his teaching performance. But the end question is the same: Do we really want judges as the ultimate arbiters of who can and can’t teach kids? Or should that decision be made by people closer to the classroom?” A false dichotomy, we think. If the people “closer to the classroom” are discriminatory, than the corrective intervention of judges is needed. A.S.L.

Criminal Litigation Notes

Federal — Georgia — Although the court found that Lawrence v. Texas announced a new substantive rule of law that should be applied retroactively, the petitioner for habeas corpus in this case could not benefit from retroactive application of Lawrence to his case because his case did not come within the factual parameters of Lawrence. Mauk v. Goodrich, 2009 WL 2914056 (S.D.Ga., Sept. 10, 2009). Although Mauk was convicted of sodomy, it was not consensual homosexual sodomy committed in private. Mr. Mauk was convicted of sexually assaulting a woman in a park.

New York — The Columbia Paper, a local upstate New York publication, reported on September 11 that Daniel Konnen, a camp counselor who was discovered to have videotaped two teenage boys masturbating during the summer of 2008 at Camp Eagle Hill in Elizaville, N.Y., had been sentenced to six years on each of two counts for twelve consecutive years, followed by ten years of post-release parole. He will also have to register as a sex offender, the degree of burdensomeness of the registration requirements to depend on further court proceedings to determine his risk of reoffending. Konnen pled guilty to the charges. A.S.L.

Legislative Notes

Federal — On September 15, U.S. Rep. Jerry Nadler (Dem-N.Y.), introduced H.R. 3567, the Respect for Marriage Act of 2009, with the support of more than 90 members of the House of Representatives. This bill’s section 2 would repeal section 2 of the Defense of Marriage Act [DOMA] (which purported to relieve states of any obligation to afford full faith and credit to same-sex marriages performed in other states) and its section 3 would amend section 3 of DOMA to provide that the federal government will recognize as a valid marriage any marriage that was valid where it was performed provided that it could have lawfully been contracted in any state. The effect of section 3 is to repeal DOMA’s requirement that the federal government refuse recognition to same-sex marriages, while at the same time making federal recognition of same-sex marriages universal, regardless whether the married couple involved is living in a state that would perform or recognize such a marriage. The bill was artfully drafted to avoid ever mentioning same-sex marriages directly. Among the co-sponsors are two of the House’s three openly-gay members, Tammy
Baldwin of Wisconsin and Jared Polis of Colorado. The senior openly-gay member, Barney Frank of Massachusetts, refused to co-sponsor, voicing his opinion that the bill is premature and by its universal applicability feature needlessly raises an issue that will subject it to criticism as seeking to force same-sex marriage on non-consenting states.

Arizona — Seeking cut-backs to balance a recession-affected budget, the Arizona legislature and Governor Jan Brewer enacted a cancellation of domestic partnership health benefits for state employees that had been granted administratively by former Governor Janet Napolitano, who is now serving as Secretary of Homeland Security in the Obama Administration. The measure also eliminated benefits of children of domestic partners of state employees, coverage of full-time students ages 23–24 and disabled adult dependents. According to a spokesperson for the state’s Department of Administration, the annual cost to the state for covering domestic partners had been estimated at $3 million. Arizona Daily Star, Sept. 17.

District of Columbia — D.C. Councilmember David Catania announced that he would introduce a bill on October 6 co-sponsored with nine other councilmembers to make same-sex marriage available in the District of Columbia. Passage was considered highly likely in the thirteen-member council, given the large number of co-sponsors, but all D.C. local legislation is subject to potential veto by Congress. When the Council passed a measure providing that the District would recognize as valid same-sex marriages performed elsewhere, there was much suspense about whether Congress would veto the legislation, but in the event there was no serious action in Congress in response to its passage, bolstering hopes that Congress will not interfere with this new, more direct provocation. Washington Blade Online, Oct. 2.

Illinois — State Senator Heather Steans has introduced a marriage equality bill in the Illinois Senate, despite the poor portents for such legislation in light of the defeat of a civil union bill in the House of Representatives earlier this year. The bill would authorize state recognition of same-sex marriages, while exempting religious institutions from having to perform any marriages contrary to their tenets. The bill was seen as a “companion” to the defeated civil union bill. Advocate.com, Oct. 1.

New York — Early in September, New York Mayor Michael Bloomberg, a candidate for re-election on the Republican ticket, told Gay City News that the chance that the State Senate would approve the marriage equality bill that had passed the Assembly last spring in this session was “zero.” Toward the end of the month, however, the Mayor, seeking to stir up support in the gay community for re-election, changed his tune and suggested that it was still possible the bill would pass during one of the special sessions that Governor David Paterson planned to call to deal with legislative proposals left hanging during the period of turmoil in the Senate that began June 8 when two Democrats temporarily switched caucuses, throwing control of the chamber into confusion. • • • Meanwhile, the Court of Appeals scheduled oral argument for October 13 on two pending appeals presenting the question whether government executives in New York may require agencies and offices under their control to recognize same-sex marriages performed in other jurisdictions. In both cases, the appellate division had answered the question in the affirmative. See Lewis v. New York State Department of Civil Service, 872 N.Y.S.2d 578 (N.Y.A.D. 3d Dept, 2009), leave to appeal granted, 12 N.Y.3d 705 (2009); Godfrey v. Spano, 871 N.Y.S.2d 296 (N.Y.A.D. 2nd Dept. 2008), leave to appeal granted, 12 N.Y.3d 705 (2009).

