CALIFORNIA SUPREME COURT SUPPORTS LESBIAN CO-PARENT RIGHTS

In a trio of significant opinions issued on August 22, California's highest court reaffirmed its earlier holding that a child can have two mothers and then applied that holding affirmatively to diverse parentage disputes arising from the break-up of lesbian partnerships. In all three cases, *K.M. v. E.G.*, 2005 WL 2000860, *Elisa B. v. Superior Court*, 2005 WL 2000864, and *Kristine H. v. Lisa R.*, 2005 WL 2000908, the six members of the court agreed unanimously that a child can have two legal mothers, but in the most complicated of the cases the court was divided on the outcome, producing two dissenting opinions in a 4–2 vote, because of differences over the application of precedents and the facts of the particular case. (There were gay organizational briefs on both sides in this case, *K.M.*.)

The court is short one member due to the recent resignation of Janice Rogers Brown to take a seat on the U.S. Court of Appeals in Washington, D.C. Ironically, Brown was the one member of the court who was most likely to dissent from the idea that a child can have two legal mothers, although even she had concurred on estoppel ground in *Sharon S. v. Superior Court*, 73 P.3d 554, 2 Cal.Rptr. 3d 699 (2003), in which the court laid the groundwork for this case by ruling in support of second-parent adoption by a lesbian co-parent.

In all three cases, Justice Carlos R. Moreno wrote the opinion for the court. Justice Moreno was appointed by Governor Gray Davis.

The most complex case, *K.M. v. E.G.*, involved both ovum and sperm donation. K.M. and E.G. met in October 1992, at which time E.G. had already begun her quest to become a mother through adoption, then changed her mind and decided to pursue donor insemination. She underwent many unsuccessful insemination procedures between July 1993 and November 1994, but doctors concluded she was not producing sufficient ova (eggs) for the process to succeed. Meanwhile, K.M. and E.G. began living together earlier in 1994. In 1995, a fertility specialist suggested that K.M. donate ova to E.G. so that E.G. could become pregnant through donor insemination from an anonymous sperm donor.

E.G. claims that she agreed to this with the understanding that she wanted to be a single mother and that although the women would be raising the resulting child or children jointly in their home, only she would be listed on the birth certificate or considered the child's mother, even though the child would be genetically related to K.M. E.G. made K.M. promise not to reveal to anyone that the child E.G. would have was conceived using K.M.'s ova.

K.M., on the other hand, claimed that she had only agreed to donate her ova because of her understanding that the women as a couple would raise the child together. She denied that E.G. had insisted that she be considered a single parent or the sole parent of the resulting child or children.

The women also differed about how K.M. came to sign certain documents purporting to waive her parental rights, E.G. claiming the documents were received well in advance of the ova donation procedure and were thoroughly discussed by the women, while K.M. said she confronted the documents for the first time just minutes before the procedure and barely had a chance to read and sign them before the procedure began.

In any event, twins were born to E.G. on December 7, 1995, and only E.G. was listed as a parent on their birth certificates. The women jointly raised the twins until their relationship ended in March 2001, when K.M. filed a lawsuit seeking a declaration of her parental rights. E.G. moved to dismiss the case, arguing that K.M. had waived her rights in the consent documents she signed before the ovum donation procedure.

Marin County Superior Court Judge Randolph E. Heubach granted E.G.'s motion, finding a clear written waiver of rights by K.M. The Court of Appeal affirmed, finding that the documentary evidence showed that only E.G. had intended to be the twins' parent when they were conceived. The court analogized K.M. to a sperm donor whose parental rights are cut off under the Uniform Parentage Act when he donates sperm through a doctor for the insemination of a woman to whom he is not married.

The Supreme Court, granting K.M.'s appeal, found the sperm donor analogy invalid, and also found that the preconception waiver could not determine the outcome.

Justice Moreno's opinion for the court drew two dissents because it appeared to make quite a bit of new law, opening up significant questions for the interpretation of existing law that it did not really answer, or so the dissenters argued.

Perhaps the biggest stumbling block to K.M.'s case, as well as the other cases decided on August 22, was a prior opinion of the court, *Johnson v. Calvert*, 5 Cal.4th 84 (1993), in which the court stated that a child cannot have two mothers. This pronouncement came in a situation where a wife who could not carry a pregnancy donated her ova to another woman, a surrogate, who was impregnated with the husband's sperm, carried the pregnancy to term, and then sought to assert parental rights as the birth mother. The court had to decide whether a child could have three parents, the biological father whose sperm was used to conceive the child, the father's wife, who donated the ovum with the intention of being the mother, and the surrogate, who carried the fertilized ovum through pregnancy to child-birth and was thus the birth mother although not genetically related to the child. In this context, the court focused on the intentions of all the parties at the time the child was conceived and ruled that the child could not have two mothers, thus effectuating their original intention that the child's parents be the sperm and ovum donors and not the surrogate, who not have become pregnant if not retained to be a surrogate for the married couple.

In *K.M.*, the court back-pedaled from its pronouncement in *Johnson*, asserting that the negative statement about two mothers must be viewed in the factual context of that case, and was really another way of saying that a child cannot simultaneously have three legal parents. As its more recent decision upholding second-parent adoptions made clear, the California Supreme Court now accepts the proposition that a child can have two parents of the same sex.

Rejecting the dissenters' arguments that the court was departing from settled precedent and making new law, Moreno asserted that the California statute on sperm donors does not apply to this situation, "under the circumstances of this case in which K.M. supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home." The court disclaimed looking at intent, as such, and concentrated on the fact that the twins are bio-

LESBIAN/GAY LAW NOTES **September 2005**

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NYC 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Alan J. Jacobs, Esq., NYC; Todd V. Lamb, Esq., NYC; Sharon McGowan, Esq., New York, N.Y.; Tara Scavo, Esq., NYC; Daniel R Schaffer, NYC; Robert Wintemute, Esq., King's College, London, England; Leo Wong, Esq., NYC

Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net. Inquire for rates.

LeGaL Homepage: http://www.le-gal.org

Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln

 ISSN 8755–9021

logically related to K.M. and that the women actually raised them jointly until the relationship broke up. In her dissent, Justice Kathryn Werdegar (who wrote the court's second-parent adoption opinion) raised the spectre of an equal protection violation, focusing on Justice Moreno's emphasis on the women being a lesbian couple and arguing that the court seemed to be making a "lesbian exception" to the sperm donor statute, which she found analogous to this situation.

In the second case, *Elisa B.*, the lesbian co-parent of twins born through donor insemination had promised to continue supporting them after breaking off the relationship with their mother, even though she had never adopted the children. When her economic circumstances changed, Elisa reneged on her promise and since the birth mother, Emily, was unemployed, support of the children, one of whom needed expensive medical care, would fall largely on the county welfare agency. The agency sued Elisa for child support, asserting that she was a co-parent who should be responsible since she and Emily had jointly planned for the birth of the children and had agreed to raise them together. (Elisa had also had a child by donor insemination at around the same time as part of their joint agreement to have children and raise them together.)

El Dorado Superior Court Judge Gregory W. Dwyer found that as the women had intended to raise the children jointly as co-parents, Elisa had a support obligation and could be held to that obligation by the county. The Court of Appeal reversed, seizing upon *Johnson v. Calvert* and the assertion that a child cannot have two legal mothers.

In reversing yet again and ruling for the county, Justice Moreno explained again the limited relevance of the statement from *Johnson* and specifically approved a reading of California's version of the Uniform Parentage Act under which a lesbian co-parent would have the responsibilities of a parent when she actively participated with a partner to plan for donor insemination with an intention to participate in raising the child as a co-parent. This time there was no dissent from any member of the court, although one of the *K.M.* dissenters, Justice Kennard, wrote separately to assert her view that a prior decision by the court in a case involving a non-biological father's attempt to escape support obligations had made this decision a "foregone conclusion."

Finally, in *Kristine H.*, the court addressed a question that affects the parental status of hundreds, perhaps thousands, of co-parents who used a procedure devised by lawyers at the National Center for Lesbian Rights during the 1990s, before California had begun to enact domestic partnership legislation, in order to achieve legal parental status without the hassles and uncertainties of post-birth adoption proceedings. Under this procedure, a pregnant woman and her lesbian partner would petition the court for a declaration, called a "stipulated judgment," that they were both parents of the forthcoming child, which would then be used to get both names on the birth certificate and establish parentage from birth.

In this case, the women split up two years after the child was born and the birth mother filed a lawsuit to have the prior declaration invalidated and to terminate her former partner's parental rights. Los Angeles County Superior Court Judge Richard A. Curtis denied Kristine's motion to vacate the stipulated judgment, finding that the court had authority to issue it, but the Court of Appeal reversed, arguing that a court could not accept "the parties' stipulation as a basis for entering the judgment of parentage." According to the Court of Appeal, parentage is a legal issue to be determined by the court, not by the parties' own agreement. The Court of Appeal's ruling placed in question the validity of all the stipulated judgments that had been approved around the state under this procedure, threatening the legal basis of numerous families headed by lesbian co-parents.

The Supreme Court reversed, but on a somewhat technical ground, using the doctrine of estoppel. Justice Moreno found that it would be inappropriate to allow Kristine to attack the very stipulated judgment that she had originally petitioned the court to grant, which had been based on her own affirmation that Lisa was the mother of her child, especially since Lisa had relied on it in assuming the burdens of parenthood and bonding with the child. "Estoppel long has been utilized to prevent a party from contesting the validity of a judgment that was procured by that party," wrote Moreno. After reviewing numerous family law cases in which estoppel had been used, Moreno wrote, "We need not, and do not, therefore, determine whether the stipulated judgment entered into by Kristine and Lisa is valid; we hold only that Kristine may not now challenge the validity of that judgment."

By applying estoppel in this situation, the court effectively precludes anyone who was a party to one of these stipulated judgments from trying to have them vacated later on if the relationship goes bad and one party wants to deny the other a continued parental role with the children. Since there were always some doubts about the ultimate validity of the stipulated judgment procedure as a way of establishing co-parent rights, this decision has the advantage of protecting those relationships without having to address directly the various arguments against their validity, which might have led to their outright invalidation. The ruling is a bit of a stop-gap, but will becoming less relevant with the passage of time because the recently effective domestic partnership law provides an alternate means for same-sex couples to establish joint parental rights. Indeed, the court cited the domestic partnership law, while acknowledging that it does not apply to this case, as an example of the evolving legislative policy in California favoring recognizing the parental status of lesbian co-parents.

Taken together, this extraordinary trilogy of cases marks an important step in the developing law recognizing the status of same-sex couples as parents, apparently extending full parental rights for the first time in a variety of situations where there was no adoption. Indeed, in some of these cases there was not even a domestic partnership registration. The legal rights were found to flow from the factual settings in which couples decided to have and raise children together by resort to donor insemination (albeit with an extra twist in *K.M.* of the co-parent donating the ovum). As such, this is a major step forward for the legal recognition of lesbian families with children.

Lesbian and gay litigation groups played a major role in securing these rulings, with lengthy lists of friends of the court in all of the cases. Briefs were filed with the court on behalf of a wide range of organizations, produced through the collaboration of attorneys from the National Center for Lesbian Rights, the ACLU, and Lambda Legal. Interestingly, in the most complex of the cases, *K.M. v. E.G.*, there were LGBT briefs on both sides, with local gay bar associations and other groups filing in support of E.G. while the leading national LGBT legal organizations filed on behalf of K.M. This reflects the peculiarly difficult issues presented by that case, such as whether the consent forms waiving a donor's parental rights should be held binding, and the sharp controversy between K.M. and E.G. as to what was said and done between the women and with their doctors before E.G. was implanted with K.M.'s ova. A.S.L.

LESBIAN/GAY LEGAL NEWS

California Supreme Court Expands Public Accommodation Law to Protect Registered Partners

The California Supreme Court ruled in *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 115 P.3d 1212, 31 Cal. Rptr. 3d 565 (Aug. 1, 2005), that registered domestic partners are protected from discrimination under California's Unruh Civil Rights Law, Cal. Civ. Code Sec. 51, a statute that forbids discrimination by "places of public accommodation." The unanimous ruling came in a Lambda Legal lawsuit filed on behalf of a lesbian couple against a country club in San Diego County, but it broadly applies to all businesses and other organizations in California that provide goods and

services to the public. Jon Davidson, Lambda's Legal Director, has represented the plaintiffs throughout the lawsuit and argued the case before the Supreme Court.

The ruling, expanding the impact of the state's Domestic Partner Rights and Responsibilities Act of 2003, came at a politically volatile time, when opponents of same-sex marriage, reeling from recent developments including a pro-same-sex-marriage decision by a Superior Court judge in San Francisco, were poised to circulate petitions for a constitutional amendment that would not only ban such marriages but also invalidate the domestic partnership law. This opinion, equating registered partnership with marriage for purposes of the public accommodations law, will add considerable fuel to the marriage debate in the state.

The plaintiffs, Birgit Koebke and Kendall French, have been partners since 1993, and registered as domestic partners in 2000 when an earlier version of the partnership law went into effect. The most recent version, which became effective on January 1, 2005, elevates the status of registered partners to the legal equivalent of spouses for purposes of almost all benefits and entitlements under state law, and applies retroactively to all those who had registered as partners under the prior versions of the law.

Koebke and French are both avid golfers. Koebke has been a member of the Bernardo Heights Country Club since 1987, years before she and French began their relationship. Koebke sought to have the Club treat French the same way it treated the spouses of other members, extending playing and clubhouse privileges of various types at no extra charge. The Club has resisted this, insisting that its policy applies only to legally-married spouses, and resting its legal position on older judicial precedents rejecting claims for spousal recognition by same-sex couples seeking workplace benefits or insurance coverage. Even after the women registered their partnership with the state in 2000, the Club persisted in rejecting their claims. Finally the women got fed up and filed their lawsuit, represented by Lambda Legal, in 2001.

The Club's refusal placed French in the position of either having to apply for membership separately, which would require payment of initial fees to buy a membership plus a second set of annual dues, or to play as Koebke's guest, under which she would be restricted to a handful of golf dates a year, extra guest fees, and reduced clubhouse privileges.

The plaintiffs pursued various legal theories, arguing that discrimination on the basis of marital status was forbidden by the statute dating back to the first time they sought such recognition from the Club in 1995, that the Club's refusal to extend privileges to French also constituted sexual orientation discrimination (which California courts have long held is also forbidden under the Unruh Act as a matter of interpretation, but as to which the legislature has approved an amendment explicitly adding sexual orientation, gender identity and marital status coverage, which was pending before the governor as of the end of August), and that the registration as partners in 2000 strengthens their claim, as does the enhanced version of the law that went into effect in January.

Judge Charles Hayes of San Diego County Superior Court granted the Club's motion for summary judgment, ruling that none of the legal theories was valid in this case because "Defendant did not provide different privileges to plaintiffs than to other unmarried couples." The court of appeal largely agreed with this ruling, but found that there was one theory on which the women could proceed, an argument that the Club's policy was not being applied in a neutral way, for reasons that are discussed below.

The Unruh Act is unusual among state public accommodations laws in that the wording has left the courts interpretive space to add categories of prohibited discrimination without the need for new legislation. As authoritatively construed by the California Supreme Court, the list of forbidden forms of discrimination that appears in the statute is illustrative and similar kinds of discrimination are also prohibited, with the categories being added on a case by case basis by the courts. This was how sexual orientation came to be included.

Justice Carlos R. Moreno's opinion for the court does not embrace the opportunity to declare that all refusals to recognize same-sex partners as equivalent to spouses violate the Unruh Act. Instead, in a carefully nuanced ruling, premised heavily on the domestic partnership statute's declaration that registered partners are to be treated in law as equivalent to spouses, Moreno announced that the status of registered partner could be seen as similar in type to other characteristics contained in the law, and thus that discrimination as between legally married couples and registered domestic partners was the kind of discrimination that the statute prohibits, as a natural application of the equality of treatment promised by the domestic partnership statute.

In that sense, it was a minimalist decision, since it does not extend protection to the more numerous same-sex couples who have not formally registered, or who cancelled their registration before the new law went into effect after deciding that it imposed obligations they did not want to incur. This minimalism is heightened by the court's conclusion that only with the most recent version of the law that went into effect this year did the partnership status become sufficiently similar to marriage to merit such treatment. Thus, the plaintiffs' claim for prospective relief (an order that the Club should now recognize French as a spousal equivalent for purposes of all membership privileges) will ultimately be successful, but any damage claim for the continuing refusal of recognition dating back to 1995 will be limited under this legal theory to damages accruing beginning on January 1, 2005.

This ruling seems tailored to pick up the votes of the more conservative members of the court, and partially lost one of the most liberal, Justice Kathryn Mickle Werdegar, who dissented from this part of the ruling, arguing that the damage claim on the theory of unlawful discrimination against registered partners should extend back to the date when the women registered their partnership in 2000 and then presented a new request for recognition to the Club. She noted that the same reasons for which the court found unavailing the Club's purported business justifications for refusing to recognize registered partners under the new law would also apply to those reasons when weighed against prior versions of the domestic partnership law.

However, it is still possible that the plaintiffs can claim damages back to an earlier date under an alternative theory. As the case unfolded, they unearthed considerable evidence that the rule being applied against them was not being applied in a neutral way. Rather, several heterosexual members had been able to obtain virtual spousal privileges for their opposite-sex unmarried partners and for children of those partners, even though the official Club policy only extended privileges to legal spouses and children of members. Furthermore, in terms of smoking gun evidence, the plaintiffs contend that the Club was refusing to accommodate them in the same way as others for fear of appearing too gay-friendly and thus attracting many applications for membership from gay couples, which some members of the Club's board thought would be inconsistent with their family-friendly image.

This was the basis for the court of appeal's conclusion that the plaintiffs might be able to prove a sexual orientation discrimination claim based on the non-neutral application of its rules by the Club. The Supreme Court agreed with the court of appeal that if this could be proved at trial, it could provide the basis for a sexual orientation discrimination claim, and that the plaintiffs were entitled to a trial on this issue. The court rejected, however, the contention that refusal to recognize unregistered domestic partners could be considered unlawful sexual orientation discrimination without this kind of evidence of discriminatory intent, because the Unruh Act has not been interpreted to apply to disparate impact claims that a neutral policy has the effect of discriminating against a particular group.

The court rejected the plaintiffs' claim that even in the absence of this evidence of unequal

treatment, they should have been able to prevail on a claim of marital status discrimination. The court found compelling the Club's argument that extending eligibility beyond registered partners would create an undesirable precedent, because of the difficulty for businesses to determine who would qualify in the absence of the clear indicia of status provided by a formal registration procedure, and because the Club had advanced other legitimate business reasons for wanting to limit membership privileges to immediate family.

Thus, the case was sent back to the San Diego Superior Court, where the plaintiffs will have the opportunity to prove their sexual orientation discrimination claim and obtain relief on their partnership discrimination claim. It seems likely that the Club, on reviewing the evidence about unequal treatment, might decide to take the practical way out and offer a monetary settlement for the damage claims, since the court's opinion strongly intimates the likelihood that the plaintiffs will succeed at trial on that claim. A.S.L.

Two Mexicans Win Reversals of Adverse Asylum Rulings

On August 10 and 12, two different three-judge panels of the U.S. Court of Appeals for the 9th Circuit issued decisions finding that Immigration Judges and the Board of Immigration Appeals had clearly erred by rejecting petitions for political asylum in the United States by men from Mexico. *Boer-Sedano v. Gonzales*, 2005 WL 1924722 (9th Cir., Aug. 12, 2005); *Pozos v. Gonzales*, 2005 WL 1901549 (9th Cir., Aug. 10, 2005)(not officially published). Both cases involved reasonable fear of homophobic persecution if the individual was forced to return to Mexico, but the cases differed in significant ways, *Boer-Sedano* presenting the complication of the petitioner being a person living with HIV, and *Pozos* the question whether a person who denies being gay can claim asylum on grounds of homophobic persecution.

Miguel Pozos had credibly claimed that he was singled out for persecution by a high-ranking police official who perceived him as being gay. The persecution included being raped and repeatedly beaten and forced to work as a prostitute, and Pozos testified that the police officer, identified in the court's opinion only as Martin, had made clear that "the harm he inflicted was motivated, at least in part, by Pozos's perceived homosexuality," according to the unsigned memorandum opinion issued by the court. Pozos, who testified that he is not gay, claimed that the persecution he had experienced had rendered him sex-averse.

Jose Patricio Boer-Sedano also had credibly testified to being singled out for persecution by a high-ranking police official, who was not named in the court's opinion by Circuit Judge Dorothy Nelson. The key difference from Pozos's case was that Boer-Sedano has self-identified as gay since childhood, although at times in Mexico he had denied being gay in order to escape arrest or persecution.

