6th CIRCUIT RULES DENIAL OF TENURE DID NOT VIOLATE CONSTITUTION

The U.S. Court of Appeals, 6th Circuit, ruled that a school district did not violate a lesbian teacher's constitutional rights when it denied her tenure after learning that she had an intimate relationship with a recently graduated former student. *Flaskamp v. Dearborn Public Schools*, 2004 WL 2256028 (Oct. 5, 2004). Finding that any burden on her rights of intimate association and privacy was minimal, the court affirmed the district court's dismissal of the teacher's due process claims. Circuit Judge Jeffrey Sutton wrote for the unanimous panel.

Laura Flaskamp began teaching high school physical education in the Dearborn, Michigan, Public Schools in 1997. According to state law, teachers are on probation for four years before they are eligible for tenure. In the spring of 2000, Flaskamp met Jane Doe, a 17–year old senior who was enrolled in her leadership class, which gave students an opportunity to assist physical education instructors in teaching their classes. Doe registered to serve as Flaskamp's assistant.

As the semester proceeded, Flaskamp and Doe began communicating outside of the classroom by e-mail and instant messaging. They sent each other cards and gifts for their respective birthdays and other occasions, and Flaskamp sent Doe a card and gift for her graduation. At one point, Doe's mother apparently saw an e-mail sent by Flaskamp that included an "inappropriate joke" filled with sexual innuendos. She immediately wrote to Flaskamp, explaining that the joke was offensive and demanding an apology, which she received.

The record contains a chronology of the development of Flaskamp's and Doe's relationship. At one point during the semester, Flaskamp revealed to Doe that she was gay, and asked Doe whether she was gay as well. Doe said that she did not know. In June 2000, Flaskamp attended Doe's graduation party. That same day, Doe sent Flaskamp a letter expressing her affection.

Doe enrolled at nearby Eastern Michigan University, but would regularly come back to the high school to visit Flaskamp. They also continued to talk often by phone, e-mail and instant messaging. Doe's mother soon figured out that her daughter's friendship with Flaskamp went beyond the e-mail she had discovered. She sent an e-mail to Flaskamp warning her to stay away from her daughter and threatening her with a civil suit if she did not comply. She also told Flaskamp that she intended to tell the school about her relationship with Doe, which she believed had started prior to Doe's graduation.

After receiving this message, Flaskamp contacted her principal, Paul Smith, about Doe's mother's concerns. Flaskamp explained that she had mistakenly sent the "inappropriate" joke to her entire address book. She also told Smith that Doe's mother accused her of being in an inappropriate relationship with her daughter, but Flaskamp denied the accusation, insisting that it was merely a student-teacher relationship. Smith accepted Flaskamp's explanation.

In March 2001, as Flaskamp's four year probation was about to come to an end, Smith recommended to the school district board that Flaskamp receive tenure. That same day, however, Doe's mother called to arrange a meeting with Smith. Four days later, Doe's mother explained that Flaskamp's message had been directed to her daughter, and not a larger group. Doe's mother also recounted how Flaskamp and Doe regularly communicated by e-mail and how Flaskamp had sent Doe over a dozen greeting cards. Doe's mother insisted that Flaskamp was "chasing after her daughter" and that the relationship had begun prior to Doe's graduation.

Smith met with Flaskamp later that day, at which point Flaskamp continued to deny the existence of any inappropriate relationship. Flaskamp also met with the president of the teachers' union, the head of human resources and again with the principal. Smith impressed upon her the seriousness of the accusations and instructed her to sever any ties with Doe, which Flaskamp agreed to do.

The following week, Flaskamp encountered Doe's brother, who was still a student at the high school where Flaskamp worked. When she inquired after Doe, he "exploded" and threatened Flaskamp. She reported the incident to Smith, who scheduled another meeting with Doe's mother shortly thereafter. At this meeting, Doe's mother accused Flaskamp of instigating the confrontation with her son and reiterated her charge about Flaskamp's relationship with her daughter. Doe's mother also told the principal about a recent instant message exchange where Flaskamp and her daughter talked about showering together and sharing a bed, and wrapped up with "love you very much."

After hearing this, Smith became convinced that Flaskamp had not been truthful about the nature of her relationship with Doe, and suspended her with pay. Soon thereafter, Smith also revised his tenure recommendation. He rated Flaskamp's performance as unsatisfactory and recommended that the board deny her tenure because she had not been truthful about her interactions with Doe. In April 2001, the board unanimously agreed to deny Flaskamp tenure.

Flaskamp brought a 42 USC sec. 1983 action in June 2001, alleging that the school board and its members had violated her constitution right to intimate association, her right to privacy and her right to be free of arbitrary state action. The district court rejected all of these claims on summary judgment. The court ruled that the right of intimate association did not protect relationships between "close friends, even one[s] with a sexual component." With respect to her privacy claim, the court dismissed this count on the grounds of qualified immunity, finding that the contours of any such privacy right were not clearly established. Moreover, the court found no policy or practice so as to warrant section 1983 liability against the municipality. Finally, the district court found that the board's decision was not arbitrary, and emphasized that Smith's recommendation was reasonable and it was also reasonable for the board to rely upon it.

On appeal, pursuant to the Supreme Court's instruction in *Saucier v. Katz* regarding the proper analysis for qualified immunity claims, Judge Sutton turned to the question of whether any constitutional right that had allegedly been violated was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Before commencing this analysis, however, the court emphasized, first, that the plaintiff's sexual orientation was not relevant to the outcome of this dispute, and second, that a school district may prevent teachers from having intimate relationships with students, even those who have already turned eighteen.

LESBIAN/GAY LAW NOTES **November 2004**

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As for Flaskamp's intimate association claim, Sutton did not adopt the district court's reasoning that the kind of relationship at issue in this case would never be protected by the Constitution. Instead, the court noted that, under *Lawrence v. Texas*, intimate relationships are protected by the substantive component of the Due Process Clause. Nevertheless, the court insisted that only government action that has a "direct and substantial influence" on the ability of individuals to form intimate associations are subject to heightened scrutiny. There is a "direct and substantial influence" on the right "only where a large portion of those affected by the rule are absolutely or largely prevented" from exercising that right "with a large portion of the otherwise eligible population," according to Sutton. Comparing the district's actions in this case to anti-nepotism policies and policies prohibiting dating within the chain-of-command of a police or fire department, the court found that Flaskamp could not demonstrate such a burden.