Ohio — Five Republican members of the Ohio House of Representatives crossed party lines to join all 51 Democrats in voting in favor of a bill that would ban discrimination on the basis of sexual orientation or gender identity in housing and employment. The September 16 vote was 56–39, a comfortable margin, but its prospects in the Republican-controlled State Senate are not considered to be very good, as the President, Bill Harris, has told the press that he does not think the measure is needed. Speaking for opponents, Republican Rep. Jeff Wagner said that the legislature “should not use the machinery of government to force people to accept lifestyles that they do not believe in. If I must blindly accept everyone’s lifestyle to be nondiscriminatory, then that is a price that I’m not willing to pay,” insisted Wagner, who nonetheless does not seem dedicated to repealing the existing law that bans discrimination based on race, color, religion, national origin, handicap, age or ancestry. During the vote, Democrats blocked a Republican amendment intended to amend the Civil Rights Commission’s procedures in various ways, including putting a cap on damage awards. Cleveland Plain Dealer, Sept. 16. On Sept. 29, the Cincinnati Enquirer ran an article titled “Gay rights law doomed in Senate,” quoting several Republican state senators stating that the bill had no chance in that chamber because it was seen as “anti-business.”

Tennessee — Nashville — On September 25, Nashville Mayor Karl Dean signed into law Ordinance No. BL.2009–502, which had been passed by the Nashville Metropolitan Council on Sept. 15 by a vote of 24–15. The measure amends the city’s Metropolitan Code, Fair Employment and Housing Section 11.20.130, by adding sexual orientation and gender identity to the list of prohibited grounds for discrimination in employment by the metropolitan government. The ordinance became effective immediately. BNA Daily Labor Report No. 186, 9/29/09. A.S.L.

Law & Society Notes

On the Ballot — On general election ballots on November 3 will be three significant measures affecting LGBT rights. In Washington State, voters will be asked whether they want to repeal a recent enactment that expanded the state’s Domestic Partnership Act to include virtually all the state law rights of marriage. In Maine, voters will be asked whether they want to exercise a veto over the legislature’s recent passage of a marriage quality bill that would make same-sex marriages available and recognized in the state. The law had been scheduled to go into effect on September 12, but its effect was delayed pending the vote when opponents of same-sex marriage submitted sufficient signatures. And, in Kalamazoo, Michigan, voters will be asked whether the city should include sexual orientation and gender identity in its civil rights ordinance. If the Maine marriage measure is upheld at the polls, then effective January 1, 2010, same-sex couples will be able to marry in six states: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire (where the new marriage statute becomes effective with the new year) and Maine, effectively tripling the number of states in which same-sex couples could marry since January 1, 2009. Pending litigation in federal court in California and state court in Texas might also have effect of spreading same-sex marriage more widely in the United States. Stay tuned...

President Clinton supports same-sex marriage — In an interview with CNN’s Anderson Cooper broadcast on September 25, former U.S. President Bill Clinton stated that he had changed his previous view and now supported same-sex marriage. Clinton indicted that exposure to gay people over the years had brought him to reconsider his views. Clinton may be the first person who has served as president of the United States to endorse same-sex marriage. Jimmy Carter has endorsed civil unions for same-sex couples, but has not so far endorsed same-sex marriage. George W. Bush supported a constitutional amendment to ban same-sex marriage, and the issue was not on the national media radar when his father was serving as president.

California Initiative to Repeal Proposition 8 — On September 24, proponents of a measure to restore the right to same-sex marriage in California filed their proposed ballot measure. The measure would substitute for the existing Proposition 8, adopted last fall, a measure that would limit marriage to two persons (without specification of gender requirements) and would provide that marriage is not to be “restricted on account of race, color, creed, ancestry, national origin, sex, gender, sexual orientation, or religion.” The measure also spells out the exemption to be enjoyed by clergy of any requirement to perform marriages in violation of their religious beliefs, and shielding such clergy from legal liability should they refuse to perform a marriage. The proposal also provides
that refusal to perform same-sex marriages would not endanger the tax exempt status of a religious organization. The proposition seems to have been drafted to anticipate various arguments made by opponents of same-sex marriage during last year’s Prop 8 campaign. Associated Press, 9/25/09.