Boer-Sedano testified that he was arrested by the police officer and told it was because he was gay — even though homosexuality as such is not a crime in Mexico — and forced repeatedly to perform oral sex on the police officer, who complained that Boer-Sedano was not good at it and slapped him around. The police officer allegedly held a loaded gun to Boer-Sedano's head and threatened to execute him on one occasion, and at other times threatened to "out" him to his employer and others if he did not comply with the officer's demands. He also testified that family and co-workers had shunned him, and that even after he moved to another city and found work in a clandestine gay club, he was subjected to harassment and lost his job when the club was raided by police.

The State Department's reports on human rights issues in other countries amply document that gay people in Mexico face continued harassment and persecution by police as well as private citizens, but in both of these cases the Immigration Judges claimed that there was no "official persecution" by the government of the type that would qualify somebody for asylum. In both cases, the Board of Immigration Appeals affirmed these rulings, without even issuing an opinion, and in both cases the federal appeals court ruled that this action was contrary to the law.

Writing for the court in *Boer-Sedano*, Judge Nelson wrote, "Police officers are the prototypical state actor for asylum purposes. These persecutory acts by a single governmental or quasi-governmental official are sufficient to establish state action," which is crucial because only "official" persecution qualifies an applicant for asylum.

The two appellate panels rejected the arguments put forth by the Immigration Judges in both cases that these men could avoid future persecution in Mexico by relocating to different areas. In the case of Pozos, the Immigration Judge, noting Pozos's denial that he was gay, opined that he could avoid persecution by avoiding acting in a manner that would suggest to others that he was gay, a point picked up by dissenting appeals court judge Alex Kosinski.

But the majority of the court ruled that the credible evidence made clear that Pozos was likely to suffer persecution if forced back to Mexico. "As Pozos testified, he frequently suffered abuse as a result of his perceived homosexuality in a range of contexts, including the workplace and while walking down the street. The records shows he continues to be perceived as a homosexual. Thus, the record does not support the Immigration Judge's conclusion that Pozos would not face the violence inflicted on homosexuals in Mexico, which the State Department Report states is 'not uncommon,' merely by not engaging in open displays of affection with other men or not frequenting gay establishments."

In *Boer-Sedano*, the court seems to have been heavily influenced by the issue of HIV status. Boer-Sedano, who was apparently infected sometime after coming to the U.S. in 1992 as he had tested HIV-negative in Mexico, provided evidence from his doctor documenting that he had developed resistance to many of the current HIV treatments of choice, and was subsisting on investigational new drugs that are not available in Mexico. Furthermore, he was able to present convincing evidence that as an HIV-positive gay men, it was highly unlikely that he could obtain employment in Mexico or could afford to purchase insurance that would cover such medications. (Health insurance policies generally exclude coverage of investigational drugs, which are made available to people living with HIV in the U.S. under special programs funded by the drug companies and the government.) Boer-Sedano also convincingly showed that the medications he is taking now are unavailable in Mexico at any price, so the court found that requiring him to return to Mexico could pose a serious risk to his health.

Thus, his health status created a separate convincing reason for ruling that he is eligible for consideration for asylum, in addition to the anti-gay persecution he expects to encounter if forced to return.

Both opinions place the asylum decisions squarely in the lap of Attorney General Alberto R. Gonzales. Under U.S. asylum law, the ultimate decision is a matter of discretion for the Attorney General, but the petition does not even get to him if it is rejected by the Board of Immigration Appeals after a negative ruling by an Immigration Judge. Although Pozos and Boer-Sedano have won impressive victories in these decisive rulings by the 9th Circuit, their struggle for asylum is not at an end, but has advanced to a new stage.

The court designated the Pozos decision as unpublished, but authorized official publication for Judge Dorothy W. Nelson's opinion in the Boer-Sedano case. A.S.L.

Gay Peruvian Loses Asylum Appeal

Jose Salkeld, a gay man from Peru, lost his bid to have his petitions for asylum and withholding of removal considered by the Justice Department, when the U.S. Court of Appeals for the 8th Circuit in St. Louis ruled on August 25 that there was no basis to overturn an adverse ruling by the Board of Immigration Appeals on his claims. *Salkeld v. Gonzales*, 2005 WL 2036216.

Salkeld, who was not "out" as a young Peruvian, came to the U.S. in 1989 on a student visa

to study at Maryville College and Webster University. He had to drop out of school due to financial hardship, and found employment at a series of restaurants. He "came out" at school and eventually had a domestic partner, but the last time he visited his family in Peru was in 1995 (when he was still able to gain readmission to the U.S. as a student) and didn't reveal his homosexuality to his family in Peru until 2001, at which time they reacted very negatively to the information.

As recounted in the decision by Circuit Judge Kermit E. Bye, "All was well with Salkeld until February 2001, when he was convicted on one count of social security fraud for defaulting on a credit card obtained by unlawfully using the social security number of another." This brought him to the attention of the Immigration Service, which quickly process him for removal due to overstaying his student visa and working without obtaining the requisite status in the U.S. That he had a domestic partner is irrelevant under current U.S. law.

Salkeld had to admit that he was removable, but contended that he should be considered for asylum or withholding of removal under three different theories. He argued he could qualify for political asylum because of the way gay people are mistreated in Peru, that he was eligible for withholding of removal on the ground that if returned to Peru he would be subject to persecution, and as a third ground (which was not discussed in the court's decision for reasons that will become obvious) he contended that he was eligible for protection under the Convention Against Torture due to the likelihood that he would suffer serious physical injury if returned to Peru.

Unfortunately for Salkeld, there are strict time limits for seeking political asylum, and the clock starts to run as soon as somebody enters the country. The Immigration Judge determined that his asylum claim was time-barred. Nonetheless, at a hearing held on September 17, 2002, the judge took testimony and considered the case on the merits, in light of Salkeld's alternative theories.

On the hearing date, Salkeld tried to get a postponement, claiming that he had fallen out with his attorney over the attorney's decision not to pursue additional evidence from gay Peruvians about the hostile environment there and wanted to retain a new lawyer, but the Immigration Judge, noting that the hearing date had been set a year in advance, refused to grant a postponement, and Salkeld had to go ahead with his original lawyer.

Salkeld testified that he had remained closeted in Peru because he was afraid of being harmed for being gay, and said he had not revealed his homosexuality on the few visits home he had while a student, noting media reporting on anti-gay incidents there.

Salkeld also presented written testimony supporting his fears by another gay Peruvian, and provided expert testimony from University of South Florida Professor Harry Vanden, a recognized expert on Peru. Vanden testified that "Peruvian society is intolerant of homosexuality," that "any manifestation of homosexuality could invite a public reaction, sometimes a violent reaction. Police and other security forces often do nothing to protect homosexuals and periodically may even join in the harassment." Vanden testified that the government dismissed gays from employment, and that as late as in 2001 paramilitary groups in the country were reported to have hunted down and killed gay people there.

However, Vanden conceded on cross examination that homosexuality is not illegal in Peru, that there is a gay and lesbian community that has held a gay pride week, that some parts of the country are safer for gay people than others, and that "more liberal elements in the Catholic Church" had been working to improvement treatment of gay people, "although their progress is slow."

This testimony did not persuade the Immigration Judge that Salkeld had met his burden to show it was more likely than not that he would encounter persecution if he returned to Peru, which is the standard for recommending withholding of removal from the U.S.. The judge pointed out that Salkeld was not required to reveal his homosexual orientation upon returning to Peru, and could locate in one of the places where things were better for gay people.

After losing this ruling, Salkeld hired his new attorney and appealed to the Board of Immigration Appeals, but the board affirmed the Immigration Judge's ruling on March 1, 2002, without issuing a new opinion. The board found it no abuse of discretion by the judge in denying Salkeld's request to postpone the hearing for him to get a new lawyer.

The scope of judicial review in immigration cases is rather limited, both by statute and by circuit court precedent. In the 8th Circuit, the chances of overturning an administrative denial of asylum or withholding of removal are rather slim, since the standard is to show that the evidence in support of the petitioner is "so compelling the Immigration Judge could not reasonably arrive at the decision reached." Judge Bye found that this standard had not been met.

"Persecution is an extreme concept," wrote Bye, "and much of the harassment and intimidation of which Salkeld complains, while serious, does not rise to the level of persecution. The record contains evidence of some alarming instances of violence towards homosexuals, but these instances are relatively sporadic, and homosexuality is not penalized by the Peruvian government. Indeed, Peru does not have laws prohibiting homosexuality and there are no requirements for homosexuals to register themselves."

Salkeld had admitted in his testimony that he was never personally abused, even though he says that he was suspected of being gay. "Moreover," wrote Bye, "the record shows, like the United States, where some areas of our country are more hospitable to homosexuals than other areas, Peru has some locations in which homosexuals may live more safely. We are therefore satisfied the BIA's denial of withholding of removal is supported by substantial evidence in the record."

It appears that in the 8th Circuit asylum or withholding of removal for gay foreign nationals cannot be obtained without very strong evidence of extreme hostility and threats of severe violence. A.S.L.

7th Circuit Panel Orders Southern Illinois University Law School to Continue Recognizing Anti-Gay Christian Student Group Pending Trial on Merits

In an unusual, unpublished ruling finding that the Chief Judge of the U.S. District Court for the Southern District of Illinois had abused his discretion by denying injunctive relief, a divided panel of the 7th Circuit U.S. Court of Appeals ruled on August 22 that the Law School at Southern Illinois University in Carbondale must continue the local chapter of the Christian Legal Society as a recognized student organization at the school pending a trial on the merits of CLS's claim that its First Amendment Rights were unlawfully abridged when the school revoked its recognition over its anti-gay membership policy. *Christian Legal Society v. Walker*, No. 05–3239. The decision was reported on August 29 by the website insidehighered.com, which evidently obtained an electronic copy of the opinion from one of the parties, which it linked to the story on its website. As of August 30, the opinion was not posted on the court's website or available in Westlaw or Lexis databases.

The opinion for the panel is unsigned. The majority consists of Circuit Judges Michael S. Kanne and Diane S. Sykes. Circuit Judge Diane P. Wood dissented.

CLS was a recognized student organization at the law school, which adopted a policy statement that CLS requires "that officers and members adhere to orthodox Christian beliefs, including the bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual

conduct, would not be prevented from serving as an officer or member."

Law School Dean Peter C. Alexander informed CLS that it was in violation of a school policy to "provide equal employment and education opportunities for all qualified persons without regard to... sexual orientation." Alexander also noted that student organizations must comply with federal and state civil rights laws, including Illinois's ban on sexual orientation discrimination in employment and public accommodations. CLS stood firm, and the school administration revoked its formal recognition. This did not deprive CLS of the right to meet on campus, but did deny it various perquisites of recognized student organizations, including use of campus bulletin boards, private meeting space, storage space, a faculty advisor, and access to university website, publication and email services.

CLS claimed a First Amendment right to continue as a recognized organization, citing in particular *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurle v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995),the Massachusetts St. Patrick's Day parade case on which the U.S. Supreme Court relied to rule 5–4 in *Boy Scouts* that a private expressive association could exclude gay people from membership to advance or avoid contradiction to its message. On July 5, 2005, Chief Judge Murphy rejected CLS's motion for preliminary injunctive relief, see 2005 WL 1606448, finding that CLS had suffered no irreparable injury because it could still meet on campus pending the outcome of the case, and that CLS was unlikely to prevail on the merits because *Boy Scouts* was distinguishable, at least in his view.

The 7th Circuit majority disagreed on both counts. First, it found that if First Amendment rights are at stake, any deprivation of such rights is irreparable, focusing on the numerous benefits of recognized status that CLS would not enjoy if the injunction was denied. Further, the majority thought that *Boy Scouts* and *Hurley* provided support for CLS's argument that its expressive association rights were being violated by premising its eligibility for official recognition on its willingness to accept gay members. Dissenting, Judge Wood found the CLS failed to overcome the substantial deference owed to the district judge's ruling when abuse of discretion is the standard. She opined that the likelihood of ultimate success on the merits for CLS was not so clear, and that Judge Murphy's conclusions on the irreparable injury point were not so clearly wrong, as to justify imposing injunctive relief in this case. She also noted that the outcome of this case might be affected by the outcome of the Supreme Court's consideration of *Rumsfeld v. FAIR*, No. 04–1152 (cert. granted May 2, 2005), in which the 3rd Circuit ruled that a law school is an expressive association and as such has a First Amendment right to bar from its facilities recruiters that discriminate based on sexual orientation, including military recruiters. A.S.L.

Pennsylvania Appeals Court Revives Allentown Rights Law

An unanimous panel of Pennsylvania's Commonwealth Court, an intermediate appellate court, ruled on August 11 that the city of Allentown did not exceed its legislative authority by passing a law forbidding sexual orientation and gender identity discrimination by businesses and landlords. Reversing a ruling by the Lehigh County Common Pleas court, which had invalidated the ordinance, the Commonwealth Court ruled that the state's home rule statute did not stand as a barrier to passage of the rights ordinance, while agreeing with the trial court that the measure was not preempted by the state's civil rights law.

The case was complicated by Allentown's decision in 1996, through a public referendum, to change its municipal status under Pennsylvania law from a third class city to a home rule city, thus bringing it under a different set of rules for purposes of determining the city's legislative authority. Allentown then amended its Human Relations Ordinance, which was originally enacted under its old city status, in 2002 to add "sexual orientation" and "gender identity" to the list of prohibited grounds for discrimination.

Several businesspeople joined to file a challenge to the expanded rights law, arguing that under the Home Rule statute the city was barred from imposing any "new obligations" on businesses that were not already required by state law. Pennsylvania's state civil rights law does not presently forbid discrimination against gay and transgendered people.

The plaintiffs also argued that the city's ability to legislate in this area was preempted by the state's civil rights law, which they claimed was intended by the legislature to "occupy the field" of discrimination law in Pennsylvania to the exclusion of local legislation. The trial court rejected this preemption argument, noting that the state civil rights law specifically provided that it should not "be deemed to repeal or supersede" any local law provisions "relating to discrimination."

However, the trial court pointed to a provision of the Home Rule law which states that a municipality "shall not determine duties, responsibilities or requirements placed upon businesses, occupations and employers" except as expressly provided in state law, and held that this deprived Allentown of authority to impose new anti-discrimination requirements on businesses.

Writing for the court, Judge Cohn Jubelirer pointed out that the trial judge had ruled prior to the Pennsylvania Supreme Court's recent decision partially upholding the validity of a domestic partnership ordinance passed by the City of Philadelphia, *Devlin v. City of Philadelphia*, 862 A.2d 1234 (2004), in which that court embraced an expansive interpretation of municipal police powers in combating discrimination. Judge Jubelirer also noted as particularly significant that the Supreme Court had relied on a prior decision upholding a city's imposition on restaurants of more stringent health standards than were required by state law, as a proper exercise of police powers to protect the health of its citizens.

Turning to the specific text of the Home Rule law, quoted above, the Commonwealth Court adopted an interpretation urged by Allentown's lawyers under which the court would distinguish between affirmative duties and negative duties, and hold that the jurisdictional restriction applied only to affirmative duties. Thus, a municipality governed by the Home Rule law could not impose new affirmative obligations on businesses, for example to provide particular services not required by state law, but it could, under its police power, protect its citizens from discrimination by imposing a duty to refrain from discriminating, which would be seen as a negative duty.

The court found this point reinforced by evidence that the legislature intended this provision to deal with the specific problem of cities imposing "affirmative duties" on businesses. The court also pointed out the oddity that had Allentown retained its prior classification, which generally authorizes a lesser scope of legislative power, it would confront no such statutory limitation on its ability to pass a non-discrimination law. The city of Harrisburg, the state's capital, has not applied for the expanded home rule authority, but successfully passed a gay rights law years ago which has been upheld against challenge. (Harrisburg filed a friend-of-the-court brief in support of Allentown's defense of its human relations law.) Philadelphia's own gay rights law was not subject to challenge under the Home Rule theory, because Philadelphia's municipal powers are specified by a different law.

The court concluded its decision with a brief discussion of the preemption issue, which was easily disposed of on the ground that the state's civil rights law expressly provides that municipalities can enact broader protection than is provided by state law.

The opponents of the law could attempt to appeal this ruling to the Pennsylvania Supreme Court. A.S.L.

Ohio Appeals Court Rejects Challenge to Cleveland Heights Partner Registry

Ohio's 8th District Appeals Court for Cuyahoga County ruled against a constitutional challenge

to the domestic partnership registry that was established in 2003 by the city of Cleveland Heights. The decision in *Hicks v. City of Cleveland Heights*, 2005 WL 1649119 (July 14, 2005), was unanimous in rejecting a bid by a dissident city council member to get an injunction against operation of the registry.

The Cleveland Heights registry provides official recognition for unmarried partners, but it confers no statutory rights other than to be listed in the registry. No partnership benefits are conferred on partners of municipal employees, and no entity is required to refrain from discriminating against registered partners. Thus, the registry is a symbolic method of providing a public record that a partnership exists, but nothing more.

Nonetheless, city councilmember Jimmie Hicks, Jr., was determined to prevent it from going into effect, even thought the council's recommendation to establish the registry was submitted to a referendum of the voters, who approved it by a comfortable margin in November 2003. Just weeks before the city was to open the registry in January 2004, Hicks filed a lawsuit seeking a state court injunction. His argument was that the city did not have authority under the state constitution to establish the registry. The trial judge rejected his argument and he appealed.

Ohio's constitution provides for broad home rule powers for cities, so long as they do not attempt to control or regulate activities outside their boundaries. The court's opinion by Judge Sean Gallagher quotes numerous prior Ohio court decisions describing the extent of municipal power.

Quoting the Ohio Supreme Court, Gallagher wrote, "he 'powers of local self-government' conferred upon municipalities by this constitutional provision include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution.… To that end, the Supreme Court of Ohio has been liberal in its application of the home-rule doctrine. Indeed, the court has established that as a general policy, municipalities have the 'broadest possible powers of self-government' for local political issues."

Thus, the significant question for the court was whether the voters of Cleveland Heights had attempted to extend the city's legislative power beyond a purely local political issue. Due to the minimalist nature of the registry, it was easy for the court to conclude that no inappropriate extension had taken place. "Here, the registry affects only the municipality itself and has no extraterritorial effects," wrote Gallagher. " As the trial court found: 'The city allows residents and nonresidents alike to register. However, the city of Cleveland Heights confers no benefit, right or obligation upon those registering. The taxpayers of the city incur no cost since the registering couples pay a fee to cover the entire cost of the registry. A nonresident must pay the same fee but obtains no benefit aside from their names on the registry. Foreign jurisdictions are not bound to acknowledge the registry or to confer any rights or obligations. Residents and nonresidents are free to recognize the declaration, but no other city is obligated to take notice. The registry does not create any result, either within the city or outside its territory, other than the mere existence of names on a list. Therefore, the court, applying the territorial test… finds the city of Cleveland Heights' Domestic Registry to be an act of self-governance."

The court noted that some companies have used the registry in the administration of their own domestic partnership benefits programs, but that this was not a problem because it did not involve conferring any rights by statute.

Surprisingly, there was no consideration by the court of whether the registry violates the anti-marriage amendment passed by Ohio voters in November 2004. Ohio's amendment broadly goes beyond prohibiting same-sex marriages, by forbidding the state or its subdivisions from creating any other status comparable to marriage for unmarried couples. Perhaps because this lawsuit was filed many months before the anti-marriage amendment was passed, the parties were precluded from arguing about its application. Certainly, the minimalist nature of the registry would make it difficult to argue that it constituted a substitute form of marriage. A.S.L.

5th Circuit Upholds Denial of Hormone Treatment to a Transgender Prison Inmate

Ruling unanimously on Aug. 26, a panel of the U.S. Court of Appeals for the 5th Circuit upheld Texas penal authorities' decision to deny hormone therapy to Joshua Prayler, a state prisoner who claimed that he was being denied medically necessary treatment in violation of his 8th amendment rights. *Praylor v. Texas Dept. Of Criminal Justice*, 2005 WL 2050114.

Praylor filed a federal lawsuit seeking injunctive relief after he was denied both hormone therapy and brassieres. According to the court's per curiam opinion, the only form of therapy Praylor requested for his transsexualism was hormone therapy. The court recognized that there is now extensive precedent holding that transsexualism is a serious medical condition for which inmates are entitled to treatment, but that "such inmates do not have a constitutional right to hormone therapy," said the court. "Rather, the prison facility must afford the transsexual inmate some form of treatment based upon the specific circumstances of each case."

The medical director for the Texas Department of Criminal Justice testified that there was a treatment policy for transsexuals, but that eligibility for hormone therapy depended on a variety of factors. In this case, said the court, "Praylor did not qualify for hormone therapy because of the length of his term and the prison's inability to perform a sex change operation, the lack of medical necessity for the hormone, and the disruption to the all-male prison." The director testified that Praylor had twice been evaluated for treatment and denied eligibility, and taht the Department did provide mental health screening as part of its process for evaluating treatment for transsexuals.