Flaskamp retained the right to form intimate relationships with a broad range of individuals, said the court. Furthermore, the court insisted that a formal policy (not present in this case) preventing teachers from dating students for one year after graduation not only would leave a large cross-section of the population available for dating but also would ensure that high school seniors were not viewed as prospective dating prospects as soon as they graduated. Such prophylactic action by the district was completely appropriate, in the court's view.

The court also found that the board's decision was otherwise completely rational on the ground that Flaskamp had not been truthful in responding to his inquiries about the nature of her relationship with Doe. In addition, the board could have reasonably concluded, contrary to Flaskamp's representations, that their relationship did, in fact, begin prior to Doe's graduation. "The type of intimate association for which Flaskamp seeks constitutional protection," the court observed, "does not generally spring into existence at one point in time; it develops over a period of time." For this reason, the court ruled, it would not have been irrational for the board to conclude that Flaskamp's relationship had actually begun to form while Doe was still a student. Relying on this analysis, the court also rejected Flaskamp's claim that the state had denied her right to substantive due process by acting irrationally and arbitrarily.

As for Flaskamp's privacy claim, Sutton noted the two different kinds of privacy at stake. First, there is the autonomy-based right to privacy. Second, there is a right to control the dissemination of sensitive information about one's self. The first principle, the court explained, "protects an individual's freedom in making highly personal choices about one's relationships and family." As for the first version of privacy, the court found any such claim to be indistinguishable from the right of intimate association, and dismissed it based on the analysis described above.

As for Flaskamp's "informational privacy" claim, Sutton first examined whether her interests implicate a fundamental, or equally important, right, and then to balance that right against the government's need for the information. Rather than addressing the first prong, with respect to whether the case implicated a fundamental right, the court ruled that the board handled any private information about Flaskamp's affairs (so to speak) with sufficient discretion to avoid any liability on this count. First of all, the court found that any initial intrusion on Flaskamp's informational privacy was minimal because the principal's request for disclosure was "quite limited." Moreover, Sutton stated that the principal and the board had an important reason for requesting the information in the first place — namely, enforcing its prohibition against teachers dating students. The court dismissed Flaskamp's attempt to distinguish between questions regarding the nature of the relationship while Doe was still a student from those regarding the relationship after her graduation. Noting that "information about a current relationship may well cast light on the nature of the relationship nine months earlier, the question was a legitimate one," in the court's view.

One can only be encouraged by the Sixth Circuit panel's nonchalance with respect to the fact that the alleged relationship at the heart of this case was a same-sex, rather than a heterosexual, one. Furthermore, the court's unwillingness to relegate a dating relationship automatically beyond the constitutional pale demonstrates just how much *LawrenceD* may have reinvigorated constitutional due process jurisprudence. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

Billy Graham Association Exempt from Minnesota Gay Rights Law

In *Thorson v. Billy Graham Evangelistic Association*, 2004 WL 2340158 (Oct. 19, 2004), the Minnesota Court of Appeals affirmed the district court's decision to grant summary judgment to Billy Graham Evangelistic Association (BGEA) against a sexual orientation discrimination claim brought by a discharged 30–year employee, on grounds of religious exemption from the state's anti-discrimination law. BGEA is a non-profit religious association that promotes Christianity through a combination of live events, productions for film and television, and publication of books, pamphlets, and magazines. Its employees are required to profess Christianity and participate in devotional activities. Sarah Thorson, who had worked in BGEA's mailroom and related services since 1971, brought suit under the Minnesota Human Rights Acts (MHRA) after the ministry dismissed her for being a lesbian. She alleged that the ministry violated two provisions of the Act, sec. 363A(2), barring discharge of employees because of their sexual orientation, and (4), barring employers from requesting that employees furnish information as to their sexual orientation. The dismissal came about after Thorson was seen kissing another woman in the parking lot by two other employees in February 2002. At a meeting on February 21, 2002, two supervisors confronted Thorson with the allegations. Thorson admitted that she was a lesbian. One of her supervisors advised that, unless Thorson reconsidered her "lifestyle," she would be terminated. Thorson wrote a letter asserting that her sexual orientation did not affect her employment and requested that she be allowed to continue working for BGEA, but BGEA did not respond. BGEA subsequently determined that Thorson's sexual orientation was inconsistent with BGEA's mission and terminated her employment on June 24, 2002. BGEA contended that it was exempt from the sexual orientation provisions of the MHRA, citing a provision on religious exemption. The district court entered summary judgment in favor of BGEA and Thorson appealed. The MHRA does not generally apply to religious associations, but a religious association's "secular business activities" are non-exempt. In its opinion, the court of appeals focused on whether Thorson's particular job was exempt from the MHRA's prohibition against discrimination in employment based on sexual orientation. Thorson had argued that as a mailroom employee, she was engaged solely in secular business activities that served no religious function, and thus the exemption should not apply. BGEA countered that the activity should be viewed in the context of the employer's purpose and mission as a whole to determine whether the business activity was secular or religious. After examining the legislative history, the court of appeals determined that BGEA was correct in its argument and that secular business activities were intended to relate to outside business activities of a religious associa-

tion. The court held that because BGEA's business activities were exclusively related to its evangelical ministry, they were not secular business activities unrelated to the religious and educational purposes for which BGEA is organized and accordingly, BGEA was exempt from the provisions of the MHRA. *Leo Wong*

Georgia Supreme Court Strikes Hate Crime Law

Georgia's Supreme Court unanimously ruled on October 25 in *Botts v. The State*, 2004 WL 2378432, that the state's law authorizing enhanced prison sentences for defendants convicted of "hate crimes," OCGA sec. 17–10–17, was unconstitutionally vague. Unlike the hate crimes laws in virtually all the other states, Georgia's law did not specifically identify groups to be protected under the law, instead adopting a more general sentence enhancement for crimes found to be motivated by bias or prejudice.