New Adoption Study — A new study by faculty at the University of Texas at Arlington, published in September in Adoption Quarterly, concluded that there is no significant difference in emotional development of children adopted by heterosexual couples and children adopted by gay couples. The authors of the study are Scott Ryan, dean of the University’s school of social work, and assistant professors Paige Averett and Blace Nalavny. The study concluded that emotional problems of adopted children were correlated with age at adoption and pre-adoption sexual abuse, and that sexual orientation of the parents was not a significant predictor of behavioral problems.

What Will the Census Show? — The Obama Administration has announced a reversal of Bush Administration policy concerning how the U.S. Census to be taken in the spring of 2010 will deal with same-sex married couples. The approach that had been planned by the Bushies would have had Census Bureau computers automatically re-classify married same-sex couples as unmarried same-sex partners for purposes of enumeration and reporting. The Obama Administration decided that those who were married should be counted as such. Now comes a new problem: When the Census form asks people to identify their marital status, preliminary surveys suggest that many same-sex couples apply a rather loose definition to that term and consider themselves married if they have had any sort of ceremony orradeed children. The AFL-CIO supports the Employment Non-Discrimination Act (ENDA) and will do all in our power to see that it passes.

Domestic Partnership at Florida University — The University of Southern Florida will provide domestic partner benefits to unmarried domestic partners in same-sex or opposite-sex relationships with university employees. Based on estimates derived from other academic employers who provide such benefits, the USF administration expects to spend about half a million annually to fund the benefits. St. Petersburg Times, Sept. 1, 2009.

Intersexuality Hits the News — The little-known or understood phenomenon of intersexuality — the physical condition of traits of both genders mixed in the same body — came into unexpected international prominence as a result of South African runner Caster Semenya’s triumph in international running competition in Berlin this summer. Suspicions that Semenya, who competed as a woman, might not be as she presented herself, led to the subsequent revelation that she is intersexual, possessing some male internal organs although classified as female at birth. This led to interesting discussions in the press about the phenomenon of intersexuality and, one hopes, a significant amount of public education. Three examples we particularly noted were a lengthy piece in the New York Times by Peggy Orenstein, titled “What Makes a Woman a Woman?”, published on September 13, a fine piece in the St. Louis Post-Dispatch on September 30 by Biology Professor Zuleyma Tang-Martinez of the University of Missouri-St. Louis, titled “What Caster Semenya Can Teach Us About Life,” and another finely detailed piece by Jenny McAssey in the Sydney Sunday Telegraph of September 13, titled “She did nothing wrong but run fast.” After providing a detailed explanation of the scientific phenomenon, Prof. Tang-Martinez concluded her piece as follows: “The recent focus on intersexuality could have a positive outcome if it teaches us to value all forms of human diversity and increases tolerance toward those who differ from the majority. We cannot take for granted that the only sexes are unambiguously male and female. Biology thrives on variation; we need to understand the complexity of sex and respect intersexuality as an expression of this natural variation.” The Semenya story also brought to the surface an earlier story of a championship runner barred from competition, Erika Schinegger, a downhill skier who was expected to win gold medals at the 1968 Winter Olympics competing as a woman until doctors “discovered” that she was male. Schinegger, raised as a woman who had no external male sex organs and who thought she was a lesbian due to his attraction to women, then had surgery that moved his internal penis and testes to outside his body, changed his name to Erik, married and fathered children. According to an article published in the Sunday Mirror on September 13 [“I was stripped of medals for being hermaphrodite”] by Adam Lee-Potter in which Erik was interviewed, he said that after the surgery “The first thing I did was buy a suit and a Porsche. My first sexual experience was amazing. I lived like a playboy after that. Later I calmed down and married. I now have a 33-year-old daughter. She has two children and my life is complete.”

The Maine Ethics Commission voted 3–2 on October 1 to investigate whether the anti-gay National Organization for Marriage has violated the state’s campaign finance laws to hide the identity of donors who are supporting the referendum to veto the recently enacted marriage equality law in that state. The vote overruled the recommendation of the Commission staff not to investigate complaints that had been filed concerning NOM’s campaign practices. Bangor Daily News, Oct. 1 A.S.L.

International Notes

Australia — A federal judge, John Spender, denounced the Refugee Review Tribunal for its mishandling of an asylum petition by a gay Bangladeshi couple, finding that the Tribunal had twisted facts and ignored evidence in its decision denying asylum. Spender ruled that the Tribunal’s conclusion that the couple were not gay and would not face persecution in Bangladesh was “not an exercise in honest fact finding.” Spender criticized the Tribunal for finding one of the men not credible because he had refused, on grounds the question was too personal, to answer a question about whether he and his partner used lubricants during sex. The case will be sent back to the Tribunal for a fourth go-around. In another earlier round, the High Court reversed the Tribunal’s decision that the men could return to Bangladesh and avoid trouble by being “discreet about such matters,” but their attorney expressed continuing doubt that they could expect a fair consideration in their next appearance before the Tribunal. Australian, Sept. 28.
Canada — A lesbian U.S. service-member, Private Bethany Smith, has reportedly fled to Canada and is seeking asylum there, claiming that after she was outed to her unit, she received numerous death threats and was subject to harassment. Although a Tribunal turned down her petition, she has appealed to the courts. A source indicated this was believed to be the first such asylum claim by a U.S. military service member on grounds of sexual orientation.