The court concluded that the record supported the trial court's conclusion that denial of hormone therapy in this case did not constitute deliberate indifference to Praylor's medical needs, and so did not violate the 8th Amendment. A.S.L.

Minnesota Appeals Court Rejects Discrimination Claim by Theology Teacher

On August 23, a unanimous Minnesota appellate panel upheld a Lutheran high school's right to discharge a closeted married man as a teacher solely because he is gay, even though he made no public statements about his sexuality and claims to be celibate. *Doe v. Lutheran High School of Greater Minneapolis*, 2005 WL 2008912. Although the discharged teacher filed his legal action as "John FR Doe" to protect his anonymity, since he is not openly gay, a lawyer for the Lutheran Church-Missouri Synod, a co-defendant in the case, revealed his name to the *St. Paul Pioneer Press*, which used it in its account of the case on August 24, but we will respect his privacy and not repeat it here.

According to the opinion by Presiding Judge Robert H. Schumacher, John Doe was ordained as a pastor in the Lutheran Church in July 1976, and was "called to serve" as the Lutheran high school's campus pastor from 1976 until 1979. After serving in various other ministries, he was "called" again to serve the school as campus pastor and teacher beginning in 1993. Doe served as chair of the school's theology department, with duties including classroom teaching, chapel oversight and student counseling. The school is affiliated with the Lutheran synod, and maintains a policy of preferring to hire instructional staff who are members of the church or, at least, believing Christians.

Doe is married and has two daughters. In the spring of 1998, he informed his family that he now identified as a gay man, and he informed his wife's family of this development at her request. Doe's wife's brother, an administrative pastor employed by the Lutheran Synod, passed the information to his bishop, who then told the bishop with authority over Doe, Dr. Seitz. Seitz contacted Doe in the spring of 1999. Doe acknowledged to Seitz that he identified as

gay, but said he was not in any "gay relationship" and had never lived a "gay lifestyle."

At the beginning of the next school year, Seitz and Doe met with the high school principal. They discussed the importance of Doe remaining "closeted" and celibate, and agreed he would continue to teach at the school because of the difficulty of replacing him, but at midyear a replacement materialized and Doe was forced out. He never said anything about his sexual orientation to students, and there were no complaints about his performance of his duties.

Doe sued the school and the synod under the Minnesota Human Rights Act, which forbids sexual orientation discrimination but allows religious employers to follow their doctrinal requirements in personnel decisions. Doe argued that because he was celibate, not living a gay lifestyle, and did not speak publicly about his sexual orientation, and because he was a "secular teacher" who was not engaged in giving religious instruction, his discrimination claim could be determined without getting into any issues of church doctrine about forbidden conduct, and thus resolution of his discrimination claim would not impinge on the Free Exercise of Religion guaranteed to the church by the First Amendment.

The Hennepin County District Court rejected that argument, and so did the court of appeals. "Analysis of Doe's claim would require delving into church doctrine," wrote Judge Schumacher. After reviewing the evidence that the Lutherans regard the high school as a "sacred community" administered "according to the Christian understanding of the Gospel," Schumacher observed that "Doe's assertion that he should not have been discharged based on his sexual orientation would require the court to analyze and apply church doctrine to assess his argument. We must conclude that this type of searching inquiry intrudes into church doctrine and church administrative matters and engenders a prohibited relationship between the church and the judiciary."

The court of appeals also approved the trial court's conclusion that the Freedom of Conscience Clause of the Minnesota Constitution would similarly shelter the school and the synod from being called to account in a court for their action against Doe, since state intervention in this case would burden the "exercise of religious beliefs." Since Doe was an ordained minister as well as a teacher, and because the court found that his job at the school was permeated with religious duties, it concluded that he could not sue because "the state may not interfere with dismissals of clergy."

Doe also tried to argue that because the school and the church had never "incorporated the religious belief that homosexuality is a sin into their employment policies and because they have no stated policy, either written or unwritten, that forbids homosexuality among its employees," it was possible for the court to resolve the case without delving into religious beliefs, but once again the court was unconvinced, pointing out that Doe "was not merely a lay employee" since part of his job was being the campus pastor, and the church had plausibly maintained that he was forced out due to the church's ecclesiastical beliefs.

Finally, the court found that a specific exemption in the Human Rights Act leaves the church and the high school free to discriminate on the basis of sexual orientation, in any event, pointing out prior cases allowing a church to fire a gay music director and the Billy Graham Evangelistic Association to discharge a mailroom employee who was discovered to be gay. Consistent with those decisions, both of which had been denied review by the state's supreme court, the court of appeals found no basis for Doe's argument that allowing the church to discriminate actually constituted an Establishment of Religion in violation of the First Amendment. A.S.L.

Judicial Theocracy in Alabama: Justices Say Parental Rights Derive From God, Not the State

An 8–1 ruling by the Alabama Supreme Court in *Ex parte G.C., Jr.*, 2005 WL 1793345 (July 29, 2005), a child custody case, shows the degree to which Christian fundamentalism has come to influence some members of that court, a body that is known to be particularly homophobic. In a case that sparked separate opinions by six of the nine justices, at least three assert that parental rights are "God-given," and the dissenting judge goes further, placing his view of "Higher Authority" as the source of governmental legitimacy.

The dissenting judge, Tom Parker, goes even further, reaching out to criticize a recent West Virginia Supreme Court decision, *In re Clifford K.*, 2005 WL 1431514 (June 17, 2005), in which a lesbian co-parent was awarded custody of a child in a dispute with the child's maternal grandparents. Parker was elected to the court last year as part of the Christian Fundamentalist reaction to removal of Chief Justice Roy Moore for refusing to remove a 10 Commandments monument from the courthouse in defiance of a federal court order. Parker's official biography on the court's website cites his connection with Alabama organizations associated with James Dobson, Pat Robertson, and the notoriously anti-gay Focus on the Family organization, and suggests that Moore is his mentor. Thus his theologically-based dissenting opinion is no surprise in this case, although its starkly worded presentation is startling.

The Alabama case does not itself involve gay issues. G.C., Jr., is the six-year-old son of G.C. and L.B., who met in 1998 at a Narcotics Anonymous meeting. They had an affair and L.B. became pregnant. They did not marry. L.B. gave birth to the child in April 1999. Although G.C. knew that L.B. was pregnant, he was out of state at the time of the birth and did not see the child until two weeks later. Two months after the birth, G.C. requested a paternity test, which established that he was the biological father, but he did not seek to be declared the legal father until more than a year later. He visited only occasionally.

The child lived mainly with L.B.'s parents, and was entirely under their care after L.B. overdosed from drugs and had to go into rehabilitation. All parties conceded that L.B. was not fit to assert maternal rights. When the child was four years old, a legal battle erupted between the grandparents and G.C., apparently spurred on by his own mother, over parental rights. The child had been raised by his maternal grandparents, with G.C. exercising occasional visitation, but he wanted to be given sole custody.

The trial court concluded that G.C., Jr., who had bonded with his grandparents, should be in their custody. They had requested joint legal custody with G.C., but he had insisted on sole custody. The trial court found that G.C. had waived his rights as a biological parent by basically allowing his son to be raised by the child's maternal grandparents and not asserting his parental rights at an earlier stage in the child's life. After denying his custody the claim, the trial court also found that G.C. was unfit to exercise custody anyway for a variety of reasons.

The Alabama Supreme Court voted 8–1 to affirm the trial court's custody decision, but was sharply split over the issue of the declaration of unfitness, with several judges writing concurring and partial dissenting opinions. Only Justice Parker completely dissented.

Justice Lyn Stuart wrote for the majority of the court. She wrote two opinions, one signed by some of the other judges and the other speaking only for herself. In the second opinion, she stated, "Children are a gift from God. They need and deserve the love and support of both their mothers and their fathers. Parents have God-given rights concerning their children, which are and should be protected by state government. With every right we possess, however, comes responsibility. Rights must be claimed and responsibilities assumed or they may be forfeited." In a footnote, Stuart cites three verses from Psalm 127 as authority for the first quoted sentence.

Justice Michael Bolin, who was also elected to the court as part of the religious uprising of 2005, concurred with the majority opinion, but stated his agreement with some of Justice Parker's religious assertions. "I agree with the characterization of the view of our country's Founding Fathers that God, not the state or any government established by man, is the source of all our rights. I strongly contend, however,

that this same God also imbued in each of us a sense of responsibility and compassion that should make us recoil from the concept of protecting parental rights to the detriment of a child's safety, well-being, and welfare. I further agree that parents have a God-given right and responsibility to rear their children and that they should be allowed to do so unfettered by state interference. But this can be true only when a parent *accepts* that right and responsibility. In this matter, the father not only did not accept his parental duty, he abdicated it."

Justice Bolin continued, "With parental rights, ordained by God, come parental responsibilities, just as much ordained by God. In fact, we can say that the more sacred the right, the more solemn the responsibility. The defaults of the father to his divinely appointed parental responsibilities throughout his child's life can only be described as egregious."

Justice Parker used his dissent as an occasion to spell out a detailed theocratic philosophy of government, captured by the subheading of the first part of his opinion: "Courts must recognize that the state is but one of several spheres of government, each with its distinct jurisdiction and limited authority granted by God." In other words, God, not the people who wrote and ratified the Constitution, is the source of governmental authority. He asserted that the various "government spheres … all possess grants of specific and *limited* jurisdiction from the ultimate source of all legitimate authority, God (see Romans 13:1–2 ["there is no authority except from God, and those that exist have been instituted by God"]), who as the Supreme Judge of the World is the final authority over all disputes among men as well as among all governments of men. (See Declaration of Independence.)"

This assertion would surely have amazed Thomas Jefferson, the principal author of the Declaration, a free-thinking Deist who used formulaic language about the Creator to ground a theory of natural rights without specifically using the word God, and who was regarded as dangerously non-religious by many of his contemporaries. Indeed, the Declaration of Independence was considered revolutionary in rejecting the divine right of Kings as a source of governmental authority. And Parker's theories would certainly have startled many of the framers of the Constitution, which specifically grounds the rights of American government in the consent of the people, although many at that time might have found his "natural rights" rhetoric to be familiar.

That a 21st century American judge would cite Biblical text for the proposition that God's word takes priority in a court over constitutions, statutes, and judicial precedents suggests a rejection of the First Amendment's Establishment Clause and a judicial environment unlikely to be hospitable to claims by LGBT litigants. (Justice Parker's mentor, former Chief Judge Moore, was infamous for a homophobic, religiously-based diatribe in his written opinion in a lesbian custody case.)

Parker pushed the point further in his second section heading, writing: "Because God, not the state, has granted parents the authority and responsibility to govern their children, parents should be able to do so unfettered by state interference." After amplifying this heading a bit, Parker takes on the West Virginia lesbian custody case. "A recent ruling from the West Virginia Supreme Court of Appeals illustrates the consequences of converting God-given rights into state-granted privileges and thus underscores the importance of judicial acknowledgement of, and deference to, the true source of our rights," he wrote.

Parker wrote, horror dripping from his pen, that the West Virginia court "held that custody of a child should be awarded to a lesbian 'partner' of the child's deceased mother rather than to the child's natural grandparents, because the lesbian was the child's 'psychological parent' and the child's 'second mother, by design' and 'in actuality.'" Parker insisted that "erroneous presuppositions underlie the West Virginia ruling," and then expressed disapproval of the concept of psychological parents as "fundamentally incompatible with our Founders' belief that inalienable rights, including parental rights, are given by God, who as the Creator determines their nature and limits."

Parker insisted that G.C. had not voluntarily relinquished his God-given paternal rights, because G.C., as an unwed father, did not know that he could assert legal rights, seizing upon G.C.'s testimony that he had not sought sole custody earlier because "I didn't know what my rights were." "At first blush," wrote Parker, "it may seem peculiar that a father would doubt his right to sole custody of his own infant child. But that is not so peculiar in a world in which courts have granted women the legal 'right' to terminate the life of their pre-born children without even notifying the fathers, let along obtaining their consent." "Pre-born children" is a familiar slogan of organizations seeking to overturn *Roe v. Wade* and is inconsistent with the U.S. Supreme Court's precedents on abortion rights, by which lower courts are bound.

Parker asserted that "the best interests of a child are served by strengthening the state's acknowledgement of, and deference to, parental rights, because God has specially and uniquely equipped parents to raise their children so that any parent who possesses at least some love can care for his or her child better than the state, which by its nature cannot love." Referring to a Higher Authority than the court's existing precedents (guess Who?), Parker argued that the court should adopt that higher standard when it conflicted with the court's precedents.

The God-rhetoric throughout Parker's opinion is startling although sadly not unprecedented in Alabama, in light of former Chief Justice Moore's example. That it is echoed by at least two other members of the court gives cause for concern. That Justice Stuart had to write two separate opinions, presumably because a majority of the court was not ready to sign an opinion that included such rhetoric, is cause for at least slight hope that the majority of the Alabama Supreme Court still believes that the courts are bound to apply law, not theology, in deciding cases before them. A.S.L.

Internet Lawsuit Stumbles on Evidence Snag

Finding that it was impossible to establish how much constitutionally-protected speech might be inhibited by the obscenity provisions of the federal Communications Decency Act (CDA), a special three-judge federal district court ruled on July 25 against a challenge to the statute by Barbara Nitke, a photographer who specializes in sexually-oriented subjects with an emphasis on bondage and sadomasochism, and the National Coalition for Sexual Freedom. *Nitke v. Ashcroft*, 2005 U.S. Dist. LEXIS 15364 (S.D.N.Y.) The three-judge panel consisted of U.S. 2nd Circuit Appeals Judge Robert Sack and District Judges Richard Berman and Gerard Lynch.

In a previous decision in this case in March 2003, the same three-judge court rejected an attempt by the government to get the lawsuit thrown out on a motion to dismiss. At that time, the court found that the plaintiffs had raised a plausible constitutional theory, that the method of determining whether particular content is obscene is sufficiently unpredictable and indeterminate that it is possible that the law might have the effect of deterring or punishing arguably protected speech, and so they should have an opportunity at trial to be able to prove that sufficient protected speech was deterred or subjected to prosecution as to render the statute unconstitutional. The court also found in the earlier opinion that the plaintiffs could establish standing to bring the suit, meaning that they sought to put on the internet the kind of material that could subject them to prosecution under the statute and thus had a real and personal interest in contesting the law's constitutionality. However, at that time the court was unwilling to issue a preliminary injunction against enforcement of the statute.

The new decision sets out the court's factual findings based on a two-day trial during which numerous expert witnesses for both sides offered testimonial declarations and were then subjected to live cross-examination.

The CDA prohibits knowingly transmitting obscene content to minors on the internet, providing a defense if reasonable methods are used to exclude minors from access to the mate-

rial. The practical effect of the CDA is to ban free and easy internet access to any obscene material that is not shielded by barriers that most minors are believed to be unable to surmount, such as adult verification, special access codes, or credit cards for access. The courts indulge the presumption that anything put on the internet without such barriers can and will be accessed by minors, and that anybody who puts out content should be held to know this, thus satisfying the statute's intent requirement.

The First Amendment generally protects freedom of speech, but the Supreme Court held beginning in 1957 that obscene material does not generally enjoy First Amendment protection, and thus may be subjected to reasonable restrictions by the government, particularly to protect unwilling consumers or minors from being exposed to it. The Supreme Court struggled for fifteen years to reach some agreement on how to define what is obscene, finally adopting a three-part test in 1973 in *Miller v. California*, 413 U.S. 15. Under *Miller*, for something to be obscene it must flunk all three parts: (1) whether an average person in the relevant community "applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest," (2) whether "the work depicts or describes, in a patently offensive way, sexual conduct" when judged by contemporary community standards, and (3) whether "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The first two tests are to be resolved using the standards of the community in which the prosecution takes place, while the third test embraces a national standard. "Prurient interest" is general defined as a morbid or obsessive interest in sex. These are clearly very subjective tests.

The *Miller* tests were adopted at a time long before the internet, and many have argued that the internet renders them obsolete, because of the difficulty of controlling who can access material where. Purveyors of traditional pornography (films, magazines, photos) have ways of controlling and geographically targeting distribution that are just not available on the internet. This becomes particularly salient in light of the kind of material that Nitke and other members of the Coalition want to exhibit on-line. Nitke has a particular interest in documenting sadomasochistic (SM) sex-play, and many members of the Coalition, most prominently The Eulenspiegel Society, a mixed-sex group interested in SM activities, also wish to post such materials on the internet. They believe that many potential adult consumers of their material would be deterred by the kind of controls necessary to satisfy the affirmative defenses of the CDA, since they would require people to surrender some degree of anonymity in order to gain access.

The plaintiffs conceded that some of what they want to post might be considered obscene under the first two *Miller* tests by the standards of some communities but not others. What would be considered quite beyond the pale in many parts of the country in terms of what a local jury would consider prurient and patently offensive could pass without controversy in places like New York and San Francisco. But the real sticking point comes with the so-called national standard for "serious literary, artistic, political, or scientific value," which has generally been the most important defense for defendants in obscenity prosecutions because the prosecutor must satisfy all three of the *Miller* tests to get a conviction and literary, artistic, political and scientific value are held to be essential characteristics that don't vary from place to place.

A vivid example of these tests at work came during the famous prosecution of the Cincinnati Museum of Fine Arts in the early 1990s for displaying SM photographs by Robert Mapplethorpe. A local Cincinnati jury, properly instructed on the law, had to acquit the Museum and its director after hearing a parade of highly-credentialed art experts who testified, without any significant contradiction, about the serious artistic value of the photographs. They were constitutionally protected even though the Cincinnati jury members might have found the depictions to be offensive or to appeal mainly to prurient interest.

Nitke and the Coalition argued that the kind of material they were interested in posting is much more controversial than the Mapplethorpe works, which tended to be formally posed, highly stylized and carefully composed as "art." Nitke's work tends to be more documentary in nature, capturing what appears to be actual rather than posed SM activity, some of it much more extreme than anything photographed by Mapplethorpe, and The Eulenspiegel Society similarly has posted stories and photographs depicting actual rather than artistically composed SM activities. The plaintiffs testified that as a result of learning of the application of the CDA, which carries potential criminal penalties, they have been deterred from putting certain kinds of things on their websites, due to uncertainty whether they would be found obscene if they were to be prosecuted in various parts of the country where there is less tolerance for fringe sexual practices being discussed or depicted to a broad audience, and as well to uncertainty how the expert testimony would pan out on the third *Miller* test of artistic quality.

Under the CDA all it takes is one outraged parent discovering little Johnny or Mary looking at a gay bondage scene on the family desktop to stimulate a local prosecution just about anywhere in the country. The internet knows no boundaries. Thus their fears of possible prosecution were quite reasonable, as the court found.

Although the court had earlier agreed that this presented a plausible theory for attacking the statute, problems of proof emerged from the Supreme Court's overbreadth doctrine, as applied in First Amendment cases. Under this doctrine, a law that might incidentally deter or punish some protected speech while serving the compelling government interest in deterring or punishing obscenity would be considered constitutional. One seeking to have a statute declared overbroad would have to show that it punishes a substantial amount of constitutionally protected speech in comparison to the amount of unprotected speech.

The court found that the plaintiffs had failed to meet their burden to document the degree of overbreadth because, as a practical matter, they could not establish how much internet content might be subject to prosecution under the CDA, and what percentage of that content would consist of material ultimately found not to be obscene. This is a problem inherent in pre-enforcement challenges to statutes of this type, and it is why most overbreadth challenges are doomed to failure. The Supreme Court has restricted overbreadth challenges to cases in which the side-effects of a statute overcome its constitutional applications, and it is up to the challenger to prove that this is so.

This does not mean that the constitutionality of the CDA can never be challenged, but rather that some brave soul determined to put his sexually-oriented material on the internet will have to run the risk of prosecution in hopes of being vindicated when a jury refuses to convict him or a judge, in the context of a particular prosecution, finds the law to be invalid.

Something like this actually happened not too long ago. On January 20, in *U.S. v. Extreme Associates*, 352 F.Supp.2d 578 (W.D. Pa.), the federal government was prosecuting a sexually-oriented website for distributing obscene material, and a federal judge in Pittsburgh ruled that the obscenity statute was unconstitutional as a result of *Lawrence v. Texas*, because the government's only justification for the law was enforcement of morality.

The three-judge panel in *Nitke* case had not been presented with this argument, because the case was filed before *Lawrence v. Texas* was decided. The *Nitke* plaintiffs' strategy was to attack the CDA for being unconstitutionally vague and overbroad, and not as an unconstitutional attempt to enforce morality. *Extreme Associates*, a trial court decision, has no precedential authority, and it is being appealed by the Justice Department with the encouragement of the House of Representatives, which passed a resolution calling for the ruling to be overturned.