The Georgia law was the result of a legislative compromise several years ago. Proponents of a hate crime law wanted it to cover the usual categories, including sexual orientation. Opponents of the law vehemently objected to the inclusion of sexual orientation. The compromise was to omit specific categories, and instead state that criminal sentences would be enhanced if the jury (or, in a non-jury trial, the judge) found beyond a reasonable doubt "that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice."

In the case before the court, Christopher Botts and Angela Prisciotta were indicted on aggravated assault charges in a case with racial overtones. After they pled guilty, there was a sentencing hearing before a judge, who concluded that the attacks expressed race bias and imposed an additional two years of prison time on top of the sentences for assault. In appealing the extra sentence, the defendants claimed that the statute violated the First, Fifth, Eight and Fourteenth Amendments of the U.S. Constitution, as well as corresponding sections of the state constitution.

Writing for the court, Justice Carol Hunstein found that it would be constitutional to enhance prison sentences based on bias-motivated conduct, but that the legislature had to spell things out in more detail so that "persons of ordinary intelligence" would know what the law covered. The state argued that the underlying assault statute was specific enough so that the defendants knew that what they were doing was unlawful, and that such specificity was not necessary for sentence enhancement purposes, but the court disagreed.

Hunstein wrote that the statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." As an example, Hunstein noted that if "a rabid sports fan" threatened somebody for wearing a competing team's baseball cap, the prosecutor could theoretically charge them with a hate crime under this statute. (So? That's an objection?)

At the time it was passed, disappointed gay rights leaders in Georgia who had hoped for the inclusion of "sexual orientation" and fell just a few votes short, accepted the law as a compromise. Harry Knox, former director of Georgia Equality, a gay political group, told the *New York Times* (Oct. 26), "It was the best that could be accomplished at the time. We tried to get more from the Legislature but couldn't."

State Senator Vincent D. Fort, one of sponsors of the legislation, claimed the decision was a partial victory, in that the court did not question the authority of the legislature to pass a hate crimes law, and vowed that a new bill with sufficient specificity would be introduced in the legislature. Whether it would cover "sexual orientation" was anybody's guess, in light of the difficulties encountered on the prior go-around. A.S.L.

Reconsideration of Shared Custody Petition Ordered by Ohio Appeals Court

A unanimous panel of Ohio's 12th District Court of Appeals ruled on the appeal in *In re J.D.M.*, 2004–Ohio–5409 (October 11, 2004), that the Warren County Juvenile Court must reconsider a petition from a lesbian couple for a shared custody arrangement. The Juvenile Court had twice rejected petitions from Jennifer and Cheryl McKettrick, based on its unsupported conclusion that it would not be in the best interest of their child for both mothers to share legal custody. Lambda Legal's Heather Sawyer was lead counsel for the McKettricks on their appeal.

The case involves an unusual set of facts. According to Judge James E. Walsh's opinion, the petition alleges that "Cheryl donated an ovum which was fertilized and implanted in Jennifer. Jennifer gave birth to J.D.M. on March 16, 2001." By complying with Ohio's statute governing donor insemination, Jennifer and Cheryl assured that J.D.M. would have no legal father. Since J.D.M. was born, the two women, who have been domestic partners since June 1998, have raised him together. According to a clinical psychologist appointed by the Juvenile Court, "J.D.M. appears in all respects to be happy, loved and well-cared for, and both parties are fit parents."

The women jointly petitioned the Juvenile Court to approve their shared custody agreement, but that court dismissed their petition after a hearing, stating that the court could not see that the agreement provided any present benefit to J.D.M. and that it was so general in terms that it was unclear what effect it would have in case the women separated. The juvenile court judge seemed most concerned that under the agreement J.D.M.'s legal mother would be relinquishing her exclusive right to exercise her discretion to determine what would be in J.D.M.'s best interest. Interestingly, the Juvenile Court made no determination whether J.D.M.'s legal mother was Jennifer, the birth mother, or Cheryl, who produced the ovum and is thus J.D.M.'s genetic mother.

Undeterred, the women had their agreement redrafted to take account of the court's concerns by including much more detail, but the judge rejected it a second time, once against asserting that so long as the women were living together with J.D.M., the court could see no purpose for the shared custody agreement, and was leery about letting the birth mother limit her future discretion to make decisions in J.D.M.'s best interest. Further, the court asserted that the women could achieve their intended result by executing powers of attorney, wills, and written releases.

The women appealed and found a more receptive ear at the court of appeal. Part of the problem was that the Juvenile Court judge, perhaps reflecting normal routine in that court, considered shared custody agreements to be what a court approves when a couple is breaking up but is going to continue sharing legal custody of the children. Thus, when there was no controversy between the parents, who were continuing to live together with the child, the court saw no need for a shared custody agreement.

But, observed Judge Walsh, this view was inconsistent with a 2002 decision in another lesbian couple parenting case, *In re Bonfield*, 97 Ohio St. 3d 387, 2004–Ohio–6660, in which the Ohio Supreme Court seemed to approve the idea of shared custody, if it was determined to be in the child's best interest. Concluding that current Ohio law does not require a controversy between the parents as a prerequisite for a shared custody order, the court concluded that the Juvenile Court judge was in error on this point.

On the issue of best interest of the child, Judge Walsh found that the Juvenile Court had failed to follow the course prescribed by the Ohio Supreme Court in *Bonfield* by failing to determine who was the legal mother and then to determine whether it was in the child's best interest for the other parent to have a legal relationship with the child. "It is axiomatic that a natural parent has a paramount right to the custody of his or her children,70 wrote Walsh, but "natural parents may voluntarily relinquish custody to a third party. However, a non-parent has no such rights to relinquish." Thus, in order to go forward with this process, a determination must be made whether the birth mother or the ovum donor should be considered the legal par-

ent. The court of appeals gave no clue as to its thinking on this question.

Turning to the best interest analysis, Walsh disputed the approach taken by the Juvenile Court judge, enumerating ways that J.D.M. would be benefitted by having two legal parents. "J.D.M. benefits from having two caregivers, legally responsible for his welfare," wrote Walsh. "Both will have the ability to make medical decisions on his behalf and be able to interact with teachers and school administrators without executing additional documents." Furthermore, the psychologist had given Cheryl and Jennifer high marks as parents, "committed to J.D.M.'s well being," evidence that Walsh found had been "in large part overlooked by the trial court."