Germany — The emergence of the Free Democrats as the leading candidate to join in a governing coalition in elections held late in September meant that it was likely an openly gay politician, Guido Westerwelle, would emerge as the next foreign minister of Germany. Westerwelle “came out” publicly in 2004 when he brought his partner, Michael Mronz, to a birthday party for Chancellor Angela Merkel, Associated Press, Sept. 29.

Indonesia — Aceh Province enacted a new Islamic criminal code that punishes homosexual conduct with up to 100 lashes, according to a report by Amnesty International. The code also prescribes severe punishments for gambling, drinking alcohol, premarital sex, adultery, and fornication—which is punished by stoning to death. Amnesty’s Asia-Pacific Director condemned the new law as a violation of international human rights standards.

Jamaica — The world press reported the shocking news that John Terry, the British honorary consul in Jamaica’s Montego Bay, had been murdered, beaten and strangled. Charges that this was a homophobic crime soon rang out. The Independent published a lengthy article on September 12, responding to the murder, titled “Jamaica, a Grim Place to Be Gay,” pointing out the island’s history of homophobic oppression. It is hard to credit, in light of such a history, the skepticism that some gay asylum seekers from Jamaica have encountered at the hands of Immigration ALJ’s.

Serbia — A scheduled Gay Pride Parade in Belgrade was cancelled under pressure from police and the government, who asserted that they could not protect the marchers from thousands of anti-gay demonstrators who were expected to attempt to disrupt the event. March opponents had reportedly covered the walls of the city with anti-gay graffiti and threats of violence. The last time Serbia had a Gay Pride Parade, in 2001, dozens of marchers and police officers were reportedly injured by anti-gay attackers. The parade was called off after activists rejected a proposal by the prime minister that the event be moved away from the city center, and organizers criticized the failure of the government to work with them to have a safe event. The cancellation was also criticized by the European Parliament’s Intergroup on Gay and Lesbian Rights, WOcker International News Report, No. 805 (Sept. 28, 2009).

South Africa — The New York Times reported on Sept. 23 that Themba Mvubu had been sentenced to life imprisonment for the murder of Eady Simelane, a lesbian activist and nationally famous soccer player, who was stabbed nine times and left to die in a drainage ditch by a group of men. One of the attackers, Thato Mphithi, pled guilty to murder, implicating three other men, two of whom were acquitted for lack of direct evidence. Bloodstains on Mvubu’s trousers sealed his fate. As he was led from the courtroom, he told a reporter, “Ach, I’m not sorry at all.” LGBT groups condemned the failure of the South African government to get serious about anti-LGBT violence.

Uruguay — On September 11, lawmakers in Uruguay approved a new law allowing gay and lesbian couples to adopt children, a first in Latin America. 17 out of 23 Senators voted for the bill on a second vote, which was required after the lower house of the legislature passed the measure with some amendments in August following initial approval in July by the Senate. President Tabare Vazquez was reportedly a supporter of the bill. The main opposition in Uruguay came from the Roman Catholic Church, with Bishop Paul Galimberti telling the press that “there is no proof that adoption by homosexuals is a positive thing.” Bishop Galimberti ignores all the professional literature indicating to the contrary, typically. A.S.L.

Professional Notes

President Barack Obama announced on Sept. 14 his intention to nominate Professor Chai Feldblum of Georgetown University Law School to be a commissioner of the Equal Employment Opportunity Commission. Feldblum would become the first openly-LGBT commissioner of that agency if confirmed by the Senate. The timing of her nomination is fortuitous; if the Employment Non-Discrimination Act is passed in this session of Congress, the EEOC will be charged with the task of promulgating regulations and guidelines for its enforcement. Prof. Feldblum, widely acknowledged as one of the architects of the Americans With Disabilities Act, a statute enforced by the EEOC, has also played a leading role as an advocate for and drafting consultant on ENDA. Prior to her academic career, she was a staff attorney with the ACLU in Washington, and clerked for Justice Harry Blackmun of the U.S. Supreme Court.

The U.S. Senate confirmed President Obama’s nomination of Jenny Durkan, a lesbian attorney with a practice in Seattle, to be the U.S. Attorney for the Western District of Washington State. Durkan was nominated in May. In the past, she has served as legal counsel to Governor Christine Gregoire and has taught trial advocacy at the University of Washington School of Law, her alma mater. Her appointment was recommended by both of Washington’s U.S. Senators, Advocate.com, Sept. 30.