The *Nitke* plaintiffs could attempt to appeal the three-judge court's ruling. Such an appeal

would be taken to the Supreme Court, which is free to refuse to hear the case and is not likely to take it on. The Supreme Court rarely gets involved in this kind of case unless the appeal is being taken by the government from a decision holding the federal statute unconstitutional. Because the lower federal courts have been generally vigilant in protecting First Amendment rights on the internet, the Supreme Court has actually ruled on a considerable number of government appeals, and the result has chipped away at the CDA, among other things, but the highest court has yet to hold that obscenity provisions of the CDA are unconstitutional.

John Wirenius of Leeds Morelli & Brown, P.C., a Long Island law firm, represents the plaintiffs. A.S.L.

Federal Court Rejects Discrimination Claim by Lesbian Employees Against Gay Supervisor

A New York federal district court rejected the sex discrimination claims of two lesbians who alleged that they were harassed by a gay supervisor. *Palomo v. Trustees of Columbia University*, 2005 WL 1683586 (S.D.N.Y., July 20). In granting the defendant's motion for summary judgment, the court determined that, because the gay supervisor had allegedly focused his attention on the women because they were also gay, and not because they were women, his actions, to the extent that they could be construed as harassment, were not "based on sex" for purposes of Title VII.

Monisha Harrell and Danielle Pow worked in the Executive Education department at the Columbia Graduate School of Business. Ethan Hanabury, who is also gay, is the Associate Dean of the Department, and was their supervisor. Prior to this lawsuit, Hanabury testified that he regarded Pow and Harell as friends as well as colleagues. Accordingly, he would speak with them about his dating life and his travel plans and would frequently invite the women to join him for dinner. Harrell and Pow, on the other hand, insisted that they were not friends with Hanabury, and alleged that his constant office chatter with them both made them uncomfortable and prevented them from completing their work, which caused them to have to work longer hours. But whenever they tried to avoid him, they claimed that he would retaliate against them by giving them more work.

As part of their hostile work environment claim, Harrell and Pow described how they felt extremely uncomfortable when Hanabury subjected them to "graphic" discussions of his sex life, including a conversation in which he made a show of sitting down gingerly and noting to the women that he'd had a "good night" the previous evening. They also described how they felt uncomfortable when Hanabury asked them to help him upload personal photographs, including one in which Hanabury was in his underwear.

In addition to these incidents, Harrell was upset that Hanabury took no action against an employee who repeatedly displayed gay pornographic material in his office and whom Harrell accidentally discovered "engaging in sexual activity in his office" (ahem) even thought Harrell reported these incidents to him. And Pow believed that Hanabury contributed to an office dispute that culminated with one of Pow's coworkers screaming at her in a threatening manner. Ultimately, both Harrell and Pow resigned because of the uncomfortable working environment that they attributed to Hanabury's behavior and management style. Consequently, in addition to their hostile work environment claim, they alleged that their resignations were, in fact, constructive discharges.

With respect to their sex discrimination claim, Harrell and Pow argued that they were required to spend hours of their working day engaged in personal conversation with Hanabury, whereas male employees were allowed to go about their business. U.S. District Judge Denise Cote, however, was not convinced. First of all, the court expressed skepticism that "engaging in extended personal conversations during the work day can constitute an adverse employment action." More importantly, however, the court noted that there was insufficient evidence for a jury to conclude that Hanabury chose to talk with these women because of their sex, as opposed to their sexual orientation:"[Plaintiffs'] own evidence supports the inference that Hanabury chose to talk to them based on his judgment that fellow homosexuals would be receptive to his chatter, or his belief (albeit misguided) that Pow and Harrell were his friends Accordingly, the judge dismissed Plaintiffs' sex discrimination/disparate impact claim as a matter of law.

Turning next to their hostile work environment claim, Judge Cote first ruled that the incidents regarding the employee who was viewing gay pornography, consideration of which would be otherwise time-barred, were too unconnected to the other issues in the plaintiffs' complaint and too remote in time to be considered part of a pattern or practice of discrimination. The remaining accusations centered on the charge that Hanabury forced the women to listen to his chatter and have dinner with him against their will. The primary difficulty with plaintiffs' claim, from the court's perspective, was that they never communicated to Hanabury that his conduct was unwelcome. In particular, Judge Cote noted that the women never claimed that they had other dinner plans or were too busy to help him with his scanning projects. Although the women claimed that Hanabury would "punish" them with additional work when they tried to avoid him, Judge Cote found no evidence that Hanabury had criticized or reprimanded them in a manner formal enough to be considered adverse employment action.

Judge Cote recognized that some of Hanabury's alleged actions, particularly his sexually explicit conversations, would demonstrate bad judgment and a lack of professionalism by someone in a supervisory role. Ultimately, however, she found that there was no evidence that Hanabury's conduct was "permeated with 'discriminatory intimidation, ridicule, and insult.'" Accordingly, she ruled that the plaintiffs failed to demonstrate the existence of a hostile work environment.

Even assuming that this factor could be demonstrated, Judge Cote noted that the plaintiffs' claim also failed because they could not prove that Hanabury's actions were directed at them "because of sex." Rather, the evidence pointed only to "Hanabury's mistaken judgment as to the existence of a friendship, and the assumptions he made because of their sexual orientation."

Finally, the court addressed plaintiffs' claim of retaliation, noting that, while the women had complained to Hanabury about his "indifferent management style" and low office morale, these complaints did not constitute "protected activity" (i.e., reports of discrimination) for purposes of Title VII retaliation analysis.

The court also addressed, and ultimately rejected, the sex discrimination claim raised in the case by the named lead plaintiff, Yolanda Palomo. Palomo alleged that she suffered adverse treatment at work because she was suffering from a difficult pregnancy. The court found, however, that the defendant's actions were reasonable steps to accommodate Palomo's diminished capacity to travel and undertake other stressful components of her job, and noted that some of the defendants' actions were in response to requests by Palomo for a modification of her duties. *Sharon McGowan*

Gay Man's Conviction Voided Due to "Egregious" Prosecutorial Misconduct

Finding that an upstate prosecuting attorney's "egregious misconduct" had deprived a gay man of a fair trial on child abuse charges, a unanimous four-judge panel of the New York Appellate Division in Albany reversed his conviction and 50–year prison sentence and ordered that a new trial take place in *People v. De Vito*, 2005 N.Y. Slip Op. 06536, 2005 WL 3488640 (N.Y. App. Div., 3rd Dept., Aug. 25, 2005). Justice Karen K. Peters' opinion was also based on Montgomery County Judge Felix J. Catena's flawed handling of objections to the admission of a written confession by the defendant.

Thomas De Vito ran a daycare center in his home until May 2002, when a boy told authorities that he had been abused by De Vito years earlier and identified another boy who he also

claimed had been abused. Two police officers went to De Vito's home and asked him to come to the police station, where they got him to sign a waiver of his right to have an attorney present while being questioned and a written confession to having had "sexual contact" with the two children during 1995. In the confession, De Vito said that was a "time in my life when there was turmoil with my marriage and I was unhappy with my life."

When Montgomery County District Attorney John Conboy filed formal charges against De Vito in September 2002, he was charged with two counts of sexual conduct against a child in the first degree and endangering the welfare of a child, but the indictment alleged only incidents occurring in 1997 and 1998, because the statute of limitations had run out on any early incidents.

Before the trial, De Vito's lawyer, Norbert Sherbunt, sought to have the statement to the police excluded from the trial, arguing that the "confession" only admitted conduct that could not be prosecuted due to the statute of limitations, that it wasn't truly a voluntary statement, and that it would have to be excluded as evidence of a prior crime that was not charged in the indictment and thus not relevant to the issues before the court. Prosecutor Conboy, opposing the motion, argued that De Vito had deliberately limited his admissions to conduct barred by the statute of limitations, and sought to have the statement ruled admissible as a confession to the crimes that were charged.

Judge Catena first held a hearing limited to the question whether the statement was voluntarily given, and concluded that it was. Then he held a second hearing to determine whether the statement was admissible as either a confession or as evidence of uncharged crimes. No witnesses were called at this second hearing, but after hearing argument from the lawyers, Judge Catena decided that the date discrepancy was "inconsequential" and ordered that the statement be admitted.

At the jury trial, the statement was read into the record, and then Judge Catena instructed the jury that it should decide whether to treat this as a confession of the crimes charged in the indictment or as a confession of uncharged acts, in which case it could consider this as evidence related to De Vito's "opportunity and/or feasibility defense." (De Vito was arguing that circumstances at his home were such that the alleged conduct could not have occurred as charged against him.) Catena also told the jury that they should not consider the statement as evidence of a "propensity" to commit the conduct charged in the indictment, if they found it admissible as evidence of uncharged crimes.

The jury was presented with what seems to have been an overwhelmingly homophobic presentation by the prosecuting attorney. During the jury selection process, De Vito's defense attorney raised the issue of homosexuality in order to try to identify individuals whose anti-gay bias would make them unsuitable as impartial jurors. Conboy apparently took this as license to make frequent derogatory comments throughout the trial about De Vito's sexuality. While cross-examining De Vito, Conboy "probed defendant's sexual conduct with his past and present homosexual partners" at length, and dwelt on graphics from De Vito's computer that had led to his wife's discovery that he was gay.

During closing arguments, Conboy tried to use De Vito's homosexuality as an explanation for the alleged crimes by referring to them as stemming from "De Vito's libido." Countering the defense argument that De Vito was the victim of a "witch hunt" by law enforcement authorities, Conboy told the jury "He's not a witch. He's Joe's bitch," a reference to De Vito's domestic partner, and he also made references to a pornographic movie and compared certain defense witnesses to celebrities based on similar names and physical appearances, according to Justice Peters' opinion.

After the jury convicted De Vito and Catena sentenced him to a cumulative term of 50 years in prison, a Metropolitan Community Church minister who knew De Vito and had been attending the trial helped to locate appellate counsel, Michael Mann, who agreed to appeal the case after reading the trial transcript and becoming convinced that the trial was unfair.

The Appellate Division agreed with Mann's arguments. First, in the matter of the whether such a confession is properly admissible, the court ruled that it was improper to put the confession in evidence and then leave it up to the jury, under confusing instructions, to decide how to use it in assessing guilt or innocence. Peters stated that a new hearing had to be held solely on the issue of the confession, its admissibility, and its relevance to the case.

But more significantly, the court found that the district attorney's conduct of the trial had violated De Vito's fundamental due process rights to a fair trial. "The prosecutor's remarks were highly prejudicial," wrote Justice Peters, "did little to impeach defendant's testimony or credibility, were irrelevant to the crimes charged, appealed to the fears and prejudices of the jury and were designed to sidetrack the issue away from defendant's guilt or innocence. They had no place in this trial."

Although Judge Catena did sustain objections by De Vito's defense attorney, Peters found that his "curative instructions were insufficient to overcome the extreme prejudice that resulted from the prosecutorial misconduct." Peters also found that Catena had improperly allowed lines of questioning by Conboy related to De Vito's sexual activities that were unrelated to the charged crimes. "Moreover," she continued, "the prosecutor should not have been permitted to repeatedly imply — without any good faith basis — that defendant had sexual contact with every man that entered into the daycare center."

Concluding that De Vito's statement to the police was improperly admitted and that the prosecutor's conduct had significantly prejudiced the fairness of the trial, the Appellate Division concluded that the judgment must be reversed and the case sent back to the county court for a new trial.

Press reports indicated that the prosecutor would push for a prompt new trial, likely to take place in October. One local police official was critical of the appellate division, saying that there was no room for "political correctness" in dealing with a confessed child abuser. A.S.L.

Tennessee Appeals Court Revives Dues Lawsuit for Anti-Gay Teacher

A school teacher who opposed gay rights and domestic partnership benefits was entitled to litigate over his union's use of his dues money to promote those issues politically, ruled the Court of Appeals of Tennessee on July 29, 2005, in *Esquinance v. Polk County Education Association*, 2005 WL 1798625. While rejecting Dewey Esquinance's argument that the union's exclusive representation rights violated a state constitutional provision on monopolies, the court of appeals found that his free speech claim was entitled to trial, reversing the Polk County Circuit Court.

Esquinance is a teacher in the Polk County school system. He sued Polk County Education Association and the Tennessee Education Association/NEA (the union) seeking monetary, declaratory and injunctive relief. Esquinance alleged that the union violated his rights to free speech, free assembly and petition, freedom of religion and due process under the Tennessee Constitution because a portion of his union dues were passed from the local union to the Tennessee Education Association and the National Education Association, which used those funds to promote abortion rights and homosexual rights, among other activities to which Esquinance objects based on his moral, religious and political views. He also alleged that the state's Education Professional Negotiations Act (EPNA), providing for the recognition of a single professional employee organization as the representative of all of the professional employees in the school system for the purposes of collective bargaining, creates an unlawful monopoly in violation of the Tennessee Constitution.

Esquinance asserted that he joined the union because only union members have a right to vote regarding working conditions, and he wanted to avoid the discrimination against those employees who decided not to join the union. He allegedly informed the union that he objected to his dues being used for any activi-

ties other than local negotiations, but the union refused to pro-rate his dues. When Esquinance instructed the Board of Education to deduct dues from his paycheck for local negotiations only, his union membership was terminated. The union refused to reinstate his membership until he paid the full amount. Esquinance brought this complaint, he said, because the union force him to choose between "a voice and a vote in his governmental workplace conditions and supporting political, religious and ideological activities to which he objects." Polk County Circuit Judge Lawrence Puckett granted the union's motion to dismiss for failure to state a claim.

Writing for the Court of Appeals, Judge W. Frank Crawford found the cases relied on by both sides distinguishable, noting that the chief federal precedent Esquinance cited, *Abood v. Detroit Bd. Of Education*, said that "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the states."

The EPNA provides that professional employees have the right to self-organize, and that any such organization must be open to those professional employees. Based on this, Judge Crawford rejected the union's argument that Esquinance does not have a right to join the union. "If the membership was not open to Plaintiff, and others in like position, the organization could not be a professional employee organization qualified to be a bargaining agent," he wrote.

Defendant also asserted that generally "the courts would not intervene in the internal affairs of voluntary associations." However, this court had previously held in *Coke v. United Transportation Union* that the court could intervene in the union's affairs "where the union's own procedures have not been followed or the union and/or its officers act in an otherwise arbitrary, oppressive or unlawful manner."

Viewing the complaint in a light most favorable to the plaintiff for purposes of the motion, the court of appeals held that the lower court erred in granting defendant's motion as to the state constitutional claims. *It seems to this Court that the authority for a collective bargaining organization is for the purpose of a relationship of the various employees with the board of education, and it could be interpreted to mean that a voluntary donation of a portion of the dues collected from the employees exceeds the authority granted," wrote Crawford. "Moreover, the facts must be developed to determine whether Polk County Education Association is acting under color of state law," he wrote, since that would determine the relevance of the state constitutional free speech provisions to Esquinance's claim. Thus, Crawford found that the trial judge should not have dismissed this part of the complaint.*

But not so as to Esquinance's claim that the EPNA created an unconstitutional monopoly. Crawford wrote that the purpose and policy of the Act is for the "promotion of the welfare and benefit of the students, teachers, and the public as a whole." Given these circumstances, Crawford writes that a monopoly was not created in violation of the state constitutional prohibition on monopolies. *Eric Wursthorn*

Anti-Marriage Group Suffers Setback in Wrangling Over Wording of California Initiative

The battle over same-sex marriage in California is proceeding along two separate paths, with one leading eventually to the State Supreme Court and the other possibly to the voters in 2006 in the form of two proposed amendments to the state constitution. On August 18, the amendment path became a bit rockier for the anti-gay forces when Sacramento Superior Court Judge Raymond Cadei largely upheld Attorney General Bill Lockyer's proposed petition and ballot summary for one of the proposed amendments. *Bowler v. Lockyer*, No. 05CS01123 (Sacramento Superior Ct., filed Aug. 1, 2005). On September 1, Judge Cadei finalized the language that will be used for the ballot title and descriptive summary, emphasizing the rights that would be lost were the measure enacted.

Two different groups proposed marriage amendments. One, calling itself ProtectMarriage.com, is proposing a single sentence amendment: "A marriage between a man and a woman is the only legal union that shall be valid or recognized by the state." If enacted, this would undoubtedly generate litigation about the meaning of "only legal union," and whether that would invalidate the state's wide-ranging Domestic Partnership statute and various government policies flowing from the statute, including a recent California Supreme Court ruling, see above, concerning protection against discrimination for domestic partners under the Unruh Civil Rights Act.

The second group, calling itself VoteYesMarriage.com, has proposed a much lengthier amendment in two parts. The first part states "Only marriage between one man and one woman is valid or recognized in California, whether contracted in this state or elsewhere." The second part provides that the institution of civil marriage as described in the first part may not be abolished, and that the government may not "bestow statutory rights or incidents of marriage on unmarried persons, or require private entitles to offer or provide rights or incidents of marriage to unmarried persons."

In both cases, the amendment supporters submitted proposed wording for petitions and for the ballot pamphlet that emphasize the marriage definition aspects of their amendments without clearly stating the impact those amendments could have on existing domestic partnership rights for same-sex couples in California. A series of statutes enacted over the past five years have gradually expanded such partnership rights to near-equivalence with marriage for purposes of state law. Under California laws, if two amendments are proposed on basically the same subject, the one that wins the most votes is enacted if it is supported by a majority of the voters.

Finding that the proposed petition and ballot language would be misleading to voters, Attorney General Lockyer exercised his prerogative to rewrite them. VoteYesMarriage.com proposed to call its initiative "The Voters' Right to Protect Marriage Initiative." Lockyer wrote a new title for both initiatives — "Marriage. Elimination of Domestic Partnership Rights" — and provided a detailed summary of the various rights of domestic partners that would be overturned by passage of the amendments. ProtectMarriage.com did not bring any legal challenge to Lockyer's action, but VoteYesMarriage.com filed suit in Sacramento Superior Court, protesting Lockyer's version and arguing that the version they submitted should be on the petitions and the ballot.

Ironically, Lockyer's office is defending the current state marriage law, which denies marriage rights to same-sex partners, in the case that will eventually reach the state Supreme Court. The Attorney General takes the position that the state is not obligated to allow same-sex couples to marry as a matter of state constitutional law, but he is committed to defending the Domestic Partnership statute, and his rewriting of the initiative language could contribute greatly to the outcome of the initiative campaign because domestic partnership rights enjoy widespread support in California, to judge by public opinion surveys.

If voters are clearly informed that passage of either proposed amendment would overturn domestic partnership rights, it is believed, many will not sign the petitions and one or both of the proposals may not even make it to the ballot, but if one or both of them do get enough signatures, the revised ballot language may help opponents of the amendments persuade the voters not to approve them.

Judge Cadei, ruling from the bench, found that Lockyer's proposed title was fair and, under state law, the Attorney General has a right to adopt a title for the initiative so long as it fairly describes the effect of the proposed amendment. However, Cadei thought that Lockyer had gone too far in his paragraph summarizing the possible impact of the amendment, in a way that might mislead voters into thinking that the amendment would mandate more loss of rights than might be the case.

"I guess my problem is, at what point does something that is technically accurate become misleading," asked Cadei in court, as reported

by a local legal newspaper, "The Recorder", on August 19. Responding to the attorney for VoteYesMarriage.com, who complained that Locker's proposed title was misleading, Cadei said, "I don't think that is misleading or false. You might choose different words. I might choose different words. But that isn't the standard."

Cadei ordered representatives of the parties to attempt to negotiate language to describe the impact of the amendment, finding that Lockyer's proposed language went too far but that the language proposed by the amendment's proponents was inadequately informative. He ordered that the parties return to court on September 1 with proposed revisions for him to consider if they could not reach agreement by direct negotiation. When the parties returned on September 1, Judge Cadei approved language mainly along the lines of the attorney general's proposal.

Numerous LGBT rights groups intervened in the case to argue in support of Lockyer's proposed initiative title and summary, including Lambda Legal, National Center for Lesbian Rights, the California chapter of the ACLU, and a group of election law experts. A.S.L.

North Carolina Sodomy Conviction Voided Based on *Lawrence v. Texas*

The North Carolina Court of Appeals ruled in *State v. Whiteley*, 2005 WL 1944764 (Aug. 16), that a sodomy conviction must be voided because of *Lawrence v. Texas*. While rejecting the defendant's arguing that the state's crime against nature statute must be struck down as facially unconstitutional, the court held that under the circumstances of this prosecution the defendant was entitled to have his conviction thrown out.

The defendant, Greg Whitely, was charged with three sexual offenses, including "crime against nature", for attempting intercourse and performing oral sex on a woman he brought home (together with several other people) from a party they were both attending. There was conflicting evidence before the jury over whether the woman was drunk or otherwise impaired. Pharmacological testing showed that she had ingested medication that could cause loss of consciousness or memory, but she testified that she did not drink at the party. Other witnesses indicated that she had walked into the defendant's bedroom on her own steam. She disclaimed any memory of what happened in the bedroom, but the police became involved when she later experienced discomfort and sought medical attention that revealed injury in her vaginal area.