The case was returned to the Juvenile Court with instructions first to determine the legal mother and then to evaluate whether a shared custody agreement between the legal mother and the other mother was in J.D.M.'s best interest, taking account of all relevant factors. In a final section of the opinion, Walsh found that the Juvenile Court had not purported to dismiss the petition on constitutional grounds, and so rejected the argument on appeal that constitutional rights had been violated in this case. A.S.L.

Rockland County (N.Y.) Judge Rejects Marriage Claim

Rockland County Supreme Court Acting Justice Alfred J. Weiner issued a ruling on October 18 in *Shields v. Madigan*, 2004 WL 2364897 (also published in *NY Law Journal* on Oct. 26), rejecting a petition by ten same-sex couples from the town of Orangetown seeking marriage licenses. Differing from two earlier rulings by local Justice Court judges in New Paltz, who had found New York's denial of same-sex marriage unconstitutional in the course of dismissing criminal charges against New Paltz's mayor and two ministers who performed weddings for same-sex couples who did not have validly-issued licenses, Weiner found that the state has a "valid purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation." (Weiner's decision failed to mention the two Justice Court rulings and, for that matter, failed to mention plenty of other relevant material, as discussed below.)

The plaintiff group is led by Nyack's mayor, John Shields, who was turned down when he and his partner applied in March 2004 to the Orangetown Town Clerk for a marriage license, and is represented by Norman Siegel, who was the longtime executive director of the New York Civil Liberties Union and is now in private practice.

According to Justice Wiener's opinion, the Town Clerk had received a written advisory from the state Department of Health, based on an informal opinion letter that was issued late in February by the office of Attorney General Spitzer, taking the position that licenses may not be issued to same-sex couples, and warning that issuing such a license could be treated as a misdemeanor under the Penal Law.

The petitioners in this case argued that the gender-neutral definition of marriage contained in New York's marriage law, Sections 10 and 15, means that the clerk should be ordered to issue them licenses, and argued alternatively that if the current law does not allow for such licenses, then it violates the state constitution. Justice Wiener rejected both arguments.

Focusing first on the issue of interpreting the state marriage law, he noted that although the definition of marriage contained in the law makes no references to gender, many other provisions of the law do, including a provision stating that a marriage is to be "solemnized by each person declaring 'that they take each other as husband and wife'(DRL Sec. 12), and that the clerk obtain information from the 'bride' and 'groom' during the application process (DRL Sec. 15[1][a]." Wiener also noted that other provisions of the law dealing with annulments, divorces, and separations of married couples all contain references to husbands and wives.

Perhaps more central to his decision, however, was the daunting body of prior New York court decisions, including *Matter of Cooper v. Kelly* 187 App. Div. 2d 128 (2nd Dept. 1993), a decision that would be a binding precedent for any Rockland County trial judge, ruling that the marriage law does not allow same-sex couples to receive licenses or be married. The prior rulings, in addition to noting the many references to husbands and wives in the state's marriage law, also adopted the view that statutory language must be interpreted in line with the intention of the legislature that passed the statute, and there is no indication that the New York State legislature ever intended to authorize same-sex marriages.

Turning to the constitutional issue, Wiener wrote his opinion as if the major developments in gay law since 1996, when the Supreme Court decided in *Romer v. Evans* that anti-gay discrimination violates the federal equal protection clause, had not occurred. Perhaps even more to the point, Wiener failed to discuss the significant rulings of the past year and a half, starting with the expansive "libertyø holding by the U.S. Supreme Court in *Lawrence v. Texas* and proceeding through the historic same-sex marriage ruling by the Massachusetts Supreme Judicial Court in *Goodridge*, and important subsequent same-sex marriage rulings from trial judges in Oregon and Washington state, all applying state constitutional provisions similar in scope to constitutional provisions in New York. The only reference to *Lawrence* is to Justice Sandra Day O'Connor's statement, in her concurring opinion, that the states might have a legitimate interest in "preserving the traditional institution of marriage." O'Connor's statement is not part of the binding majority ruling in the case.

Although Wiener was considering a challenge raised under the New York constitution, these decisions from other jurisdictions are important because they discuss and reject the very same arguments that Wiener accepted from the state in this case, especially the spurious argument about linking marriage and procreation. While Wiener cited some U.S. Supreme Court decisions to support that point, at least by inference, he failed to cite an important Supreme Court decision cutting the other way, *Turner v. Safley*, in which the Court struck down a regulation against state prisoners getting married, rejecting the state's argument that since it did not provide conjugal visits for prisoners, such a marriage would be meaningless because it could not be sexually consummated and produce offspring. In that opinion, the Supreme Court decisively rejected the argument that marriage is only or principally about procreation.

After following state precedent binding in the 2nd Department that anti-gay discrimination is subject to the minimal "rational basis" test, under which just about any non-discriminatory justification can serve to reject a constitutional challenge to a law, Weiner asserted, with no reasoning or discussion, that preserving "the historic institution of marriage as a union of man and woman" is a "valid public purpose." Weiner made no attempt in his opinion to explain why this is a valid purpose, when examined in the light of the gross inequalities that exclusion from marriage works on same-sex couples, which are detailed at great length in the recent marriage opinions that he failed to cite from other jurisdictions.

In other words, this reads like a "know-nothing" opinion, and there has been speculation in the press that this is all about Acting Justice Weiner's hope to win election to a Rockland Court Supreme Court seat by not issuing a controversial opinion. Such speculation may be unfair, however, since Weiner's ruling is constrained by the 2nd Department precedent. Trial courts may not reverse decisions by the courts to which their decisions are appealable; only an appellate court can reconsider existing precedents in our legal system. On the other hand, Weiner could have noted the disparity between that appellate precedent, which dates from 1993, and more recent developments (including both U.S. Supreme Court decisions mentioned above).

The matter will be appealed to the 2nd Department, which is already considering an appeal in *Langan v. St. Vincent's Hospital*, in which a trial judge in Nassau County, John Dunne, had ruled that the surviving partner

from a Vermont Civil Union could bring a wrongful death action for his loss stemming from alleged medical malpractice by the hospital in the treatment of his partner. Under New York law, such lawsuits can only be brought by a surviving legal spouse. A.S.L.