In testimony presented to the House of Representatives Committee on Education and Labor during its hearings on the Employment Non-Discrimination Act (ENDA) on September 23, Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at Yale Law School, ended his lengthy, highly illuminating historical account of employment discrimination against LGBT people by state and local governments with his personal account of the homophobia that infected his tenure process at the University of Virginia Law School in 1985. The short-sighted homophobes of UVA denied tenure to Eskridge, who went on to earn tenure at the superior Georgetown University Law School, to teach as a guest at New York University and Harvard, and finally to earn his appointment as the holder of a named, endowed chair at Yale Law School, achieving eminence as a leading national academic in the fields of statutory construction and LGBT law. The faculty at UVA back in 1985 were not only homophobic, they were just plain stupid.

At its Spirit of Justice Dinner on October 23 in Boston, Gay & Lesbian Advocates & Defenders will honor Vermont attorney Beth Robinson, co-counsel in the landmark Vermont case of Baker v. State, which led first to the enactment of the nation’s first Civil Union Act, and more recently the triumphant enactment by the Vermont legislature (by super-majorities over the governor’s veto) of a marriage equality bill that went into effect in September. Robinson was both co-counsel in Baker, and a leader in the public education and lobbying effort that led to the enactment of the marriage bill. She also officiated at Vermont’s first same-sex marriage on September 1, 2009. GLAD Executive Director Lee Sislow described Robinson in a press release announcing the honor as “a historic force and a true ground-breaker.”

According to Human Rights Campaign, law firms have emerged as the most highly ranked employers for LGBT people, based on a survey of company policies in a variety of professions and industries. An HRC Foundation press release issued in September said that 88 law firms have received 100% ratings in the most recent survey, out of 127 law firms that were evaluated. The Corporate Equality Index used to rate employers focuses on several factors: whether the company has a non-discrimination policy covering sexual orientation and gender identity, whether same-sex partners get health insurance coverage, whether the insurance coverage includes transgender-related health care, and whether the company refrains from activities “that would undermine the goal of equal rights for LGBT people.”

On a not so happy note, the Ft. Lauderdale Sun-Sentinel (Sept. 29) reported that John Michael Moody, a gay attorney who had served as board president of the Gay & Lesbian Community Center of South Florida, had submitted his resignation from that position and had recently accepted temporary disbarment from the Florida Bar as a result of his behavior aboard a Southwest Airlines flight on June 11, 2007, during which he allegedly used profane language, groped a flight
attendant, and carried a 7-year-old boy down the aisle while the plane was airborne. Air marshals arrests Moody when the plane landed at a scheduled stop in Jacksonville, Florida. Moody pled guilty to federal charges of intimidating or assaulting a flight attendant and was sentenced to four months in federal prison followed by two years of supervised release, and was ordered to undergo substance-abuse and mental-health treatment. The Florida Supreme Court approved the temporary disbarment on July 16.

Albert L. Gordon, a heterosexual lawyer who had twin gay sons and became an ardent gay rights advocate, helping to lead the struggle as a leading pro bono lawyer for gay causes, died August 10 in Los Angeles of “natural causes” at age 94. According to an obituary in the Los Angeles Times, Gordon represented gay rights advocates during the 1970s in a variety of movement cases, and was a major player in the effort to get the California legislature to decriminalize gay sex. A.S.L.

AIDS & RELATED LEGAL NOTES

D.C. Court of Appeals Rejects Emotional Distress Claim Stemming from Misdiagnosis at Whitman-Walker Clinic

A unanimous panel of the District of Columbia Court of Appeals (which is the District of Columbia’s equivalent of a state supreme court) ruled that a man who suffered severe emotional distress as a result of being mistakenly informed that he was HIV⁺ after testing at Whitman-Walker Clinic could not sue for damages because of the “zone of physical danger rule” employed in the District of Columbia for emotional distress claims where there was no impact injury. Hedgepath v. Whitman Walker Clinic, 2009 WL 3125191 (D.C.App., Oct. 1, 2009). A concurring member of the panel wrote separately to urge that the full court reconsider whether the “zone of danger rule” should be maintained, agreeing with the rest of the panel that under the District’s practice a three-judge panel was bound to apply the rule until the full court decides whether to abandon it.

According to Terry Hedgepath’s allegations, when he found out that his girlfriend was being treated for HIV infection, he went to Whitman Walker to get tested. He told the intake worker he thought he had HIV because his girlfriend was HIV⁺, although, as later come out in his deposition, he had tested negative elsewhere just weeks earlier. The intake worker then made a mistaken notation on the file that Hedgepath was HIV⁺, before any testing had been done. He then had blood drawn, which Whitman Walker sent out to American Medical Laboratories for testing. The test result was “non-reactive,” which means negative, but because of an erroneous interpretation of the negative result test, a “Client Lab Results” form showed him as testing positive. When he met with a doctor at Whitman Walker to get his results, he was mistakenly told that he was positive, but asymptomatic with a “normal” viral load. Whitman Walker also completed paperwork to establish funding for Hedgepath’s treatment under the Ryan White Care Act, and for ADAP public assistance for medications, but Hedgepath never requested any treatment, presumably because of his normal viral load.