These events occurred on the evening of May 24–25, 2002, a year prior to the Supreme Court's decision in *Lawrence v. Texas*. Whiteley was prosecuted the following year on three charges, first degree rape, first degree sexual offense, and crime against nature. By then, the *Lawrence" decision had been announced. Whiteley moved to dismiss all the charges against him, contending that the sexual acts (which he did not deny having done) had been consensual. The trial judge denied his motion, but reduced the first two charges to second degree rape and second degree sexual offense. The judge also rejected Whiteley's demand to charge the jury that he could only be convicted under the crime against nature statute if it found lack of consent. Thus, the judge charged the jury that consent was an issue on the rape and sexual offense charges, but not on the crime against nature charge, a correct reading of the statutory language. Whiteley was convicted only on the crime against nature charge, and he appealed.*

Writing for the appeals court, Judge Robert Hunter rejected Whiteley's argument that the crime against nature statute, which has withstood numerous earlier constitutional challenges, was facially invalid. Whiteley had argued that after *Lawrence* a state could not single out oral sex and treat it separately from other kinds of sex, but Hunter focused on the limiting language in Justice Anthony Kennedy's opinion in *Lawrence*, which made clear that the Supreme Court was ruling only on the criminalization of private, consensual, non-commercial sex between adults. In light of this, found Hunter, the North Carolina law was not facially invalid because there was a wide range of conduct to which it could constitutionally apply.

However, the court ruled that in this case, because the defendant was acquitted on the other counts and convicted only on the sodomy count, and because the trial judge did not charge the jury on the element of consent, the conviction must be vacated. Because Whiteley had conceded that he committed the sexual acts, the jury must have acquitted him on the first two charges because it believed those acts were consensual. Consequently, since the same conduct was the basis for the sodomy charge, the jury must have convicted on that charge only because the trial judge had inappropriately refused to give the same charge on consent under the crime against nature statute, so the conviction must be set aside. Furthermore, no new trial was needed, concluded Hunter, because the jury verdict clearly indicated that the jury had found as a matter of fact that the sex was consensual, and thus constitutionally protected. A.S.L.

Lawrence Held Irrelevant to "Incest" Case Involving a Stepparent

Ruling on August 15, the Ohio 5th District Court of Appeals found that *Lawrence v. Texas* was irrelevant to the constitutionality of the state's incest statute, in the prosecution of a stepfather charged with having sex with his adult stepdaughter. *State of Ohio v. Lowe*, 2005 WL 1983964, 2005–Ohio–4274.

Paul D. Lowe was charged with incest for initiating a consensual sexual relationship with his 22–year old stepdaughter. The incest statute covers sex between an adult and his "stepchild." In his defense, Lowe argued that the wording of the statute clearly applied only to sex with minors and, alternatively, that the statute was unconstitutional under *Lawrence v. Texas* to the extent it penalizes private sex between consenting adults.

Turning first to the statutory construction issue, Judge Julie A. Edwards wrote for the court, "While appellant argues that the prohibition in such statute is limited to minor children only, as noted by appellee, age is not an element of the offense of sexual battery. R.C. 2907.03(A)(5) clearly and unambiguously and with no limitation prohibits sexual conduct between a stepparent and stepchild regardless of the age of the stepchild. The age of the stepchild is immaterial."

Edwards relied on the Ohio Supreme Court's ruling upholding the prohibition on sex between stepparents and stepchildren in *State v. Noggle*, 615 N.E.2d 1040 (1993), where the court stated that the statute "was obviously designed to be Ohio's criminal incest statute. The traditional family unit has become less and less traditional, and the legislature wisely recognized that the parental role can be assumed by persons other than biological parents, and that sexual conduct by someone assuming that role can be just as damaging to a child." The court also noted a prior decision upholding penalties where the stepdaughters were 18 and 20 years old.

Turning to the constitutional argument, Lowe argued that his conduct came under the protection of *Lawrence* because it was consensual and did not involve a minor. After noting *Lawrence*, however, Judge Edwards went on to reject the constitutional challenge without further direct reference to *Lawrence*. First Edwards rejected the argument that the statute was facially unconstitutional, citing a prior Ohio Court of Appeals ruling (from 1990) rejecting a challenge in the context of a 17 year old stepdaughter, premised on the idea that a stepparent is in loco parentis to the minor and thus "this statute bears a real and substantial relation to the public morals." Turning to the as-applied challenge, Edwards noted a 2003 Ohio Court of Appeals ruling, *State v. Freeman*, 801 N.E.2d 906, rejecting a *Lawrence*-type defense to a charge of incest between a father and his young adult biological daughter, pointing out that the *Freeman* court had premised its ruling, in part, on the state's "legitimate interest in protecting the family unit." She found the same rationale determinative in this case: "While the relationship in the case sub judice is not between a biological father and a biological daughter, but

rather between a stepfather and stepdaughter, the same important value is at stake — the protection of the family unit." A.S.L.

Illinois Appellate Court Holds State Agency Incorrectly Applied Abused and Neglected Child Reporting Act

On July 29, 2005, the First District, Fourth Division, Appellate Court of Illinois reversed a determination by the Circuit Court of Cook County affirming the Illinois Department of Professional Regulation's (DPR) holding that plaintiff Geoffrey Magnus exhibited professional incompetence and committed malpractice in counseling a male teenage sex offender who was sexually attracted to other boys. *Magnus v. Department of Professional Regulation*, 2005 WL 1797504 (Ill. App. 1 Dist.).

Magnus, a licensed clinical social worker, was employed by the University of Illinois College of Medicine in Rockford, Illinois. He provided psychotherapy services to adults and children assigned to him by the university. Magnus provided treatment services to a 13–year-old male identified as M.G. for approximately one and a half years. During this time, M.G. pled guilty to a delinquency petition for aggravated criminal sexual abuse involving his three-year-old male cousin. M.G.'s probation officer submitted a charge with DPR alleging that Magnus encouraged M.G.'s sexual activity and instructed M.G. on sexual technique.

DPR filed an administrative complaint against Magnus which alleged M.G. told his probation officer that he had been having sexual relations with other 13– and 14–year old boys and that plaintiff not only encouraged this behavior, but instructed M.G. on how to relax his anal sphincter muscle so that he would not experience pain during receptive anal intercourse. Also, the complaint alleged that Magnus failed to intervene, discourage or report M.G.'s activities to appropriate authorities.

Hearings were held before an administrative law judge, who concluded that DPR had proven by clear and convincing evidence that Magnus' actions constituted malpractice and professional incompetence. DPR suspended his license to practice clinical social work for 60 days and placed him on a two-year period of probation. Magnus appealed, contending that DPR's determination was clearly erroneous and that he was prejudiced by numerous procedural errors during his hearing.

Specifically, Magnus argued that his failure to report M.G.'s sexual activity to either his parents or probation officer did not constitute malpractice and professional incompetence in violation of the Illinois Mental Health and Developmental Disabilities Confidentiality Act. The Appellate Court, in an opinion written by Justice Patrick J. Quinn, found that neither DPR nor Magnus addressed whether there was an obligation to report M.G.'s sexual activities to the Department of Children and Family Services pursuant to the Abused and Neglected Child Reporting Act.

Quinn cited *People v. Morton*, which involved admissions made by an adult to a social worker, interpreting the Reporting Act to be an exception to the Confidentiality Act. "[T]herapists and recipients have the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications in court proceedings and before other various situations. The privileged quality of communication between any professional person required to report and his patient or client shall not apply to situations involving abused or neglected children and shall not constitute grounds for failure to report as required by [the Reporting Act]."

This case was remanded to DPR for a determination of whether M.G., or the other boys with whom M.G. had sexual relations, should be considered an "abused child" as defined by the the Reporting Act. If any of the boys are, then DPR is to determine whether the Reporting Act required Magnus to report M.G.'s sexual activities to the Department of Children and Family Services. Quinn did not address DPR's findings that Magnus encouraged M.G. to engage in sexual activity or that he gave improper advice to M.G. Magnus' procedural claims had little effect on the decision. *Eric Wursthorn*

8th Circuit "Seriously Doubts" *Batson* Applies to Sexual Orientation

Ruling Aug. 31 on two appeals by circuit boys convicted of drug offenses involving crystal meth, a panel of the U.S. Court of Appeals for the 8th Circuit expressed "serious doubt" that a prosecutor's attempt to keep a gay man off a jury would be unconstitutional under the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). However, the court did not have to rule on the question, because it found that the prosecutor had other, nondiscriminatory reasons for rejecting the potential juror in question. *United States v. Ehrmann*, 2005 WL 2086740; *United States v. Blaylock*, 2005 WL 2086739.

Timothy Ehrmann and Eugene Blaylock were stopped on June 8, 2002, by an Arizona highway patrol officer when Blaylock was driving at 94 miles an hour in a 75 mile and hour zone. The stop led to a search of the vehicle, resulting in the recovery of crystal meth in the trunk as well as Ehrmann's laptop, on which were incriminating email messages. Ultimately, Ehrmann and Blaylock and several other codefendants were tried on charges of running a meth distribution operation, and all the codefendants were jointly tried before Judge Joan N. Ericksen, U.S. District Court for the District of Minnesota. Although Ehrmann and Blaylock were acquitted on some charges, Ehrmann was convicted on numerous charges involving his leadership role in setting up and running the meth distribution scheme, in which Blaylock was a minor player. The jury convicted Blaylock only on lesser charges. Ehrmann was sentenced to 30 years, Blaylock to 10 years.

Their appeals raised a variety of evidentiary and procedural issues, none of which the court of appeals found to be of merit. In identical language in both decisions, Circuit Judge William Jay Riley addressed the argument that the jury convictions were constitutionally tainted because of the prosecutor's peremptory strike of a prospective gay juror.

Under *Batson*, a racially-motivated peremptory strike is a violation of the Equal Protection rights of the potential juror and may taint the outcome of the trial. In *People v. Garcia*, 92 Cal. Rptr. 2d 339 (2000), the California Supreme Court extended the reasoning of *Batson* to find a constitutional violation when a prosecutor used peremptory challenges to exclude gay jurors in a case involving a gay defendant, and the 9th Circuit Court of Appeals has assumed, without deciding, that sexual orientation discrimination in the jury selection process would come within the *Batson* holding, in *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996). But the 8th Circuit panel was not ready to take this step.

"While we seriously doubt *Batson* and its progeny extend federal constitutional protection to a venire panel member's sexual orientation," wrote Riley without any explanation, "our review of the trial record persuades us that even if Ehrmann made a prima facie case of purposeful discrimination, his *Batson* objection fails because the government offered legitimate, nondiscriminatory reasons for striking the panel member. The prosecutor told the district court he questioned the suitability of this panel member even before learning of the panel member's sexual orientation. The prosecutor was concerned about the panel member's liberal education and background, his livelihood as a musician, and his being a potential loner." Riley wrote that Ehrmann had provided "no evidence to show the government's proffered reasons were pretextual," and presumably it goes without saying that the pro-defense bias of a musician with a liberal education in a drug case can be readily assumed. At any rate, the court would not upset the convictions of Ehrmann or Blaylock over this issue.

The court also refused to find fatally prejudicial the district court's admission of videotape evidence stemming from Ehrmann's visit to a friend who was in jail, during which the men had to communicate through videoconferencing. Riley found that the circumstances were such that Ehrmann had to expect that his statements might be recorded. During the conversation, Ehrmann told his friend to let Ehrmann know if the authorities were going to charge him with conspiracy, speculated that the authorities

were going to try to link Ehrmann with another individual referred to as Bam, and commented that if "they do that they're looking at Bam like this kingpin in the Gay Mafia so to speak... You or I would be the next best candidate after Bam." On appeal, Ehrmann alleged that the "kingpin in the Gay Mafia" comment was prejudicial, but Riley found the content of the conversation so plainly relevant to the conspiracy charges that no abuse of discretion had occurred. Besides, said Riley, the comment referred to Bam as the kingpin in the Gay Mafia, not Ehrmann. A.S.L.

Outed Man Wins Workers Compensation Payments From Arbitrator

The Associated Press reported on Aug. 15 that an arbitrator in San Francisco has awarded $270,000 for emotional injuries and loss of employment as a result of being "outed" on a nationally-transmitted radio program. According to the news report, Roberto Hernandez was driving to work when he received a phone call from a man who claimed to have met Hernandez in a gay bar in San Francsisco, and stated that their conversation was being broadcast live on the "Raul Brindis and Pepito Show," a Spanish-language radio show originating in Houston. Hernandez was an advertising salesman for a local radio station that broadcast the show. He was not open about his sexual orientation at work or to his family. He claimed to have suffered such severe emotional distress that he was unable to continue working there. He filed a claim against Univision Radio, his employer and the producer/syndicator of the program. Arbitrator Rebecca Westerfield, ruling on his contested claim on August 12, found that he had suffered emotional distress and was entitled to compensation for this work-related injury. Hernandez was unemployed for seven months after quitting his job over this incident. *Hernandez v. Univision Radio*. A.S.L.

Middle School Can't Ban "Offensive" Anti-Gay T-Shirt

U.S. District Judge George S. Smith ruled in *Nixon v. Northern Local School District Board of Education*, 2005 WL 2000706 (S.D. Ohio, Aug. 18, 2005), that a rural school district violated the rights of 7th grader James Nixon when authorities required him to remove a black t-shirt because of white text on the shirt that stated "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"

Young Nixon acquired the t-shirt while attending a church camp with his mother during the summer of 2004, and decided to wear it to the first day of seventh grade on September 1. His father warned him to anticipate trouble, but told him to stand his ground. Although no student protested or reacted violently to Nixon's shirt, a guidance counselor demanded that he remove it, and ultimately the principal ordered him off the premises and told him he would be suspended if he tried to wear the shirt at school. The school superintendent backed up his administrators when Nixon's father came to argue, so the lawsuit followed, with the American Liberty Institute of Orlando, Florida, representing Nixon.

Judge Smith decided that the controlling precedent was *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), in which the Supreme Court held that high school students could wear black armbands to protest the Vietnam War despite concerns by administrators of potential disruption. Smith rejected the precedent of *Boroff v. Van Wert City Bd. Of Educ.*, 220 F.3d 465 (6th Cir. 2000), cert. denied, 532 U.S. 920 (2001), which upheld a school district's requirement that a student remove a "Marilyn Manson" t-shirt. The 6th Circuit held the school's action justified because the Marilyn Manson singing group promoted suicide, murder and drugs contrary to values the school was seeking to instill. Smith found *Boroff* distinguishable on the ground that, in his view, Nixon's t-shirt was merely stating views, not promoting activities. (Interestingly, however, the Manson t-shirt, as described by the court, never mentions suicide, murder and drugs, but instead specifically disparages Christianity, and testimony showed that this was a motivation of a school administrator who decided to ban it.) Smith paid no attention to the distinction between high school students in *Tinker* and Sheridan Middle School, even though the Supreme Court has stated that school administrators may take a more active role in supervising the speech of younger students.

Smith ruled that Nixon's First Amendment rights took priority over administrators' concerns that the t-shirt might be disruptive and cause offend other students, awarded Nixon a symbolic dollar in damages, declared him the prevailing party so his public interest law firm representative can file a fee petition, and enjoined the school district from interfering with Nixon's desire to wear the t-shirt to school. A.S.L.

Federal Civil Litigation Notes

U.S. Supreme Court — The Supreme Court has scheduled oral argument in *Forum for Academic and Institutional Rights [FAIR] v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004), cert. granted, May 2, 2005, to take place on December 6. If John Roberts is confirmed to take Justice Sandra Day O'Connor's seat on the Court, this will probably be the first gay-related case on which he will sit. In *FAIR*, the court of appeals ruled that the Solomon Amendment, a provision of federal law authorizing termination of federal financial assistance to educational institutions that bar military recruiters, violates the freedom of speech and expressive association of law school faculties. FAIR is an organization of law schools, faculty members and students that was formed specifically to challenge the constitutionality of the Solomon Amendment. A dissenting judge in the 3rd Circuit argued that any burden on expressive association was slight compared to the national security needs of the United States to recruit lawyers for the Judge Advocate General Corps, and rejected the main points of the majority's expressive association analysis.

3rd Circuit — In *Kay v. Independence Blue Cross*, 2005 WL 1678816 (July 19, 2005) (not officially published), the court rejected a same-sex harassment claim premised on gender stereotyping on the ground that the plaintiff's factual allegations actually documented discrimination based on perceived sexual orientation rather than gender non-conformity. The evidence included numerous references to the plaintiff by others in the workplace as "fag" and "gay" and references to him as not being a "real man." The reason the court did not treat this latter reference as gender-stereotyping was because it was followed by the comment that the plaintiff was "just so gay." A concurring judge demurred from disposing of the case on this basis, instead preferring to base it on a conclusion that the incidents alleged were insufficiently pervasive to support a hostile environment case, commenting, "The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct fits within both rubrics."

7th Circuit Court of Appeals — A 7th Circuit panel ruled on July 19 in *Ovadal v. City of Madison*, 2005 WL 1669474, that the district court erred in granting summary judgment to the city against a claim by an anti-gay minister that his First Amendment rights were violated when police required him to take down a banner he had hung on a highway overpass reading "Homosexuality is a sin!" Rev. Ralph Ovadal claimed that policy were engaging in content-based regulation of speech. The city argued that Ovadal's banner had cause traffic problems as upset drivers were looking up at his banner and driving erratically. The police had rejected Ovadal's request to be able to display his banner at times of lighter traffic or on less-traveled routes, taking the position that it was unsafe for him to display the banner on any highway overpass in the Madison area. District Judge Shabazz granted summary judgment to the city, reasoning that the safety concerns of the police were real and not-content based. Writing for the 7th Circuit panel, Judge Kanne disagreed, finding that there was a factual question of whether the city's ban was

narrowly-tailored to achieve a compelling interest, since the appeals court believed that Ovadal's protest was banned based on the content of his banner.

7th Circuit Court of Appeals — Thad A. Shafer did not have a valid sex discrimination claim under Title VII on account of four batteries committed against him by a male co-worker that had sexual overtones, according to the 7th Circuit in *Shafer v. Kal Kan Foods, Inc.*, 2005 WL 1798295 (Aug. 1, 2005). Shafer allegedly complained about these incidents to a woman who had previously worked in personnel, but she no longer worked there and soon left the company, and did not relay his complaint to anyone in management. The harasser stopped his misconduct after the fourth incident, either out of fear that his misconduct was being reported to management or to intervention by a supervisor, but the exact reason was not known. In upholding the district court's summary judgment in favor of the company, the court found no basis for imputing the co-worker's misconduct to the company, and found that the four incidents were not sufficiently egregious to constitute a hostile environment in any event.

Immigration — According to an A.P. report, Immigration Judge Jan D. Latimore has agreed to withholding of deportation for Cristina Gomez Ordonez, an HIV+ transgender woman from Honduras, finding that she would be in physical jeopardy if she were returned to her home country, both from reasonable fear of physical assault and from lack of appropriate treatment for HIV infection. *PlanetOut Network*, Aug. 5.

Arkansas — In light of *Lawrence v. Texas*, did Arkansas State Police officials violate the constitutional privacy rights of a police officer when they investigated a report that he had engaged in a sexual relationship with a married female complainant in a criminal investigation, after the complainant's husband had complained about the relationship to authorities? No, said U.S. District Judge Dawson in *Sylvester v. Fogley*, 2005 WL 2016252 (W.D.Ark, Ft. Smith Div., July 28, 2005). Without getting into the issue whether adultery laws are invalid in light of *Lawrence*, in which the Supreme Court struck down the Texas Homosexual Conduct Law as intruding upon individual liberty protected by the 14th Amendment Due Process Clause, Judge Dawson found ample caselaw (albeit mostly earlier than *Lawrence*) supporting the proposition that law enforcement agencies can investigate off-duty sexual activities of their employees that might impinge on their official conduct, so long as such investigations are narrowly focused and are triggered by reasonable suspicion that there is a problem. In this case, the husband's complaint was sufficient justification for an investigation, and the fact that the relationship involved a complainant in a case that the police officer was assigned to investigate was a sufficient nexus to legitimate concerns by the State Police.

Georgia — In a curious case of inept representation, a plaintiff's same-sex harassment case fell apart due to defective pleadings and a failure to preserve a Title VII claim by filing an administrative discrimination charge before filing a lawsuit. *Johnson v. Shoney's, Inc.*, 2005 WL 2007236 (M.D. Ga., Aug. 18, 2005). Ultimately, in the absence of a statutory claim due to failure of exhaustion, Judge Lawson confronted the question whether an at-will employee could bring a common law wrongful discharge claim based on the allegation that he suffered a retaliatory discharge because he refused the homosexual advances of a supervisor of the same sex. The court found no cause of action for an at-will employee under such circumstances.