Arkansas Supreme Court Rejects Pre-Vote Challenge to Marriage Amendment

The Arkansas Supreme Court denied a petition to remove from the Nov. 2 ballot an initiative that would add to the Arkansas Constitution an amendment banning same-sex marriage, and barring recognition of legal status for unmarried persons that is "substantially similar" to that granted married persons. *May v. Daniels*, 2004 WL 2250882 (Oct. 7, 2004). The amendment recognizes as valid out-of-state common-law marriages, if the Legislature recognizes them.

The challenge, brought by one straight married couple (Ronald and Susan May) and one gay man (Gayle Bradford) whose partner had recently died, focused on whether the "Popular Name" and the "Title" that would appear on the ballot sufficiently described the content and effects of the amendment. They alleged that Arkansas voters would not know what they are voting for because these two items are insufficiently informative.

The Popular Name appearing on the ballot was "AN AMENDMENT CONCERNING MARRIAGE."

The Title appearing on the ballot was: "A proposed amendment to the Arkansas Constitution providing that marriage consists only of the union of one man and one woman; that legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman; and that the legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage."

The complete text of the amendment, which did not appear on the ballot, is:

"*SECTION 1: Marriage:* Marriage consists only of the union of one man and one woman.

"*SECTION 2: Marital Status:* Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman.

"*SECTION 3: Capacity, rights, obligations, privileges, and immunities:* The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage."

The petitioners alleged that "AN AMENDMENT CONCERNING MARRIAGE," the Popular Name, was inaccurate because the amendment also concerned the rights of the unmarried, hence, it does not merely concern marriage. The majority dismissed this argument, stating that the Popular Name "clearly and concisely identifies the measure to the voters. It is intelligible, honest, and impartial and does not contain inflammatory language, political catchwords, or partisan coloring." The court compared "An Amendment Concerning Marriage" with "The Unborn Child Amendment," which was disallowed because it used partisan language, and did not in any way inform voters that its purpose was to bar state funding of abortions. The court further pointed out that each of the three sections concerns marriage, hence, the Popular Name is properly descriptive of the content of the amendment.

The petitioners next challenged the Title, stating that its language was vague and misleading; it failed to disclose the effect of the amendment on laws giving equal protection to both unmarried and married persons, it failed to disclose that it curtails the privileges of those in legal relationships other than marriage, and it failed to disclose the amendment's effect on existing common-law marriages.

The petitioners claim that the Title used "marital status" as a synonym for marriage, which it is not. "Marital status" includes the status of being married as well as the status of being unmarried. Therefore, "identical … to marital status" could mean "identical to the state of being married" or "identical to the state of being unmarried." It is ambiguous terminology.

The court found this argument unpersuasive ("the fact that a term is capable of more than one possible meaning does not render the term meaningless") in the context of the wording of the amendment, and found that the petitioners did not meet their burden of proof of ambiguity.

The unstated effect of the amendment on unmarried persons was the petitioners' next argument. The Title did not reveal that certain benefits and protections granted by the state of Arkansas are guaranteed to unmarried persons to the same extent as unmarried persons. Specifically, unmarried persons are protected against discrimination, and homestead rights are granted to those who are "married or the head of a family," the latter condition without regard to marriage. The court's majority found this argument to be based on mere speculation, that the amendment does not necessarily apply to these situations, and that informing the voters of every possible contingency is not a requirement for the title of a ballot initiative. The argument was rejected.

The petitioners further asserted that the Title ought to state outright that the purpose of the amendment is to prohibit civil unions and domestic partnerships. The court's majority disagreed. First, they contended, there is no legal definition in Arkansas of either of these terms; second, it cannot be said the amendment would have this effect: if a civil union or domestic partnership is not "identical or substantially similar to marital status," it would have no effect on such arrangements at all. This argument was also rejected.

Last, the petitioners claimed that the Title was misleading as to the amendment's effect on existing common-law marriages. They base this on the statement in Section 3 that the Legislature "may" recognize such unions. The Title may lead voters to believe that currently recognized common-law marriages are invalid unless the Legislature takes some action, which it may do, but is not required to do. The majority agreed that this section may signal a change in the current law, but held that a ballot title was not insufficient merely because it failed to disclose the current state of the law. The final argument of the petitioners, therefore, was rejected, and the constitutional amendment would be on the ballot.

Two justices wrote separate dissenting opinions. Justice Ray Thornton agreed with the petitioners that the Popular Name did not describe the amendment. Justice Thronton suggested, "An Amendment Concerning Marriage and Prohibiting Unmarried Persons from Having Substantially Similar Rights." He also felt that tax effects on unmarried people were not properly described by the Title, and that the equal protection granted unmarried persons would also surreptitiously be affected.

Justice Jim Hannah stated that the Popular Name was misleading, that the term "legal status for unmarried persons" is ambiguous, and that the term "marital status" is not, as stated by the majority, clarified by its context. "Neither the popular name nor the ballot title meet the statutory requirements. They are one-sided, and only present a partial description of the proposed change to the Constitution." Both dissenters would have granted the petition. *Alan J. Jacobs*

Georgia Supreme Court Finds No Jurisdiction for Pre-Ballot Challenge to Marriage Amendment

A sharply-divided Georgia Supreme Court ruled on October 26 in *O'Kelley v. Cox*, No. S05A0236, that the state courts did not have jurisdiction to decide prior to the November 2 election whether a proposed anti-marriage amendment to the state constitution must be blocked from the ballot for violating the Single Subject rule. A majority of the court joined an opinion by Justice George H. Carley. Justice Carol W. Hunstein, writing a separate opinion

for herself, disagreed with the majority about the court's jurisdiction, but concluded that the lawsuit was filed too late for an appropriate judicial determination prior to the election. Finally, Justice Leah Ward Sears wrote a sharp dissenting opinion, joined by Justice Robert Benham.

The Georgia amendment is one of the more complicated ones slated for the ballot. It states: "Recognition of marriage. (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship."