He went on believing he was infected for five years, until a new test showed he was negative. He provided substantial and convincing evidence of suffering severe emotional distress during this time, loss of employment in the restaurant business, damage to his relationship with his young daughter, and suicidal thoughts leading to psychiatric commitment on two occasions, during which he received various psychotropic medications. He had struggled with depression and drug abuse prior to this incident, but his belief he was HIV⁺ worsened both of those problems, especially his cocaine addiction. Feeling he was fated to die from HIV infection, he began a sexual relationship with a new girlfriend who was HIV⁺. Once it was confirmed that he was negative, many of these problems were resolved.

Superior Court Judge Robert E. Morin dismissed his complaint, noting that the D.C. Court of Appeals precedent required that claims of negligent infliction of emotional distress involve either emotional distress accompanying an impact injury or arising from a situation where a plaintiff was in a zone of danger created by the defendant’s negligent actions. Here, Hedgepath was never in any direct physical danger as a result of Whitman Walker’s negligence in telling him he was HIV⁺, ruled the court. On appeal, the Court of Appeals, in a per curiam opinion, agreed with this disposition, finding that the three-judge panel was bound by precedent.

“Although appellant presented evidence that supports that he suffered genuine and severe emotional distress during the years he believed he was infected with HIV,” wrote the court, “he was never within a ‘zone of physical danger’ — as defined by Williams v. Baker, 572 A.2d 310 (D.C. 1990)(en banc) and its progeny — as a result of appellants’ HIV misdiagnosis. Because we, as a division, are bound by Williams, we conclude, as did the trial court, that even if appellant were otherwise able to prove his case, he cannot recover as a matter of law. As noted, appellant did not take medication and was not otherwise medically treated for the purported HIV-positive condition. Appellant does not argue — nor do we think our cases would support — that the needle pricks he underwent for blood tests satisfy the zone of physical danger requirement that has been enunciated in our cases.”

Associate Judge Vanessa Ruiz concurred in an opinion urging that the issue he reconsidered by the court en banc. “This is a case in which no one disputes that appellant was owed a duty by appellants, and he has presented evidence that as a result of their breach of the standard of care, he suffered severe and verifiable emotional distress… I write separately because I believe that this case warrants reconsideration by the full court of the applicability of the Williams “zone of physical danger” requirement to cases where foreseeable and severe emotional distress is inflicted on a patient as a result of breach of the standard of care. When dealing with common law, as we do here, courts should revisit and reconsider rules when subsequent legal or other developments so warrant.” She noted that some other jurisdictions have decided to expand the scope of the tort of negligent infliction of emotional distress in similar circumstances. “This issue can present difficult choices and imprecise line-drawing,” wrote Judge Ruiz, “But it is an important one. I write separately because I believe that, if asked to do so, this may be an opportune case for the full court to revisit the question.” A.S.L.

AIDS Litigation Notes

Federal — Fifth Circuit — In Villanueva-Amaya v. Holder, 2009 WL 2900266 (Sept. 10, 2009), the U.S. Court of Appeals for the 5th Circuit rejected, per curiam, an attempt by an HIV⁺ Honduran woman to remain in the U.S. on the grounds of government discrimination against HIV⁺ individuals in Honduras. The court found that the plaintiff had failed to property raise this issue before the BIA, and thus had not exhausted administrative remedies. As to her attempt to achieve withholding of removal on this ground, the court commented, “there was no evidence that the Honduran Government sanctions social ostracism of HIV positive persons or that Villanueva was singled out for mistreatment,” and her sons, co-petitioners, had not shown that they suffered persecution due to their relationship with their sick mother.

California — It doesn’t seem to matter how often California appellate courts reverse HIV testing orders on the ground that trial courts failed to make appropriate findings to support them — the problem recurs again and again and again. The latest example is People v. Mars, 2009 WL 3070833 (Cal.Ct.App., 3rd Dist., Sept. 28, 2009), in which yet another prosecutor and trial judge got carried away with their indignation at a defendant who sexually abused minors and imposed a mandatory HIV testing order despite the lack of any evidence that the conduct for which defendant was charged could possibly have communicated HIV to the children involved. “The order that defendant undergo HIV testing is stricken,” wrote the court, “and the matter remanded for the sole
purpose of conducting further proceedings at the election of the prosecution to determine if there is sufficient evidence to support an order requiring HIV testing pursuant to Penal Code section 1202.1.”