Kansas — A federal district court jury in Kansas City, Kansas, awarded $250,000 in damages to Dylan J. Theno, 18, who sued the Tonganoxie School District under Title IX of the federal Education Amendments Act of 1972, which forbids sex discrimination in schools receiving federal money. Theno claimed he was singled out for harassment and name-calling by other male students who perceived him as inadequately masculine in appearance and conduct, and that the school failed to take effective action to deal with the problem. The school district claimed that it had a non-discrimination policy in place and had followed up whenever Theno complained, but Theno testified that school officials did not discipline the offenders, who if anything accelerated their harassment after being spoken to by school officials. Theno testified that similar problems occurred when his parents tried to speak to the parents of the harassing students, and finally he just gave up, stopped complaining, dropped out of school and got a General Education Diploma from home study. The school district's attorney argued that this was in effect a "boys will be boys" case, and drew parallels to workplace name-calling among adults, but evidently the jury was impressed by Theno's testimony. Theno plans to attend a community college. His attorney, Arthur Benson, mistakenly told the Kansas City Star that this was the first affirmative federal jury ruling in a "same-sex student-on-student harassment case under federal law," apparently forgetting or not being aware of the historic victory by Lambda Legal in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), in which the 7th Circuit reversed a summary judgment and remanded a similar case for trial, and a federal jury subsequently found the school district liable, resulting in a monetary settlement of nearly $1 million. Perhaps the newspaper's reporter overgeneralized Benson's claim, since the *Nabozny* jury did not actually get to the penalty phase in a bifurcated trial. MIKansas City Star, August 12, 2005; GenderPAC Press Release, August 16, 2005.

Michigan — In an unusual case, District Judge Tarnow found that Patricia Wolshon should be able to go to trial on her quid pro quo sexual harassment case against American Communications Network, premised on unwanted sexual advances from her lesbian supervisor. Female same-sex harassment cases make up an almost infinitessimal proportion of all the same-sex harassment claims filed, and most same-sex harassment claims are dismissed, so surviving summary judgment in this case was quite an accomplishment for the plaintiff. *Wolshon v. American Communications Network, Inc.*, 2005 WL 1838611 (E.D. Mich., July 29, 2005).

Minnesota — Hostile environment sexual harassment claims do not fare well unless they allege truly egregious, repeated misconduct of a sexual nature aimed at the plaintiff/victim because of his/her sex and/or gender nonconformity. *Johnson v. Burlington Northern and Santa Fe Railroad Co.*, 2005 WL 1868311 (D. Minn., Aug. 8, 2005), illustrates the point quite well. Russell Johnson's complaint mainly concerned hostile graffiti in the men's room, some with sexual overtones. The court found that the apparent motivation for the graffiti was dislike for Johnson because he made a practice of turning in other employees for violations of company policies. Although some of the graffiti was of a crude sexual nature, including the homophobic references, Judge Kyle thought these words were used as just crude insults in common with the non-sexual insults also found in the graffiti, and were not singling out Johnson for harassment due to his sex. Also, the problem was found insufficiently pervasive to constitute an actionable hostile environment.

Mississippi — In *Hitchcock v. Atlantic Southeast Airlines, Inc.*, 2005 WL 2007136 (N.D. Miss., E.D., Aug. 18, 2005), District Judge Mills denied the defendant's motion for summary judgment in a defamation and "malicious interference with employment" case brought by a former Transportation Security Administration (TSA) officer who alleges that an employee of the airline, perturbed by a security check that Hitchcock performed on him, defamed him by calling him a "cocksucker" and charged him with "homosexual harassment," which ultimately led to the TSA forcing Hitchcock to resign his job (which ultimately led to his personal bankruptcy because rumors about the charge against him got in the way of finding new employment). The court held that it could not decide as a matter of law that the statements made about Hitchcock were not defamatory. Without getting into specifics, Judge Mills' opinion implies that in Mississippi falsely calling somebody a homosexual is defamatory, although a determination whether it is per se defamatory may not be necessary in this case

because Hitchcock would probably be able to demonstrate special damages. ASA argued that Mississippi does not recognize a cause of action for "malicious interference with employment," but Judge Mills found that the state does recognize tortious interference with contractual relations and it would be mere semantics to try to distinguish between the two tort theories.

New York — In *Mehrhoff v. William Floyd Union Free School District*, 2005 WL 2077292 (E.D.N.Y., Aug. 22, 2005), District Judge Joanna Seybert granted the defendants' motion to dismiss claims of sex, age and sexual orientation discrimination brought by a lesbian probationary public school teacher whose contract was not renewed. Judge Seybert's description of the complaint filed on behalf of Diane M. Mehrhoff suggests a vague, conclusory set of allegations insufficient to put defendants on notice of the specifics of the claims against them. Indeed, it is hard to construct a coherent story out of the sketchy factual allegations summarized in the court's opinion, but it appears that Mehrhoff had some sort of romantic relationship with another woman on the teaching staff, that this relationship ended in acrimony, and that Mehrhoff may attribute her non-renewal to the influence of this other teacher and the alleged failure of the teachers union to go to bat for her. Thus, the most charitable interpretation of the court's ruling was that the complaint was so theoretically and formally deficient (with some claims being time-barred or clearly asserted against improper parties) that dismissal was inevitable, almost regardless of the underlying facts.

Texas — A magistrate in the Southern District of Texas has recommended that a gay state prison inmate be allowed to proceed with some of the claims he has asserted against prison officials for mistreatment at the Garza West Transfer Facility. *Hull v. Ford*, 2005 WL 2086187 (S.D. Texas, Aug. 29, 2005). The full story of Donald Hull's allegations is too detailed to include here, but in essence he claims that his attempt to be placed in protective custody was ignored, resulting in his sustaining injuries from a severe beating by fellow inmates, after which prison guards were inattentive to his need for medical attention. His allegations are set forth in great detail in the opinion published on Westlaw by Magistrate Owsley. A.S.L.

State Civil Litigation Notes

California — The California Supreme Court rejected a suggestion by all parties to pending same-sex marriage litigation to let the case bypass the court of appeal and go directly to the Supreme Court. On March 14, the San Francisco Superior Ct. (Richard Kramer, J.), ruled in *Marriage Cases*, 2005 WL 583129, that same-sex partners should be entitled to marry under the California constitution's equality guarantees. Attorney General Bill Lockyer applied to the Supreme Court to take the state's appeal directly, so that the resolution of the matter would not hang fire. (Lockyer clearly was hoping to win his appeal and thus take the wind out of the sails of those pushing for a state constitutional amendment to ban same-sex marriages and domestic parternerships.) The plaintiffs, including the city of San Francisco and various intervenors, also urged a bypass of the court of appeal. However, on August 10 the court said no. The case will go instead to the First District Court of Appeal, placing in doubt whether there would be an ultimate decision in the Supreme Court before the voters are called upon to settle the question through constitutional amendment, which could then forestall a state constitutional ruling. *Associated Press*, Aug. 10. So far, the strategy of the current wave of same-sex marriage cases has been to emphasize state constitutional law, so as to avoid making a ruling appealable to the U.S. Supreme Court, based on calculations that there may not be 5 votes in support of same-sex marriage on the nation's highest tribunal. Such a calculation seems quite pragmatic, in light of the statements in *Lawrence v. Texas* by Justice Kennedy (who wrote for the Court) and Justice O'Connor (who concurred) that the Court was not holding that the state was obligated to extend legal recognition to same-sex couples for their relationships, even if those relationships were shielded from criminal intervention under the Due Process Clause.

Connecticut — A public defender did not give ineffective assistance to an arson defendant when she did not voir dire jurors on their attitudes to homosexuals, ruling Superior Court Judge William L. Hadden in *Inzitari v. Warden, Cheshire*, 2005 WL 2009573 (Conn. Super. Ct., July 28, 2005) (not officially published). The defendant and another man, with whom he had a gay relationship, were both charged with arson in connection with a particular fire. The defendant's attorney did not believe that the sexual relationship of the two defendants would be an issue in the case, so made a strategic decision not to raise the issue of homosexuality during voir dire, because she did not want to plant in the jurors' minds the idea that the case was somehow about homosexuality. Rejecting the defendant's argument that this was ineffective assistance, because the sexual issue did come up at trial and he was convicted, Judge Hadden found that the defense attorney had made a conscious strategic decision that the defendant had agreed to at the time, and this could not be the basis for an ineffective assistance claim.

District of Columbia — Holding that a trial judge had incorrectly read a violence requirement into the district's standard's for issuing civil protection orders in intrafamily disputes, the D.C. Court of Appeals reinstated a petition for a civil protection order filed by Dr. Michael S.A. Richardson against his "former homosexual lover," Aaron Easterling. Superior Court Judge Jeanette J. Clark had dismissed the petition, asserting that Richardson's allegations sounded in defamation and that a civil order of protection was not available unless there was some allegation of violence. The appeals court, in an opinion by Associate Judge Schwelb, found there was no such requirement in the statute, which only required a "criminal act." As Richardson had alleged facts adequate for the crime of "stalking," there was a basis for his petition, which should not have been dismissed outright. *Richardson v. Easterling*, 2005 WL 1653859 (D.C. Ct. App., July 14, 2005).

Florida — Florida Attorney General Charlie Crist has submitted to the state Supreme Court two proposed citizen initiatives to amend the state constitution on September 1. If that court finds no constitutional defect, the proposals will be certified for petitioning. One is an amendment intended to ban same-sex marriages, proposed by Florida4Marriage.org, a group with ties to conservative Christian organizations, which is seeking to put the measure on the November 2006 ballot. Calling their proposal the Florida Marriage Protection Amendment, the organization proposed the following text: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." *Associated Press*, Sept. 2; Florida4Marriage.org website.

Missouri — In *Weiss v. Crites*, 2005 WL 2076630 (Mo. Ct. App., E.D., Aug. 30, 2005), the court found that award of primary physical custody of a young boy to his father rather than his lesbian mother must be voided because the trial court neglected to produce written findings in support of its decision in conformity with a Missousi child custody statute and because the statute did not specifically authorize the concept of primary physical custody. Austin was three years old when his father and mother split up after the mother announced that she was involved in a lesbian relationship and preferred to live with her partner rather than her husband. The trial court found joint legal custody appropriate, but awarded "primary" custody to Weiss. Both parties sought custody after the break-up. As both were qualified for custody, the court had to determine what custodial arrangement would be consistent with the best interest of the child. The trail court concluded in favor of the father for "primary physical custody," with Crites entitled to visitation, but provided no written factual findings. The trial court's decision did not include anything but conclusory statements going to this issue. Ultimately, the court determined that when qualified parents are contesting for custody, the

court needs to do an explicit best interest of the child analysis.

Virginia — Alexandria — The Alexandria Human Rights Commission found that Long & Foster, a real estate firm, had violated the city's non-discrimination ordinance when it sold a home to a marriage couple instead of a gay man who had offered a higher bid. It was unclear from news reports whether the basis of the finding was sexual orientation or marital status discrimination, both of which are covered under the ordinance. The Commission was expected to recommend a $5,000 fine. *Richmond Times*, Aug. 24. A.S.L.

Criminal Litigation Notes

Massachusetts — A jury rejected a homosexual panic defense and convicted Christopher Cutts of the first degree murder of John C. Gallina, a gay man. The Supreme Judicial Court sustained the conviction in *Commonwealth v. Cutts*, 2005 WL 1863561 (Aug. 9, 2005), rejecting arguments of ineffective assistance of counsel. Cutts was critical of his defense attorney's pursuit of the homosexual panic theory instead of a more traditional insanity defense, but Justice Cordy, writing for the court, found that the defense attorney's strategy did not fall short of professional standards and was appropriately tailored to the evidence in the case.

Nebraska — The Nebraska Supreme Court ruled in *State v. Senters*, 2005 WL 1704811 (June 24, 2005), that the state could make it a crime to videotape a lawful sex act if one of the participants was below the age of 18, even though the age of consent for sexual relations in the state was 16. In so doing, the court adopted a narrow reading of the U.S. Supreme Court's ruling on the Texas sodomy law, *Lawrence v. Texas*, upon which the 28–year-old defendant relied to challenge his prosecution for filming a sex act between himself and a 17–year-old woman. The court said that the right of privacy identified in *Lawrence* applied only to consenting adults, and that the state was free to set a different age cut-off for adult status for purposes of consensual sexual relations than it set for purposes of its Child Pornography Prevention Act. The court opined that because the right of privacy identified in *Lawrence* did not extend minors, a law respecting minors was subject to rationality review and that the usual reasons cited in support of laws banning sexually-explicit films of minors sufficed to justify application of the Nebraska law to the defendant's actions.

New York — A New York trial judge decided that selective prosecution in violation of the Equal Protection Clause did not occur when the Manhattan District Attorney's office charged Jenny Paulino with promoting prostitution for running an escort service on the Upper East Side of Manhattan, while not prosecuting "Goliath" corporations that profit from producing and distributing pornographic films in which actors are paid to engage in sex before the camera. *People v. Paulino*, NYLJ, 8/4/2005 (N.Y. Sup. Ct., N.Y. Co.). Judge Budd G. Goodman, using the traditional law school style hypothetical to explain his reasoning, wrote that prostitution requires person A paying person B for sexual activity to be performed between the two of them, while pornography involves person C paying B to perform sexual activity with A. Goodman decided that the distinctions between the two were sufficient so that there was no Equal Protection violation. This is good news for all those who were planning to purchase the services of prostitutes as gifts for friends (provided, of course, that the recipients are eager to be filmed having sex for commercial distribution).

North Carolina — In a unanimous ruling upholding a capital conviction and death sentence in *State of North Carolina v. Campbell*, 2005 WL 1993980 (Aug. 19, 2005), the North Carolina Supreme Court rejected defendant Terrance Campbell's argument on appeal that he should have been allowed get before the jury evidence about sexual paraphernalia found in the victim's home to provide corroboration for his argument that his deadly assault was provoked by a homosexual advance. (Campbell had provided expert testimony that "he had extreme beliefs and fears regarding homosexuality," the forensic psychiatrict expert testifying that "defendant felt that being touched by another man, however benignly, was 'evil' and 'unGodly' an that it would 'change your manhood.'") In finding exclusion of the evidence appropriate, Justice Parker wrote for the court, "defendant's attempt to show that the victim was homosexual does not prove that the victim was the first aggressor. If the evidence had been allowed, 'it would have added little to the proof of this fact and could have been very inflammatory and unfairly prejudicial.' Thus, even if relevant, exclusion of the evidence would have been proper pursuant to Rule 403."

Texas — The Texas Court of Appeals, El Paso, reversed a trial court ruling that a state ban on promotion and sale of obscene devices was rendered unconstitutional due to *Lawrence v. Texas*, finding that the state could prosecute a sales clerk who worked in an adult bookstore for selling a "crystal cock vibrator" to an undercover police officer. *State of Texas v. Acosta*, 2005 WL 2095290 (Aug. 31, 2005). Defendant Ignacio Acosta had argued that prosecuting him would violate the right of privacy of his customers, who were entitled under *Lawrence* to use sex toys at home for personal gratification. Writing for the court, Chief Justice Richard Barajas agreed that the constitution may protect the right of adults to use sex toys at home, but found no logical extension to protect the clerk who sells the sex toys in violation of a state statute. Embracing a narrow view of *Lawrence*, Barajas wrote, "In *Lawrence*, the Supreme Court decided if sex between two members of the same sex can be denied by law when practiced in the privacy of their apartment. While the Supreme Court struck down the sodomy law in Texas, we note the Supreme Court specifically excluded from its analysis any aspect of public conduct or prostitution. Rather, the holding applied to private sexual conduct. Therefore, we do not perceive that the *Lawrence* holding that the Texas sodomy statute furthered no legitimate interest implies that commercial promotion of sexual devices is constitutionally sanctioned." Finding that rationality review was the appropriate level of scrutiny for the statute, Barajas asserted that "it is appropriate for the State to act to protect the social interest or order, morality, and decency by restraining commercial dealing in non-communicative objects designed or marketed for use primarily for the stimulation of human genital organs."

Texas — The Court of Appeals, Ft. Worth, refused to overturn the jury conviction and twenty year prison sentence of Marcos Hernandez on charges of raping a 62–year-old female neighbor, even though Hernandez's boyfriend testified that Hernandez is gay and was with the boyfriend at the time the alleged rape occurred, and DNA swipes taken from the victim a few hours after the rape did not match Hernandez's DNA. *Hernandez v. State*, 2005 WL 2043953 (Aug. 25, 2005). The per curiam opinion asserted that Hernandez's "sexual identity" was irrelevant because "expert testimony provided that rape is a crime of anger, power and control." The victim identified Hernandez from a photo-spread, and was the only eye-witness against him. She claimed to have been assaulted a week prior to the rape, at which time her gun was stolen from her by her attacker, and then that the same gun was used by the rapist. The victim identified both assailants as Mexican men with heavy accents, but Hernandez does not have a heavy accent. The victim's height and weight of the two assailants differed by several inches. Nonetheless, the court said that "the trier of fact is the sole judge of the weight and credibility of the evidence and the demeanor of the witnesses," and found the trial record "legally and factually sufficient to support Appellant's convictions."

Texas — The Texas Court of Criminal Appeals rejected a same-sex harassment hostile environment claim in *Willborn v. Formosa Plastics Corp. Of America*, 2005 WL 1797022 (July 28, 2005) (unofficial publication). The opinion for the court is so short on factual details that it is impossible to reconstruct a coherent narrative David Willborn's factual allegations, as the court merely stated in conclusory terms that Willborn had failed to allege the necessary elements for his claims. However, the court engages in extensive summary of the applicable

law, in which Texas appears to track Title VII precedents, so the opinion may be useful for legal research purposes. A.S.L.

Legislative Notes

California — On Sept. 1, the California Senate became the first legislative body in the United States to approve a state law authorizing same-sex marriage, by a vote of 21–15. The measure was headed to a vote in the State Assembly early in September. The Assembly narrowly defeated a similar measure earlier this year. Governor Arnold Schwarzenegger has given no direct indication whether he would sign the measure, but his office announced that the governor prefers to see this issue settled by the legislature, which may signal a veto. Several years ago California voters approved Proposition 22, which enacted a statute providing that only a marriage between a man and a woman is recognized in California. Some opponents of the same-sex marriage bill argue that the legislature could not pass it because of the success of Prop. 22, but Assemblyman Mark Leno, the bill's chief sponsor, argues that Prop. 22 only pertains to recognition of out-of-state marriages, and that a state constitutional amendment is not required to enact the new marriage bill. We'll see..... ••• Senate Bill 973, also pending before the governor, would allow partners of public employees who retired before the state's comprehensive domestic partnership bill went into effect on January 1, 2005, to receive death benefits if the retiree died before their partner. ••• Both houses of the legislature passed a measure that would specifically add "sexual orientation, gender identity and marital status" to the list of forbidden grounds of discrimination under the Unruh Civil Rights Act, which prohibits discrimination by businesses providing goods and services to the public. Although California courts have interpreted the list of forbidden grounds in the Unruh Act to be illustrative rather than exhaustive, and have found that "sexual orientation" discrimination is unlawful under the statute, legislators determined to expand this ground of discrimination and make more certain the application of the law to a wider range of cases. Ironically, while legislative action was pending on this bill the state Supreme Court expanded coverage of the Unruh Act to protect registered domestic partners from discrimination (see above) while refusing to construe the act to forbid marital status discrimination generally. As August ended it was unclear whether the governor would sign the bill. ••• The legislature also passed an election reform law that would, inter alia, require candidates for the first time to eschew anti-gay attacks in their campaigns. The measure specifically forbids "negative appeals based on prejudice," and amends a law that already covers race, sex, religion, national origin, physical health status, or age, as the basis for such appeals. ••• Both houses of the legislature passed a resolution calling for Congress to enact the Military Readiness Enhancement Act, authored by Rep. Martin Meehan (D-Mass.), which would end the ban on military service by openly-gay personnel.

Kansas — An attempt by some Republican legislators to put a ban on gays adopting children on the legislative agenda has reportedly stalled, because the chair of the Joint Committee on Children's Issues, Rep. Willa DeCastro, a Wichita Republican, has taken the position that there are other issues of higher priority to be addressed by the Committee. "I have a full agenda," Rep. DeCastro told the *Kansas City Star* (Aug. 11), and prohibiting gay adoption "didn't make the cut with this chairman."