The amendment as proposed appears to raise several different policy questions. It would prohibit same-sex marriages, apparently prohibit other legal forms of recognition for same-sex unions (although how far this would go is not clear from the language of the proposed amendment), make it impossible for same-sex couples married or united elsewhere to get their unions legally dissolved in Georgia, and deprive the courts of any authority to rule on the rights people might have as a result of being in a legally-recognized same-sex relationship from another jurisdiction.

Under the Georgia Constitution, proposed amendments presented to the voters must relate to only one subject, to avoid putting voters in the position of having to vote for something they personally reject in order to get something they want.

The amendment was approved by supermajorities in the state legislature in March, but the lawsuit challenging its validity under the Single Subject rule was not filed until September 16 in Atlanta. The trial judge quickly scheduled a hearing and ruled that the Georgia courts do not have jurisdiction to hear any legal challenge to a proposed amendment until it has been voted upon by the electorate. According to the trial judge, relying on a 1920 state supreme court precedent, until the voters speak, the proposal is like a bill introduced in the legislature, and it would violate the separation of powers between the branches of the state government for the courts to start making rulings about the constitutionality of bills that have not even been finally approved.

A majority of the Supreme Court agreed with the trial court. Justice Carley wrote that the challengers of the amendment do not have a legal right to be protected from participating in an election where they will be considering a constitutional amendment that would be subject to constitutional attack immediately after it is approved by the voters. "They are entitled to campaign against enactment of the proposed amendment and, if they are unsuccessful in that effort, they may bring a challenge to its constitutionality on any arguably meritorious basis."

Carley was careful to avoid expressing any view in the opinion for the court about whether the proposed amendment would be vulnerable to attack if it is approved by the voters.

By contrast, three members of the court thought that the Georgia courts do have jurisdiction to consider whether a proposed amendment violates the single subject rule, and keep it off the ballot on that basis. In a dissenting opinion for herself and Justice Robert Benham, Presiding Justice Leah Ward Sears wrote at length about how challenges under the single subject rule were different, and required different treatment, from challenges contending that a proposed amendment was substantively unconstitutional. This is not an issue of substantive law, she wrote, but rather a problem of compliance with a state constitutional mandate to avoid confronting voters with the dilemma of having to vote for what they dislike in order to get what they like.

Justice Sears accused the court of failing "in its duty to protect Georgia voters from coercion and fraud," and argued that the case should be immediately sent back to the trial court for a quick determination of whether the proposed amendment violates the single subject rule. She found the reliance on the old 1920 case inappropriate. In that case, the 1920 challengers were attacking the substantive constitutionality of the proposed amendment, which is not the subject of the current lawsuit. The harm that the state constitution sought to prevent was to present voters with an inappropriate choice, and this harm could not be remedied by filing a new lawsuit after the vote in case the amendment passed.

In a separate opinion, Justice Carol Hunstein agreed with the main points of Sears' argument, but felt that the case was before the court too late to do anything about it. Had the plaintiffs filed suit shortly after the legislature approved the measure, there would have been plenty of time for the trial court to hear testimony, read legal briefs, and decided whether the single issue rule was violated and what the remedy should be. However, she felt that to send the matter back to the trial court for a ruling on the merits, on an arcane subject as to which there is not much published literature, was inappropriate. Thus, although a fellow traveler of the dissenters, Justice Hunstein apparently reluctantly agreed to reject the lawsuit.

The Georgia decision was unsurprising in light of the string of defeats the activists have suffered over the past few weeks in try to get some of these initiatives knocked off the ballot. A.S.L.

Ohio Supreme Court Rejects Pre-Vote Challenge to Marriage Amendment

In a ruling that drew an outraged dissent from Justice Paul E. Pfeifer, the Ohio Supreme Court voted 6–1 on October 21 to reject an attempt to keep the Ohio "Marriage Protection Amendment" off the November 2 ballot. *The State ex rel. Essig v. Blackwell*, No. 2004–1603. The court wrapped its decision in a fog of procedural trivia, avoiding addressing serious violations of law by the Secretary of State, J. Kenneth Blackwell, and the proponents of the amendment.

The majority's approach was so outrageous that it drew unusually strong language from Justice Pfeifer in his dissent. After labeling as "implausible" the chief argument that the court used to evade dealing with serious objections to the process, Pfeifer wrote, "This court is essentially giving the Secretary of State a free pass to ignore clear statutes and to use tactics of delay to achieve a result in which he has a blatant political interest… It is regrettable that today this court vindicates the Secretary of State's tactics and thereby denies the relators meaningful review of their claims. Three cheers for judicial indifference."

What drew Justice Pfeifer's ire was the court's conclusion that the challenge was time-barred because it was not brought before the court until after a statutory deadline of 40 days prior to the election had passed. But the Secretary of State seems to have deliberately stalled at a key point in the process in order to make sure that the appeal would be delayed, according to Justice Pfeifer's recitation of the facts.

This should not be surprising to anybody who has been following the saga of Blackwell's attempts to tilt Ohio, a swing state, into President Bush's column by doing anything possible to suppress the urban minority vote and enhance incentives for religious conservatives to turn out in large numbers. For example, reacting to a highly successful voter registration campaign carried out in minority communities by Democratic Party activists, Blackwell, a Republican, instructed local election officials to reject new registration forms based on a hyper-technical interpretation of the voting law, including prescriptions of the weight of paper to be used for the applications.

In the case of the marriage amendment, Blackwell "overlooked" clear requirements of Ohio law in order to find that the measure quali-

fied for the ballot. Most significantly, he refused to apply a statutory requirement that all printed petitions contain not only the text of the proposed amendment but also the official summary approved by the Secretary of State's office and a copy of the certification of that summary by the Secretary of State. In their rush to begin gathering signatures, the promoters of the amendment had printed up their petition forms before the Secretary of State had approved the summary. They even used these incomplete forms to gather additional signatures after the Secretary found that their initial submission fell many signatures short. Although the law clearly specifies that every petition carry all this information, Blackwell rejected without explanation the challenges to signatures that were obtained using these invalid forms. And he delayed his final ruling on such challenges just long enough so that an attempt to take the issue to the courts would fall within the prohibited 40 day period.

Which explains Justice Pfeifer's outraged dissent. "It is a seductively easy slide from the golden fortress of judicial restraint to the desolate valley of judicial indifference," Pfeifer commented. "In this case, this court has been seduced into the valley by hyper-technical arguments that cause it to disregard the initiative petition's clear statutory violations."