Maryland — Semantic games? In EEOC v. Chesapeake Academy, 2009 WL 2767671 (D.Md., Aug. 26, 2009), Chauncey Stevenson filed a complaint with the Equal Employment Opportunity Commission (EEOC) in 2006, alleging that he had been discharged in violation of the Americans With Disabilities Act by Chesapeake Academy, because he was HIV+. On September 8, 2008, EEOC filed suit on Stevenson’s behalf in U.S. District Court, and a month later the court granted Stevenson’s motion to intervene because he wanted to be represented in the case by his own counsel. On June 18, 2009, Stevenson’s doctor testified at a deposition that he diagnosed Stevenson with full-blown AIDS before he was discharged. Within a few weeks, both Stevenson and the EEOC had filed motions to amend the complaint to allege that he was discharged because he had AIDS. Chesapeake opposes the amendment on the ground that Stevenson did not allege AIDS discrimination when he filed his charge with the EEOC, but rather HIV-related discrimination. District Judge William R. Quarels, Jr., pointed out that amendment of complaints is freely allowed unless there is prejudice to the defendant, and he couldn’t see prejudice here. Chesapeake argues that amending the complaint would be futile because it did not know that Stevenson had AIDS when he was discharged. Quarels responded that this is a factual issue, so amendment would not be futile. Chesapeake argued that the amendment would be prejudicial because the amendment would require it to undertake additional discovery on “potentially dispositive expert medical evidence regarding the difference between being HIV positive and having AIDS, and the impact of Stevenson’s AIDS on his ability to work. EEOC and Stevenson responded, in effect, that the amendment was merely clarifying Stevenson’s diagnosis. In a footnote, the court makes the absurd statement that “HIV and AIDS are considered one virus” (absurd because AIDS is not a virus, it’s a complex of symptoms caused by the virus called HIV), followed by the more salient assertion that “AIDS is the last stage of progression of HIV.” Quarels concluded there was no prejudice and granted the motions to amend the complaint.

Michigan — In Dunn v. State Farm Mutual Automobile Insurance Company, 2009 WL 2960479 (E.D. Mich., Sept. 11, 2009), District Court Judge Lawrence Zatkoff rejected a request by the defendant insurance company to extend discovery in a no-fault auto insurance claim case where the plaintiff is HIV+. The defendant asserted that more discovery was needed because doctors in their depositions suggested that some of the plaintiff’s problems could be due to her pre-accident HIV+ status and not to the accident. Plaintiff countered that her HIV+ status was a known fact in the lawsuit from early on, and was not “new information,” so could not be the basis for prolonging discovery. District Judge Zatkoff agreed with the plaintiff.

Missouri — Stating that “there is not yet recognized a clearly established right of privacy in a person’s HIV status” in the 8th Circuit, U.S. District Judge Henry Edward Attery dismissed a pro se complaint by man who alleged that his privacy had been violated by the spreading of allegations about his HIV status by various government officials, Harris v. City of Carathensville, 2009 WL 2836521.

New York — Where there was no evidence that the defendant employer knew that the plaintiff was HIV+, there was no basis to charge the employer with liability under the Americans With Disabilities Act for dismissing her, according to U.S. District Judge Muriel Seybert, granting the employer’s motion for summary judgment in Volmar v. Cold Spring Hills Center for Nursing and Rehabilitation, 2009 WL 2984194 (E.D.N.Y., Sept. 14, 2009). In her deposition, the plaintiff testified that she had told nobody at the Center that she was HIV+, and that her HIV status was not recorded in any of her employee records. She maintained the Center could have found out by contacting her primary health care provider, but there was no evidence that it had done so, and the plaintiff’s speculation that the head of the Center and the director of the facility where plaintiff’s medical records were kept were “friends” (based on a photograph of those individuals shaking hands at a public event) was not sufficient to prove knowledge. The Center maintained it was unaware of plaintiff’s HIV status, and she was discharged after a series of work-related disciplinary infractions.

Ohio — In State of Ohio v. Russell, 2009 WL 3090190 (Ohio Ct. App., 10th Dist., Sept. 29, 2009), the court rejected appellant’s argument that his conviction of felonious assault should be set aside because the only evidence introduced at trial as to his HIV status was the tape recording of his interview with a police detective in which he indicated that he was HIV+. Joseph Russell admitted that he had sex with the complainant and that he neither used a condom nor told her he was HIV+. He was acquitted of rape and kidnapping charges, but convicted of felonious assault and sentenced to seven years. The statute makes it a crime for somebody who knows he is HIV+ to engage in sexual conduct with another person without disclosing in advance that he is HIV+, R.C. 2903.22(B)(1). On appeal, Russell argued that under the doctrine of corpus delicti the state could not rest its case on felonious assault solely on his statements to the detective while being interviewed, but had to produce independent evidence that Russell was HIV+. The court rejected this argument, rejected the argument that because there was no other evidence introduced of Russell’s HIV status that there was insufficient evidence to support the verdict, and also rejected the argument that Russell’s attorney provided incompetent representation because he did not make these arguments at trial.