Massachusetts — Legislative leaders have set September 14 as the date for a joint constitutional convention session, at which the proposed constitutional amendment to ban same-sex marriages and authorize civil unions will be put to its second vote. The measure narrowly passed the joint session last year. If it passes again this year, it will be placed on the general election ballot in 2006. There were widespread predictions that due to the increase in supporters for same-sex marriage after the intervening legislative elections last November, changes in the leadership, and changes of heart by some prior supporters of the amendment as a result of the experience of more than 6,000 same-sex couples marrying in Massachusetts since May 2004, the measure may fail. That does not necessarily mean that there will be no amendment, however, since opponents of same-sex marriage are agitating for a popular initiative amendment that would both ban same-sex marriages and possibly civil unions as well, although Attorney General Thomas O'Reilly was pondering a proposal to rule that such a measure could not go on the ballot. Governor Mitt Romney urged the Attorney General to certify the measure as appropriate and authorize petitioning to begin. Because Reilly was expected to announce his ruling the week before the convention, it was possible that a ruling barring the initiative amendment could revive support for the proposal pending before the convention. *Boston Globe*, Aug. 26. Interestingly, the amendment proposed through citizen initiative would be prospective only in its effect, so even if it were passed, those married between the effective date of the *Goodridge* decision and the enactment of the amendment would still have legally valid same-sex marriages in Massachusetts. *Boston Globe*, Aug. 30, 2005.

Oregon — Although a measure to ban sexual orientation discrimination passed the state Senate by a vote of 19–10, House Speaker Karen Minnis refused to schedule a vote and the session ended early in Aug. 5 without further action on the bill. Disappointed supporters talked about seeking enactment through a citizen initiative, frustrated by the roadblock in the state House. *HRC Press Release*, Aug. 5.

Texas — The legislature approved a proposed constitutional amendment which will be on the ballot this November 8. The text states: "(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." Texas already has a Defense of Marriage Act, but legislative proponents believe that the wild-eyed Texas Supreme Court, bent on radical social reform, might declare that statute unconstitutional and open the floodgates to same-sex marriage, which would undoubtedly endanger the social order, leading to the collapse of Texas "civilization", as has recently happened in the Netherlands, Belgium, Spain and Canada, where riots in the streets have broken down the social order irredeemably as same-sex couples take dangerous vows of fidelity sure to wreak havoc on society. A.S.L.

Law & Society Notes

Federal — President Bush's nomination of D.C. Circuit Court of Appeals Judge John G. Roberts, Jr., to the Supreme Court brought intense speculation about how the little-known judge might rule on LGBT issues in particular and civil rights issues generally. Retiring Justice Sandra Day O'Connor had a mixed record on such issues, voting to strike down the Texas same-sex sodomy law in *Lawrence v. Texas* on equal protection grounds (narrower than the majority opinion's due process approach that invalidated all remaining sodomy laws as applied to private, consensual adult conduct) and voted to strike down anti-gay Colorado Amendment 2 in *Romer v. Evans*, but she sided with the majority in allowing the Boy Scouts to exclude gay people in violation of a state civil rights law in *Boy Scouts of America v. Dale*, and, of course, had originally voted to sustain Georgia's felony sodomy law in *Bowers v. Hardwick*, a ruling she refused to repudiate in her *Lawrence* concurrence. Conservative groups were stunned when it was revealed that Roberts, as a partner at Hogan & Hartson in D.C., had provided pro bono assistance to former Colorado Supreme Court Justice Jean Dubofsky as she prepared her argument to the Supreme Court in *Romer*. Apart from that, there was no word about Roberts' opinion or inclinations on legal issues affecting gay people, and several national gay rights organizations, including Human Rights Campaign, the National Gay & Lesbian Task Force, the National Center for Lesbian Rights, and PFLAG released a joint statement on Aug. 25 opposing his confirmation, premised on Roberts' long record of political and legal conservatism while employed as a lawyer in the Reagan and earlier Bush administrations. Interestingly,

Lambda Legal, while expressing concerns, held off taking a position pending the confirmation hearings that were to begin on September 6. Many other national civil rights organizations had stated their opposition to the Roberts nomination by the end of the month. Senate Judiciary Committee Democrats promised that Roberts would confront detailed questioning about many civil liberties topics, but with Republicans in control of the committee and the Senate, there seemed little likelihood that the nominee would be denied confirmation, barring spectacular developments during the hearings.

Maine — Secretary of State Matthew Dunlap issued a declaration that proponents of a ballot measure to repeal Maine's sexual orientation discrimination ban had secured sufficient signatures for a place on the ballot this November. The declaration suspended enforcement of the law, pending the vote on November 8. The legislature had passed earlier versions of the law twice, and both times the voters repealed the law. *Associated Press*, July 28.

California — Los Angeles — Mayor Antonio Villaraigosa announced his appointments for the Los Angeles Police Commission on July 14. One of those designated by the recently-elected mayor is Shelley Freeman, a vice-president of Wells Fargo Bank who was described in the *Los Angeles Daily News* (July 15) as "active in the gay and lesbian community."

American Psychiatric Association — The APA board of trustees voted on July 31 to approve a position statement, which was previously approved by the APA Assembly at its annual meeting in May, stating support for legal recognition of same-sex civil marriage and opposition to any restrictions on the rights, benefits, and responsibilities of marriage as applied to same-sex partners.

Evangelical Lutheran Church in America — A national meeting of the church voted on Aug.26 to delete language from a same-sex blessing measure that some saw as providing cover for Lutheran ministers to perform same-sex marriages. The proposal, which was then overwhelmingly approved, affirmed current church practice opposing same-sex marriages, and expressing trust in pastors ministering to gays and lesbians. Delegates to the meeting overwhelming voted in support of maintaining the unity of the church rather than splitting over this issue. *Associated Press*, Aug. 26.

Roman Catholic Church — There were widespread news reports late in August that the Vatican is considering issuing a document establishing an explicit ban on gay people serving as priests, regardless of vows of celibacy. This is said to represent the Vatican's attempt to take a forceful step to combat widespread allegations of child abuse against Roman Catholic priests, particularly in the U.S. According to one American Catholic academic familiar with the draft, "It will be written in a very pastoral mode. It will not be an attack on the gay lifestyle. It will not say 'homosexuality is immoral.' But it will suggest that admitting gay men into the priesthood places a burden both on those who are homosexual and those who are working alongside who are not." In light of media estimates of the portion of the American priesthood that is gay, such a policy, if vigorously enforced, would undoubtedly require a significant shrinkage of the Church in the United States, forcing further downscaling of the Catholic schools and retrenchment of already understaffed parish churches. *Observer*, August 28.

Raytheon Corporation — One of the nation's top defense contractors, Raytheon Corporation, has announced that it will extend protection against discrimination to transgender and transsexual workers. Ryatheon joins at least 71 other Fortune 500 companies that have expended their employment policies to protect transsexuals, but is the first large defense contractor to do so, according to an announcement on the Human Rights Campaign website. Raytheon's human resources office is aware of at least 19 out of its 80,000 global work force who are transsexual. *Wichita Eagle*, July 30.

Oregon — The board of the Oregon State Bar voted 11–3 on Aug. 19 to ban the Oregon National Guard from advertising in the state bar's magazine because of the military "don't ask, don't tell" policy on service by gay people. The board rejected a contrary recommendation from its advisory committee. Bar President Nena Cook told the *Oregonian* (Aug. 21), "I don't believe the board was willing to basically gut its diversity policy to make an exception for the military."

Utah — The *Salt Lake Tribune* (Aug. 24) reported that Salt Lake City Mayor Rocky Anderson was prepared unilaterally to extend health benefits to unmarried domestic partners of city employees if the city council failed to pass a symbolic resolution authorizing him to do it. Anderson was awaiting final word from city lawyers as to his authority to take such a step without a council resolution.

University of Arizona — Beginning with the fall 2005 semester, the University of Arizona (Tucson) will extend the same tuition reduction privileges to domestic partners of employees that are now enjoyed by married employees. Employees will have to register their partnerships with the city of Tucson in order to qualify. *Tucson Citizen*, July 26. A.S.L.

International Notes

Argentina — A bill will be introduced in the Argentine Congress during September to provide legal recognition for same-sex couples through the device of civil unions. The civil unions would provide a non-religious official status for both same-sex and opposite-sex couples, that proponents suspected would be considered desirable by many heterosexual couples as well as gay couples. The proposed bill would grant civil union couples the inheritance and adoption rights now limited to married couples under Argentine law. The civil union bill was drafted by Judge Graciela Medina, who also drafted the initiative that was adopted by the city of Buenos Aires to extend legal recognition to same-sex partners. A gay male couple raising children made themselves available for media interviews to advance public support for the bill, and received sympathetic coverage, even in the conservative daily press. *Inter Press Service*, Aug. 26.

Aruba — Local authorities in Aruba refused to register a marriage between two women, one an Aruban and the other Dutch, that had been celebrated in the Netherlands. Aruba is considered to be governmentally part of the Netherlands, and Aruba's Superior Court ruled on Aug. 23, affirming a lower court decision, that the marriage must be registered. The Aruban government has promised to resist this ruling by appealing to the Supreme Court of the Netherlands, claiming that recognizing same-sex marriages would be contrary to traditions and culture of the island and to the right of self-rule that the Netherlands has extended to it (albeit without giving up ultimate sovereignty). *Associated Press*, Aug. 23.

Canada — It may seem pro forma, but on July 21 there was royal assent (given by a Supreme Court justice in palce of the governor-general, who was recovering from surgery) to the same-sex marriage bill, which had passed the Senate by a vote of 47–21 a few days earlier, making Canada the fourth nation after the Netherlands, Belgium and Spain, to make full legal marriage available to same-sex couples. Canada is different from the other three in placing no citizenship or residency restrictions. In the Netherlands, Belgium and Spain, at least one member of the couple must be a resident of the country in order for a license to be issued. Any couple from anywhere in the world can be married in Canada without delay. *Globe and Mail*, July 21.

Canada — Can a wife seek a divorce on grounds of adultery of her husband is having an affair with another man? That depends on the definition of adultery. In a case of first impression, Justice Nicole Garson of the British Columbia Supreme Court (a trial court) ruled on Aug. 30 that the definition of adultery needed to be expanded to take account of modern life, including the recent advent of same-sex marriages in Canada. She ruled that the wife in *P. v. P* should be able to premise her divorce action on adultery by her husband. Justice Garson ruled from the bench, and the *Canadian Press* reported that she would release a written opinion in September. *Canadian Press*, Aug. 30.

Cherokee Nation — A Cherokee Nation tribal court has ordered a delay on the filing of a

marriage certificate by a lesbian couple, pending a decision on a new challenge filed by tribal leaders arguing that the Nation does not recognize same-sex marriages. *365Gay.com*, Aug. 12.

Fiji — Lautoka High Court Justice Gerard Winter ruled that the prosecution of a gay Australian and his Fijian sex-partner under the nation's sodomy law was a violation of constitutional privacy principles, and thus the sex crimes law could not be applied to private consensual adult same-sex conduct, thus ordering the release from prison of Thomas Maxwell McCosker and Dhirendra Nadan, whose convictions were overturned on Aug. 26. *Australia Courier Mail*, Aug. 27. Laesenia Qarase, the prime minister of Fiji, who is a devout Christian, reacted by saying that he considered homosexuality a sin and he would consider attempting a change in the laws to keep it illegal in his country. *Advertiser (Australia)*, Aug. 30.

Greece — Greece's left-wing Synaspismos Coalition, a socialist opposition party, has committed itself to support proposals for same-sex marriage. The government of Prime Minister Karamanlis is opposed to same-sex marriage, but the National Human Rights Commission has urged the government to create some sort of civil union registry for both same-sex and opposite-sex couples. *365Gay.com*, July 14.

Hong Kong, South China — Justice Michael Hartmann of the Court of First Impression ruled in August that a Hong Kong law prescribing a higher age of consent for gay sex than heterosexual sex was invalid, casting doubt on the enforceability of several sex crime statutes in the province, including one providing a prison sentence up to life for sodomy when one of the participants is under 21. A challenge to the statute had been brought by William Leun, a 20 year old gay man who claimed that the government was impermissibly interfering with his private life by making it a crime for him to have sex while straight youths age 16 or older were free to do so, and the judge agreed. "I fail to see how imprisoning young men because of their sexual orientation, when there has been no abuse or exploitation of a third party, can today be said to represent a proportionate response to any perceived need to protect those young men against moral degradation," ruled Hartmann. The court found the law discriminatory, in violation of Article 25 of the Basic Law of Hong Kong, which is an equal protection provision. Statistics introduced in court showed that 63 men had been arrested under the challenged law from 1998 to 2003, of whom 26 had been prosecuted and served prison time. The government could appeal this ruling. *South China Morning Post*, Aug. 28 & 28; *Miami Herald (Associated Press)*, Aug. 25.

India — *365Gay.com* reported on July 30 that a lesbian couple, Nitima Biruwa and Laxmi Bari, were married in a traditional Hindu ceremony in West Singhbhum Province, an event arranged by their family members after determining that they would be unable to get the couple to break up. The same source reports that two other women who married in India late last year confronted an attempt by family members to get them prosecuted under India's sodomy law, which dates from British colonial days, but that a court ruled that lesbian sex was not illegal under this traditional sodomy law, which evidence requires that at least one party possess a penis in order to accomplish the crime. The government of India does not recognize same-sex marriages, however.

Iran — Iran executed two teenage boys in July after the country's Supreme Court upheld their convictions on charges of rape of a 13–year-old boy. Iranian newspapers reported that the boys were subjected to 200 lashes each for theft and drinking alcohol prior to their executions by hanging in a public square in Mashhad, a city east of Tehran. Uncertainty about the facts of the case led to charges by some gay rights organizations that the boys had been executed for being gay, or for engaging in consensual gay sex. It was unclear whether they had indeed engaged in a non-consensual sexual assault of a younger boy, or were being executed for consensual acts. In either event, human rights groups pointed out that Iran is signatory to international conventions prohibiting executions of minors and decried the executions on those grounds. Many news reports about these executions mentioned that Iran has executed many gay men in the past on a variety of charges. *Australian*, July 23. One immediate result of these news stories: the Dutch Immigration and Naturalization Office announced it would suspend all expulsions of gay Iranian asylum seekers, according to a press release from COC Netherlands, the nation's gay rights organization, sent on July 28.

Ireland — The Attorney General of the Republic of Ireland issued a ruling interpreting the adoption laws to allow placements with gay couples, whether single or cohabiting with a same-sex partner. The Adoption Board, which approves all adoptions, confirmed that single people may adopt even if they are living with another person, as can single people living alone. *Irish Independent*, Sept. 1. ••• A labor tribunal awarded 6,000 pounds sterling in compensation to Paul Hindley, a gay man who brought his employer, Fannin Healthcare Ltd. before the tribunal on charges of workplace harassment by co-workers due to his sexual orientation. Hindley alleged that his bosses failed to deal effectively with his discrimination complaint, and he had been forced to resign as a result of severe verbal harassment. This was one of the first cases to go to a decision and a monetary award in Ireland under recently-enacted legislation intended to comply with European Community civil rights requirements. *Belfast Telegraph*, July 30.

Scotland — The first unfair dismissal claim brought under a new law banning sexual orientation discrimination was unsuccessful, reported the Glasgow *Daily Record* on Aug. 20. Matthew Hearne's discrimination claim against his former employer, a Tesco restaurant in Bathgate, West Lothian, faltered on evidence from the employer that it had never inquired about his sexuality and that his job had been eliminated in a force reduction.

Spain — An attempt by a judge to challenge the constitutionality of the new law opening up marriage to same-sex couples has faltered. At the end of July, the General Directorate of Registries declared that the judge in question, Laura Alabu, "has no jurisdiction" to launch such a challenge and reject applications for licenses. According to an Aug. 2 report in *El Pais* (English edition), this means that Judge Alabu's complaint will not be heard by the Constitutional Court. "Those inn charge of registry offices do not have the right to raise questions about constitutionality," according to the communication sent by the Directorate to Judge Alabu. Gay rights activists have charge that Alabu and another judge in the Canary Islands, a Spanish-governed territory, who has turned down license requests, are in dereliction of duty. ••• However, additional judges have moved to question the constitutionality of the law, according to an August 11 report in *El Pais*, in Denia and Gran Canaria, and the new report suggested that if the minority party in the Parliament wishes to push the question, they might be able to bring it up to the Constitutional Court in any event. See also 365Gay.com, Aug. 13.

Thailand — While the U.S. Defense Department continues to struggle with recruitment shortages while maintaining a ban on military service by openly-gay personnel, the republic of Thailand announced on Aug. 10 that restrictions on military service by gay and transgender people were being lifted. Gays and transsexuals had been exempted from the country's military draft on grounds of "mental disorder," but the military finally bowed to lobbying prressure from the increasingly visible LGBT community there. Lt. Gen. Arthorn Lohitkul, director general of the Army Reserve Command, stated, "The existing conscription law has been promulgated since 1954, when there were few homosexuals and transvestites, but society is changing very fast, so the army is in the process of amending the law and omitting those words from the certificate." LGBT groups had particularly complained about the career fate of those who were labelled as having a "mental disorder" by the government and then faced employment discrimination when they were required to show papers on their conscription status to potential employers. *365Gay.com*, Aug. 10.

United Kingdom — While the U.S. Department of Defense, facing serious staffing shortages, persists in supporting the exclusion of gay people from the uniformed forces, the British Army, with similar staffing concerns, is taking the opposite approach. On Aug. 28, uniformed troops marched in a gay pride parade in Manchester as part of a new recruiting outreach to gay people. According to one press report, "Out to attract homosexual recruits, soldiers gave out sweets as they traveled the 3 km course behind another float of muscular men in pink Lycra shorts dancing to music and blowing whistles." Truth in recruiting? Do they allow the uniformed forces to wear pink Lycra shorts? Would such attire be uncomfortable in Iraq?

United Kingdom — Quashing the findings of an immigration tribunal, a court of appeal panel ruled that a gay Palestinian would face persecution if returned to his home in Lebanon, and thus should have his asylum petition reconsidered. *Times (UK)*, July 21. A.S.L.

Professional and Movement Notes

Gay & Lesbian Alliance Against Defamation — GLAD has announced that its new president effective September 1 will be Neil Giuliano, a gay Republican who is the former mayor of Tempe, Arizona. Giuliano's new position will mix administrative and promotional duties. *Arizona Republic*, August 19, 2005.

San Diego, California — San Diego council members chose openly-gay Councilwoman Toni Atkins to be acting mayor pending a new council election, in light of the resignation of one mayor and the extortion conviction of his successor. Atkins is the first openly-gay "bit city" mayor in the country. Just days later, the mayor of the San Diego suburb of Chula vista, Steve Padilla, proclaimed his gay identity at a Friday night gay pride rally. That makes San Diego the largest city with an openly-gay mayor, Chula Vista the second largest, and Providence, Rhode Island, the third. A.S.L.

HIV/AIDS & RELATED LEGAL NOTES

Employer Owes No Duty of Care to Spouse of HIV+ Employee

An August 11 decision by Maryland's highest court, the Court of Appeals, in *Doe v. Pharmacia & Upjohn Co., Inc.*, 2005 WL 1902496, involves a sad story concerning a Jane and John Doe anonymous couple as plaintiffs.

John Doe worked for Pharmacia & Upjohn Company between 1974 and 1991 at a lab in Montgomery County, where the company manufactured live viral lines of HIV–1 and HIV–2 for use in making diagnostic test kits. The company offered periodic HIV testing to employees. John Doe tested negative repeatedly until 1989, when he scored positive on the mass screening test, ELISA, which reacts to the presence of both strains of HIV. However, he tested negative on the confirmatory test, the Western blot, which is specific to HIV–1 and does not detect HIV–2, and was told by the company that he was not infected. At the time, there was no generally accepted confirmatory test for HIV–2 infection, although it was technically possible to make one. Thinking that he was not infected, John continued to have unprotected sex with his wife. Doe continued to test negative on the screening tests at work until the plant closed in 1991. In 2000, John suffered symptoms that led to hospitalization, new testing, and the revelation that he was positive for HIV–2. Jane then got tested and turned out to be positive for HIV–2 as well, and her only risk factor was sex with John.

Jane sued Pharmacia for negligence, alleging that if it had properly notified John that he was HIV–2+, they would have used barrier contraception and she would not have been infected. The case was brought in federal court because the employer is incorporated in a different state, but the employer's liability would depend on Maryland law. The federal judge granted the employer's motion to dismiss the case, finding no basis in Maryland law for holding that the employer had any duty of care to an employee's wife in this situation. Jane Doe appealed, and the federal Court of Appeals for the 4th Circuit, finding that the issue was not clear under existing Maryland precedents, certified the question of the employer's duty to Maryland's Court of Appeals.

Writing for the court, Judge Irma S. Raker agreed with the federal trial judge. Under Maryland personal injury law, in order for the defendant to be liable to the plaintiff for negligence, there must be a finding that the defendant owed some duty of care to the plaintiff. In a case where there was no direct contact between those parties, the existence of such a duty depends upon both foreseeability to the defendant that its conduct could cause the injury in question, and some sort of relationship between the parties that would justify imposing the duty.