Pfeifer stressed that the summary was very important because this proposed amendment, in common with many of those pending this year, uses ambiguous language to attempt to go further than just banning same-sex marriages. After stating the same-sex marriage ban, the proposed amendment states: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Said Pfeifer, "A summary is especially important in this case because the second sentence of the proposed amendment is expansive and susceptible of more than one interpretation."

A main focus of debate about the amendment has been the uncertainty whether it would be used to ban domestic partnership health benefits, now available at the state university and in some of the state's cities for public employees. The uncertainty is due to the ambiguous wording of the second sentence in the amendment.

After noting that Blackwell had ignored clear legal requirements in certifying the petitions for the ballot, Pfeifer commented, "Whether the Secretary of State's overt political interest in the passage of the proposed amendment influenced his decision is unknowable; the perception of influence is undeniable."

The rest of the court, perhaps shamed by Pfeifer's comments, decided to hide their opinion behind the shield of *per curiam* (literally "by the court") rather than attribute the pages of procedural obfuscation to any one judge. A.S.L.

Other Marriage & Partnership Litigation Notes

California — San Francisco Superior Court Judge Richard Kramer has set Dec. 22 as the date to begin hearing arguments in *City of San Francisco v. State of California*, a consolidation of several cases involving challenges to California's marriage statute on behalf of those seeking the right of same-sex marriage. *Contra Costa Times*, Oct. 27. Kramer had previously allowed several anti-gay groups to intervene in the case to defend the current marriage law, in light of their arguments that Attorney General Lockyer would be politically constrained against making some policy arguments in support of the current marriage regime. *San Francisco Chronicle*, Oct. 16.

Louisiana — Louisiana District Court Judge William Morvant (19th Judicial District, Baton Rouge), ruled on October 5 that the Louisiana anti-marriage amendment, approved by the voters on Sept. 18 by greater than a 3–1 margin, violated the state constitution's rule against ballot measures that have multiple purposes. *Forum for Equality v. Secretary of State*. Judge Morvant found that the proposal as written was intended to ban both same-sex marriages and civil unions, thus putting voters to in the unfair position of having to vote to ban both even if they wanted only to ban marriage. The lawsuit was filed by Forum for Equality, a group that is leading opposition to the amendment, the Louisiana Log Cabin Republicans, and five individuals, with defendants being the state secretary of state, several state legislators and some conservative groups. Supporters of the amendment promptly filed an appeal with both the court of appeals and the supreme court, hoping that the high court would take the case directly, but on Oct. 12 it was announced that the next stop for the case would be the court of appeals. However, after hearing oral argument on Oct. 13, the court of appeals promptly sent the case to the Supreme Court, which announced that it will schedule oral argument for December 1. In a brief opinion, *Forum for Equality PAC v. McKeithen*, 2004 WL 2293702 (La. Ct. App., 1st Cir., Oct. 13, 2004), issued later that day, the court of appeals explained its refusal to decide the case, as follows: "Under Article V, Section 5(D) of the Louisiana Constitution, 'a case shall be appealable to the supreme court' if a law or ordinance has been declared unconstitutional," and that the Supreme Court would also have appellate jurisdiction of all other issues in a case that was properly before it. The court opined that because the supreme court "has exclusive appellate jurisdiction to review the declaration of unconstitutionality," it would be illogical and contrary to principles of judicial economy for the court of appeals to spend any more time on a case that will have to be decided by the Supreme Court. *Associated Press*, Oct. 5 & 12–13; *Washington Blade*, Oct. 8.

Pennsylvania — On Oct. 5, the ACLU announced that it's long-running lawsuit against the University of Pittsburgh seeking domestic partnership benefits has been withdrawn after eight years, as a result of the University's decision to voluntarily adopt such a plan, assertedly for competitive reasons. After vigorously defending the lawsuit, the University suddenly pulled a turnaround and announced on September 2 that it would be adopting a domestic partnership benefit plan unmarried partners of both gay and straight employees. According to Chancellor Mark Nordenberg, such a policy is now necessary for the university to compete effectively in the market for top academic talent. A.S.L.

Marriage & Partnership Legislative Notes

Colorado — Denver — The City of Denver has revised its procedures by which municipal employees qualify for domestic partnership benefits for their partners. Under the old policy, applicants had to deal with lots of intrusive questions about the nature of their relationship. The city decided that there was no reason to treat domestic partners differently from common law spouses, and has reduced the procedure to signed affidavits certifying that the couple meets the requirements set out in the city's domestic partnership ordinance: both partners 18 or older; sharing a committed relationship and holding themselves out as domestic partners or common law spouses; not married to anyone else or too closely related to be able to marry; sharing basic living expenses in a relationship expected to last indefinitely; and mentally competent to contract. *Rocky Mountain News*, Oct. 9.

Maine — Kittery — The council of the town of Kittery has voted to let same-sex domestic partners of municipal employees take advantage of the same sick leave and bereavement leave policies now available to marital spouses. The benefit allows employees to take five days off every years for a death within the immediate family, now to include domestic partners. *Portsmouth Herald News*, Oct. 14.

New York — On Oct. 1, Gov. George Pataki signed into law A. 9872, a bill sponsored by New York State Assemblymember Deborah Glick, that provides domestic partners with the same visitation rights at hospitals, nursing homes or other health care facilities as are accorded to spouses and next-of-kin. The measure will be codified as a new Section 2805–q of the state's Public Health Law. Because New York State has not enacted a state domestic partnership law, the new statute had to define a domestic partnership status. Those who have registered as domestic partners under existing

state, local or foreign laws will be recognized as such for this purpose. Otherwise, the statute adopts a functional test for partnership. The definition is not gendered, so it applies to all domestic partners, not just same-sex partners. A.S.L.