Pennsylvania — In Birkhichler v. Butler County Prison, 2009 WL 2986611 (W.D.Pa., Sept. 17, 2009), the pro se plaintiff, an inmate at the defendant institution, is living with AIDS and claims that he did not receive appropriate treatment for his medical condition. He was receiving medications to deal with opportunistic infections, but was not being given anti-retrovirals that he demanded. Magistrate Amy Reynolds Hay ruled that plaintiff had “failed to adduce evidence of a policy on the part of either Butler County or on the part of SHP (the subcontractor providing health services to inmates)” to deny such treatment, he could not maintain an 8th Amendment deliberate indifference suit. “In the alternative, because his personal AIDS specialist physician recommended against the provision of drugs intended to treat AIDS while he was at BCP given Plaintiff’s history of noncompliance in taking these specific drugs and due to the anticipated short stay at BCP, and this recommendation was followed by BCP, Plaintiff cannot establish a deliberate indifference claim.” The plaintiff was incarcerated at the defendant institution from June 26, 2007, until December 1, 2007.

Virginia — The Washington Blade reported on-line on September 11 that Alexandria Circuit Court Judge Nolan Dawkins had affirmed a unanimous decision by the Alexandria Human Rights Commission that a TGI Friday’s restaurant in Alexandria had unlawfully discriminated against James McCray, a general manager of the store, by discharging him because of his HIV+ status. The Commission disbelieved the employer’s claim that McCray was dismissed for dishonesty, finding the employer’s story not credible in the circumstances, and notifying the horrified reaction of the employer’s Director of Operations when McCray revealed his HIV status to her. McCray was dismissed the next day. Somebody at corporate was apparently asleep at the switch on this one. Unfortunately, the remedy is limited under the local ordinance, consisting of a $5,000 fine against the employer, which it is up to the Alexandria City Manager to seek to collect. McCray v. Carlson Restaurants (Va., Alexandria Circuit Ct., Sept. 2, 2009).

Virginia — In Thornton v. Commonwealth of Virginia, 2009 WL 2932756 (Va. Ct. App., Sept. 15, 2009) (not published in S.E.2d), the court upheld the appellant’s conviction for felony child neglect on charges that she had withheld medication from her HIV+ teenage son. According to the evidence, appellant told her son that “too much medication would be bad for him” and she only administered the medication prescribed by his doctor for short periods of time prior to his medical examinations. As a result, his viral load, which had initially been under control, shot up, and the court found that based on the trial record, the jury could have concluded that appellant “knew or
should have known her behavior in failing to give N.T. his medications regularly created a substantial risk to N.T.’s life or health.” The doctor testified that he had explained to appellant the importance of N.T. taking medications as prescribed and potential consequences of failing to comply with the medical regimen, as did a social worker who testified. A.S.L.

Social Security Disability Cases

California — In Rouihac v. Astrue 2009 WL 3066636 (C.D.Cal., Sept. 21, 2009), U.S. Magistrate Judge Margaret A. Nagle ruled that an HIV+ plaintiff’s disability benefits application required a remand for reconsideration, because in denying her application for benefits the ALJ had failed to give adequate reasons for rejecting the opinion of the plaintiff’s treating physician that her capabilities were below the level needed to be able to perform gainful employment and had failed to adequately consider the adverse impact on the plaintiff of side effects of the medication she was taking, including her HIV-related medication.

California — In Ryan v. Astrue, 2009 WL 3011420 (E.D.Cal., Sept. 17, 2009), U.S. Magistrate Dennis L. Beck rejected a claim that the plaintiff’s decedent, who died in 2008, was wrongly denied Social Security disability benefits, finding record evidence supported the conclusion that at the time of the hearing in 2006 he was capable of working. The Appeals Council denied his appeal in May 2008, two months before he died.

AIDS Law & Society Notes

U.S. Immigration Policy — As the federal government evaluates comments received in response to a proposal to drop the current ban on HIV+ immigrants, the Immigration Service has advised administrators to “hold in abeyance” pending adjustments in status (green card applications) which would be denied due to the applicants’ HIV status under the existing rules. These applications will be acted upon after the new rules go into effect.

AIDS Vaccine News — A new study announced late in September indicated that for the first time an experimental vaccine to be used in preventing HIV infection has shown some effectiveness. Devising an effective HIV vaccine has been quite challenging due to the many different strains of the virus and its ability to mutate rapidly, making it a moving target for vaccine development. In addition, of course, there is the documented phenomenon that the body manufactures antibodies upon HIV infection, but that this virus mutations and reproduces so rapidly that it eventually overcomes the body’s immune response. Current treatments stave off the development of full-blown HIV disease (AIDS) by interfering with viral replication, but ideally a vaccine would arm the body with antibodies capable of preventing a new HIV infection from establishing itself after initial exposure. Although the new vaccine showed only about 31 percent effectiveness, that was seen as an encouraging sign in light of the failure of earlier experimental vaccines to show any statistically significant effectiveness. The research breakthrough is not expected to lead to immediate widespread introduction of the vaccine, however, since the results remain tentative and a more effective vaccine would be needed for wide-scale immunization campaigns. A.S.L.

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