Clearly, the employer had breached its duty of care to Mr. John Doe, but the court found that no such duty ran to his wife, even though it was foreseeable that a failure to accurately diagnose his HIV infection could result in subsequent transmission to her if they engaged in unprotected intercourse. "Neither party has identified and we could not find any Maryland case holding that an employer has a duty to the spouse of an employee," wrote Judge Raker. On the contrary, Maryland courts have generally been reluctant to expand liability for personal injury beyond immediate parties.

"Pharmacia had the responsibility, according to Ms. Doe, to inform Mr. Doe of the meaning of the laboratory test results for his health and the implications of the results for his future conduct," wrote Raker. "In this context, an employer could owe a duty to a third party only in extraordinary circumstances. Such extraordinary circumstances do not exist in this case. Ms. Doe had no relationship with Pharmacia. There is no assertion in the complaint that she was ever an employee of Pharmacia, that she had ever been tested for HIV or any other disease by Pharmacia, or that she had ever had any contact with Pharmacia."

The court express reluctance to extend liability without any limiting principle. Could it extend to unmarried partners, for example, or fiances? "The concern with recognizing a duty that would encompass an indeterminate class of people is that a person ordinarily cannot foresee liability to a boundless category of people," wrote Raker.

The court rejected Ms. Doe's argument that there were special public policy reasons to extend liability here, based on Pharmacia's dangerous activity of manufacturing a deadly virus. But the court was unwilling to assess moral blame against Pharmacia, noting that there was not an available HIV–2 confirmatory test at the time and that Mr. Doe had subsequently tested negative on ELISA tests, so the company was never alerted to the potential problem. A.S.L.

N.J. Appeals Court Voids Municipal Needle Exchange Law

In a decision signaling that former Governor McGreevey's Executive Order authorizing needle exchange programs may be held invalid when the court gets around to ruling on it, a New Jersey Appellate Division panel ruled unanimously in *State of New Jersey v. City of Atlantic City*, 2005 WL 1944323 (Aug. 16, 2005), that Atlantic City's municipal ordinance authorizing the city health department to set up a needle exchange program in order to combat a local epidemic of HIV and hepatitis C infection among drug users, was invalid due to preemption by the state's criminal law.

After the city passed the ordinance in June 2004, the local prosecutor in Atlantic County quickly went to court to challenge its legality, and a trial judge issued a TRO preventing it from going into effect, then writing a decision finding a fatal conflict with the state's Criminal Code provisions dealing with possession and distribution of drug paraphernalia. Appealing this ruling, the city argued that it was covered by a provision of the paraphernalia possession

law that exempts government agencies from liability for possessing such paraphernalia, but the Appellate Division was not persuaded by this argument.

Writing for the panel, Judge Stephen Skillman concluded that distributing syringes to drug addicts with the knowledge that they would use them to inject controlled substances unlawfully would make the city an accomplice to unlawful acts. Even conceding that the government agency exemption might apply — which the trial judge had rejected, opining that a municipality is not a government agency within the meaning of the statute — Skillman asserted that the potential accomplice liability was sufficient to render the ordinance void.

Skillman analogized to the exemption under the possession law for doctors. "Thus, a doctor may provide a diabetic patient with a hypodermic syringe for the patient's use in injecting insulin, but if an unscrupulous doctor were to go into the business of selling hypodermic syringes to drug addicts, that doctor would be subject to prosecution as an accomplice of the drug addicts.… Assuming that the term 'government agency' in NJSA 2C:36–6(c) encompasses a municipality such as Atlantic City, the municipality or any of its employees is in the same position as any other entity or person to which the exemption provided by NJSA 2C:36–6(a) applies. They may possess or distribute hypodermic needles and syringes for any lawful purpose but not for the purpose of assisting a violation of one of the provisions of chapter 35 [the drug abuse statute]."

Skillman conceded that the city council had proceeded based on studies showing the effectiveness of needle exchange programs in reducing the incidence of blood-borne disease, but noted that other studies had not supported this conclusion. Perhaps more to the point, however, Skillman noted that the legislature had yet to be convinced that a needle exchange program would be in the public interest. "The failure of enactment of such legislation precludes an individual municipality from adopting a needle exchange program on its own because the policy determination whether to authorize an exemption from the provisions of the Code of Criminal Justice for such programs rests exclusively with the Legislature." The assertion does not bode well for the outcome of the pending appeal in *Kean v. Dep't of Health and Senior Servs.*, challenging the McGreevey executive order. A.S.L.

HIV Confidentiality Not Sufficiently Established in 3rd Circuit Prior to 2001 to Overcome Governmental Immunity Claim

On August 11, Chief Judge John W. Bissell of the U.S. District Court in New Jersey ruled in *Williams v. Francisco*, 2005 WL 1924489, against an HIV breach of confidentiality claim that had been brought by Melvin and Tianee Williams, an HIV+ couple, against the Plainfield Police Department and one of its employees, Steven Francisco.

In December 1997 the Williamses were placed under arrest, for reasons not specific in Bissell's opinion, and taken to the Plainfield police department, where they told Francisco that they were HIV+, presumably during the intake process. They claim that Francisco and the department failed to keep this information confidential, violating their privacy rights. The defendants argued that they enjoyed governmental immunity from these claims.

The claim of governmental immunity turns on whether, at the time, it was clearly established that a particular course of conduct would violate the constitutional rights of a member of the public. Most courts now agree that HIV-related information should be kept confidential, and depending on the circumstances a breach of confidentiality may violate federal privacy rights, but the question for the court was whether this was well enough established in December 1997 to justify imposing liability.

Judge Bissell noted the decision in *Doe v. Delie*, 257 F.3d 309 (3rd Cir. 2001), which rejected a similar privacy claim from an HIV+ Pennsylvania prison inmate based on a 1995 incident. In that case, the 3rd Circuit found HIV-related information to be protected by a privacy right, but that it was not well enough established by prior cases to justify holding prison officials liable at that time. Judge Bissell state that he had scoured the law-books for the period between 1995 and 1997 and found that "the right was also not clearly established at the time of the Plaintiffs' arrest in December of 1997," and thus that it was "not sufficiently clear in 1997" that "a reasonable prison official would understand that the non-consensual disclosure of a prisoner's HIV status violates the constitution."

The 3rd Circuit's 2001 decision would now provide the basis going forward for such a privacy claim in any state within the 3rd Circuit, since a federal court of appeals decision is generally seen as sufficient to find that a right has been sufficiently "well established" that prison officials within the circuit would be charged with knowledge of it. But such claims could only be made based on privacy violations occurring after the date of that decision. A.S.L.

HIV+ SSI Applicant Wins Reversal of Denial of Benefits; Court Finds ALJ Ignored Relevant Medical Evidence

An HIV+ applicant for Social Security disability benefits won a reversal of the administrative denial of benefits from a federal court in Philadelphia, the judge concluding that the administrators had wrongly neglected to weigh medical evidence in favor of the applicant's claim. *Oliphant v. Barnhart*, 2005 WL 1971880 (E.D. Pa., Aug. 11, 2005) (not officially published).

Marlon Oliphant applied for Supplemental Security Income benefits in 1999, alleging that he was disabled as a result of HIV and depression. Oliphant's application was denied on July 29, 1999, and following an appeal, was denied again on October 29, 1999. Oliphant then filed a request for an administrative hearing on his eligibility. On April 4, 2000, a hearing was held before an administrative law judge, who denied Oliphant's application on May 18, 2000. Oliphant appealed to the Appeals Council, which affirmed the ALJ on February 14, 2002, and Oliphant went to court. Chief United States District Judge James T. Giles reversed, finding that the ALJ did not consider all of the medical evidence and did not give appropriate weight to the opinions of Oliphant's treating physicians. To establish a claim, Oliphant had to show that (1) he is not currently engaging in "substantial gainful activity"; (2) that he suffers from a "severe impairment"; (3) that his disability meets or equals an impairment as defined in the Code; and (4) that he does not have sufficient residual functional capacity to perform his past relevant work. Once these four elements are established, the burden shifts to the Commissioner to show that Oliphant can perform "other work." At the ALJ hearing, Oliphant presented a plethora of medical evidence supporting his claim, including a report from Dr. James C. McMaster, who found Oliphant to have general fatigue, numbness in his right leg, advanced AIDS, and hallucinations. In addition, a report from Dr. Swiggard characterized plaintiff as depressed, with neuropathy of the right leg, blurry vision, raised skin lesions and marks on his back. Other evidence was submitted from a psychologist who diagnosed Oliphant with dysthymic disorder and substance abuse. The psychologist's conclusion was that given Oliphant's decreased energy level and need for rest periods, it would be difficult for Oliphant to maintain regular attendance and work schedules at any job. Notwithstanding this evidence, the ALJ affirmed the denial of Oliphant's claim for disability benefits. The ALJ rejected Oliphant's symptomology as found and reported by Oliphant's treating physicians in their medical reports and concluded that Oliphant was exaggerating his condition and that his condition was not severe enough to preclude work activities.

Reversing, Judge Giles found that the ALJ ignored the reports from Oliphant's treating physicians including the fatigue, numbness in his leg and hallucinations noted by Dr. McMaster and the depression, fatigue, blurry vision, and skin lesions noted by Dr. Swiggard. In addition, Giles found that the ALJ ignored the psychologist's findings that Oliphant would be unable to maintain a regular work schedule. In addition to rejecting all of the evidence from

treating and examining physicians, the ALJ even rejected some of the evidence from non-examining, non-treating health professionals regarding Oliphant's lack of capacity to work. Finally, Judge Giles found that the Social Security Administration had failed to include a second report from Dr. McMaster in the record , which had been sought and obtained by Social Security, and which ultimately supported Oliphant's case. Judge Giles enlarged the record to include the report from Dr. McMaster and remanded the matter to the ALJ for reconsideration of the enlarged record and for a new decision, to be based on record evidence rather than the ALJ's preconceptions. *Todd V. Lamb*

Mistaken Placement on Blood Donor Deferral List Not Actionable

On August 10, the U.S. District Court for the Southern District of West Virginia dealt with a rather unusual claim in *Delp v. American National Red Cross*, 2005 WL 1924399, in which the plaintiff sought to impose liability on the Red Cross for refusing to remove her from its blood donor deferral list.

Jennifer K. Delp, a minor, donated blood at a Red Cross drive and was notified to see her doctor because "abnormalities" made her blood unusable for transfusion. The abnormality turned out to be an HIV+ screening test result. The communication to Delp indicated that a positive on the screening test did not necessarily mean that she was infected and urged her to seek confirmatory testing.

Delp's father took her to the doctor for further testing, and repeated tests confirmed that she was not HIV+. She then contacted the Red Cross, offered to let them test her again, and asked that her name be taken off the deferral list. The Red Cross refused, claiming that under their rules, consistent with federal government regulations, anybody who tests positive goes on the deferral list and stays there, regardless of subsequent negative test results.

Delp claimed that the Red Cross was negligent in conducting her blood test, mixing up her sample with somebody else's, thus causing her emotional distress, and sued in federal court. (Under the federal law chartering the Red Cross, lawsuits against that organization can be brought in federal court, although state law will apply to a negligence claim.) Chief Judge David Faber granted the Red Cross's motion to dismiss her case.

In order to impose liability for negligence, there must be an injury, said Fabor. Delp suffered no physical injury, so her claim must be for either negligent or intentional infliction of emotional distress. West Virginia law is rather stingy when it comes to emotional distress claims of either type. For a negligent infliction case, the emotional distress must be very severe to the point of incapacitating. For an intentional infliction case, the defendant's conduct must be truly outrageous and the emotional injury very severe. Judge Faber found that neither of these standards had been met.

Monetary damages are not available for the normal upset flowing from a negligently performed HIV test, and Judge Faber quoted extensively from the correspondence that the Red Cross sent to Delp and her doctor, showing that it had communicated carefully to avoid undue alarm and to stress that a positive screening test did not necessarily mean a person was infected.

As to Delp's demand that the court order the Red Cross to remove her from the deferral list, Faber declined to rule on it because of the lack of any legal theory under which the Red Cross could be found at fault, thus avoiding an interesting policy question of whether it makes sense, in light of persistent shortages of donated blood, to apply a permanent deferral policy when it turns out a positive test result was mistaken. A.S.L.

Ohio Appeals Court Upholds Deadly Weapon Conviction for Spitting & Biting

On August 8 the 5th District Court of Appeals of Ohio affirmed a six-year prison term for Tommy Dale Price, who was convicted of attempted felonious assault and assault on a peace officer for spitting at and biting a police officer who showed up at his house after he made a series of harassing and "nonsensical" telephone calls to the local police department. Price, a hemophiliac, is infected with both HIV and Hepatitis-C. *State of Ohio v. Price*, 2005–Ohio–4150, 2005 WL 1924347.

According to the opinion by Judge Sheila G. Farmer, Price became agitated when two police officers began questioning him on April 25, 2003. He swore at the officers and then spit at and bit Sergeant James Greenawalt. Although Greenawalt has consistently tested negative since the incident, Price was prosecuted on the theory that his saliva is a deadly weapon. Two doctors testified at the trial, opining that a hemophiliac with HIV would have infected blood cells in his saliva so it was possible HIV could be transmitted through spitting or biting, and both doctors, who had previously treated Price, said that he knew he was infected and contagious. The evidence also showed that Price had transmitted hepatitis to another police officer in the past.

The jury convicted Price, and the court of appeals rejected his argument that there was insufficient evidence to support the conviction. Judge Farmer found the testimony "sufficient to establish that given [Price's] knowledge of his illnesses, he knew his saliva was a deadly weapon capable of inflicting physical harm to another." Even though Officer Greenawalt was not injured, the court found Price's conduct serious enough to merit the sentence. "The attack in this case is similar to an individual holding another individual under water to injure him or her and fortunately the victim does not suffer any ill effects," Judge Farmer explained. "The attempt was made and despite the fact that it was unsuccessful, a criminal act occurred." A.S.L.

AIDS Litigation Notes

Federal — Alabama — Finding no basis for federal jurisdiction, Senior District Judge Albritton ruled in *Elliott v. PAX Academic Exchange*, 2005 WL 2002075 (M.D. Alabama, Aug. 18, 2005), that an action alleging that an organization running a foreign student exchange program could not be removed to federal court, when the basis of the action was a collection of state law contract and tort claims arising from the HIV+ status of a student placed with the plaintiffs. The plaintiffs alleged that PAX had promised that all students were medically screened and that no HIV+ student would be placed with them, but the student they got tested HIV+ and they incurred unanticipated medical expenses as well as the need for HIV testing for themselves and their children. PAX sought to remove the case to federal court, claiming that pervasive federal regulation of the foreign student exchange program meant complete preemption of state law claims against an organization participating in the program. Judge Albritton rejected the idea that complete preemption applied, since the Elliotts had failed to identify any federal statute or regulation that applied in this case.

Federal — Connecticut — Federal courts are not willing to get involved in disputes between HIV+ inmates and prison medical personnel about appropriate treatments. Under the 8th Amendment, the only basis for a claim against medical personnel is if they deny treatment altogether, apparently. Any treatment, no matter how outmoded or sloppy, is usually considered sufficient to satisfy 8th Amendment concerns, as illustrated by *Baxter v. Pesanti*, 2005 WL 1877200 (D. Conn., July 29, 2005)(slip copy).

Federal — New Jersey — U.S. District Judge Lifland denied cross-motions for summary judgment in *White v. Unumprovident*, 2005 WL 1683735 (D. N.J., July 18, 2005), finding that there were serious inconsistencies in the insurer's treatment of medical evidence in determining whether an HIV+ disability benefits claimant qualified for benefits under the relevant insurance plan. Lifland noted that the insurer totally disregarded all of the medical evidence submitted by the claimant, and even disregarded medical evidence obtained from doctors it retained to examine the claimant when such evidence cut in her favor. Under the circumstances, Lifland concluded, deference to the insurer under its insurance policy was not due,

and fact-finding would be required to determine whether Wanda White was entitled to disability benefits.

Federal — Pennsylvania — U.S. District Judge Buckwalter (E.D. Pa.) affirmed a magistrate's report and recommendations to uphold the Social Security Administration's determination that an HIV+ girl is not disabled for purposes of federal social insurance law. *Garcia v. Barnhart*, 2005 WL 2033385 (Aug. 22, 2005). The evidence showed that her HIV infection was "asymptomatic and well controlled" and that she "has not experienced any side effects from her HIV medications." Thus, any limitations in terms of her health were "less than marked" and could not provide the basis for a determination of disability.

California — A 15–year-old boy who was sentenced to the custody of the California Youth Authority for a ten-year term after being found guilty of two counts of forcible sexual penetration should not have been ordered to submit to HIV testing, since the forcible penetration consisted of inserting his fingers into vagina of a 16–year-old girl. In a per curiam opinion, the California Court of Appeal, 5th District, ruled Aug. 17 in *People v. Flavio E.*, 2005 WL 1971001 (not officially published), observed that "the juvenile court did not make a finding of probable cause of fluid transmission associated with that conduct, and an implied finding would not have been supported by the facts adduced at the adjudication hearing. The order for AIDS antibody testing under section 1202.1 was therefore improper." The court said that the matter should be remanded to the trial court for appropriate factual findings before a determination could be made whether a test was authorized under the statute.

Louisiana — Ruling on an HIV-transmission case stemming from a 1980 blood transfusion, the Louisiana Court of Appeal, 4th Circuit, found that a 1980 transfusion was "unavoidably unsafe," since at that time the virus associated with AIDS had not yet been isolation. Indeed, the disease identity had not even been well-identified as of that date, and it was not reasonably well established until two years later that AIDS was spread by a blood-borne virus. The first screening test was not licensed by the FDA until 1985. Thus, the defendant hospital would have no liability for the transmission of HIV at that time. *Patin v. Administrators of Tulane Educational Fund*, 907 So.2d 164 (June 15, 2005).

New York — Kings County Supreme Court Justice Marsha L. Steinhardt ruled in *Melendez v. Strong Memorial Hospital*, NYLS, 8/24/05, p.20, that the hospital was not entitled to summary judgment against a state prisoner suing for emotional distress stemming from a prison guard's disclosure of his HIV status. The plaintiff was an inmate of Willard Drug Treatment Campus, who was accompanied by a corrections officer from Willard when he went to the defendant hospital's infectious disease clinic. The nurse asked the officer to leave the room while she spoke with the plaintiff, but the officer refused to leave. The nurse then discussed his medical situation with the plaintiff, including revealing his HIV status. The plaintiff claims the correctional officer subsequently revealed the plaintiff's HIV status to others at Willard. In rejecting the hospitals motion to dismiss, Justice Steinhardt found it foreseeable that the corrections officer would disclose this information to others, and faulted the hospital for not providing him with a written notice that under Article 27–F of the Public Health Law he was forbidden to disclose the plaintiff's confidential HIV-related information to any other person. A.S.L.

International AIDS Notes

Ireland — On August 2, Mr. Justice Frank Clarke of the High Court granted a temporary order in favor of a South African man, identified in court papers as Mr. N., to forestall his deportation. Mr. N is a gay HIV+ man who is in a cohabiting relationship with another man in Ireland. He had been ordered deported last year, but sought to forestall the order by arguing that his life would be endangered by being sent to South Africa where he claims persons with HIV suffer from open discrimination and lack of appropriate treatment. *Irish Independent*, Aug. 3. The *Independent* reported on Aug. 23 that the High Court extended the interim injunction pending receipt of further medical evidence. The court is awaiting new blood tests to assist in determining how dangerous it would be to send Mr. N back to South Africa. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conference Announcement — Montreal 2006

The Right to Be Different: International Conference on Gay, Lesbian, Bisexual and Transgender Rights, has been announced for July 26–29 at the Convention Center in Montreal, Canada. The conference will include keynote speakers, plenary sessions, and workshop sessions. Co-Presidents of the International Scientific Committee that is organizing the conference are Joke Swiebel (openly-lesbian member of the European Parliament 1999–2004) and Robert Wintemute (faculty of law, Kings College, London). Those interested in speaking at the conference should consult the website: http://www.montreal2006.org/Call_for_Proposals_Montreal2006.pdf. Conference organizers are entertaining proposals for panels of 3–4 speakers, which must be submitted no later than October 31, 2005, to be considered. The conference is being presented in collaboration with 1st World Outgames, to be held simultaneously in Montreal.

Movement Job Positions

The ACLU has posted a staff attorney opening at its Program on Freedom of Religion and Belief in New York City. The staff attorney will coordinate and litigate cases in federal and state courts on freedom of religion and separation of church and state. The position requires at least five years of legal practice experience and admission to a state bar. Applicants should send a current resume, a cover letter explaining their interest in the position, contact information for three references, and an original legal writing sample, to Jeremy Gunn, Director, ACLU Program on Freedom of Religion and Belief, [Attn: LGLF–25], 915 15th St., N.W., Washington, D.C. 20005, or email the material to hrjobs@aclu.org. Deadline for submissions is October 1.

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