Marriage & Partnership Law & Society Notes

Bush Supports Civil Unions — The *New York Times* reported on Oct. 26 that during his appearance on ABC's "Good Morning America" on October 23, George W. Bush told anchor Charles Gibson that he was in favor of allowing civil unions for gay same-sex couples. "I don't think we should deny people rights to a civil union, a legal arrangement, if that's what a state chooses to do so," said the candidate in his characteristic prose style. After confirming that he differed from the Republican Party's platform on this point, Bush added, "I view the definition of marriage different from legal arrangements that enable people to have rights. And I strongly believe that marriage ought to be defined as between a union between a man and a woman. Now, having said that, states ought to be able to have the right to pass laws that enable people to be able to have rights like others." The comments brought a storm of criticism from anti-gay organizations.

California — The state's Fair Political Practices Commission, responding to a question from a gay city council candidate in Solana Beach, has announced that financial disclosure requirements applicable to the spouses of public officials also apply to domestic partners. The Commission based its decision on recently enacted changes to the Domestic Partnership law that, effective Jan. 1, 2005, will make California registered partners virtual spouses, having almost every right and obligation of spouses under state law. *Los Angeles Times*, Oct. 8. A.S.L.

Pennsylvania Supreme Court Rejects Media Privilege in Gay Defamation Case

In an Oct. 20 decision, the Pennsylvania Supreme Court rejected the contention that the media is privileged to report newsworthy defamatory information without being subject to liability upon a showing of actual malice. *Norton v. Glenn*, 2004 WL 2359400.

The case arose out of a contentious meeting of the Parkersburg Borough Council, after which one member of the Council stated that two other members of the Council were homosexuals; the same member of the counsel said that he had observed one of the others involved in a homosexual act; and, in a subsequent written statement, asserted that the two Council members were "queers and child molesters," and that the Council member felt it necessary to make this charge publicly because the two had "access to children." The local newspaper accurately reported these charges, as well as a charge that one of the Council members had made homosexual advances towards the accuser, including groping his genitals. The maligned Council members filed a defamation suit against their accusatory colleague as well as the local newspaper. The newspaper claimed that as an accurate reporter of a Council member's charges, it was entitled to a "neutral reportage privilege," and the trial court agreed. At trial, the court excluded evidence that would go to the issue of "actual malice" on the part of the media defendant, treating that as irrelevant due to the privilege. The jury found that the report was accurate and exonerated the newspaper from liability, and the plaintiffs appealed. The Superior Court reversed, finding there was no such privilege, and the media defendants appealed in turn.

The Supreme Court, in an opinion by Chief Justice Cappy, found that the trial court had misconstrued the leading U.S. Supreme Court precedent, and that in fact the U.S. Supreme Court has never squarely held that a media defendant is absolutely privileged to give a true account of a defamatory statement by a public official. In the cases upon which the trial court relied, the Supreme Court had required proof of actual malice before a media defendant could be held liable for accurately reporting defamatory statements in such circumstances, therefore it was error for the trial court to exclude evidence on that point. Cappy also rejected the defendants' contentions that the court should recognize such a privilege by embracing a broader reading of the state constitution's protection for freedom of the press. Cappy commented that there are interests in contention in such cases the press versus the individual's interest in protecting his reputation and no reason for giving greater weight to the media's interest. A concurring justice asserted that were the court writing on a clean slate, it might be appropriate to recognize such a media privilege, but that in default of the U.S. Supreme Court having done so, the majority's approach was appropriate.

At the trial, the jury did find the accusatory Council member to be liable for defamation and awarded damages against him, so the charges he made were evidently found to be false and made with actual malice. There is no discussion by the court from which one could draw any conclusion one way or another whether Pennsylvania still considers a false imputation of homosexuality to be defamatory per se. In this case, the imputation of sexual assault and pedophilia would probably, due to criminal connotations, be sufficient for per se defamation. A.S.L.

Psychiatric Privilege Overcomes Ex-Husband's Suspicions in Maintenance Appeal

In appealing the trial court's award of maintenance to his ex-wife Kathleen, Michael Meyer claimed that the trial court erred in refusing to order disclosure of her psychiatrist's records, which might show that she had admitted to engaging in lesbian affairs during the marriage, but the Kentucky Court of Appeals affirmed the trial court's ruling that such records are privileged. *Meyer v. Meyer*, 2004 WL 2260261 (Oct. 8, 2004) (not officially reported).

Michael's attorney had first requested the records during discovery. In a deposition, Kathleen replied that she "might have" discussed her sexual orientation with her psychiatrist, but denied that she had ever engaged in lesbian relationships. Michael's attorney then asked for Kathleen to agree to release of her psychiatrist's records, but Kathleen refused, and the trial court denied disclosure motions, holding that privilege applied. On appeal, Michael argued that marital fault can be a basis for reducing maintenance in Kentucky, and that he needed access to these records to prove fault.

Wrote Senior Judge Emberton for the court, "Misconduct can be a party's sexual activity with either a partner of the opposite sex or of the same sex. But, the party opposing maintenance must demonstrate that the misconduct occurred. The burden is not on the party seeking maintenance to prove a lack of misconduct. There is no evidence that Kathleen engaged in any marital misconduct. She denied any sexual relationship with anyone outside the marriage and Michael presented no evidence to the contrary. Although Kathleen admitted having lesbian thoughts, thoughts of such a sexual relationship do not constitute misconduct any more than lustful inclinations toward one of the opposite sex. Misconduct in the context of a consideration of maintenance requires some kind of wrongful behavior."

A Kentucky statute privileges confidential communications between a patient and a psychiatrist and makes such communications non-discoverable unless specific exceptions apply. For example, if there was a dispute about child custody, it would be accepted that a proposed custodial parent's mental stability is relevant and such records could be discovered in that context. However, wrote Emberton, "Kathleen did not, by seeking maintenance, make her mental health an issue so as to have waived the privilege. The conversations between Kathleen and her psychiatrist were properly held privileged." A.S.L.

Federal Civil Litigation Notes

Federal — 3rd Circuit — A 3rd Circuit panel unanimously rejected the argument that the office of governor of New Jersey became vacant

on the day in August when Gov. James McGreevey announced that he was gay and would resign effective November 15. In a suit brought by a bunch of angry Republicans, Bruce I. Afran and Carl Mayer, the court issued an unpublished opinion on October 13, 2004, finding that under New Jersey law a resignation does not take place until the governor has sent a written letter of resignation to the secretary of state. There being no vacancy yet in the office, the court ruled, the constitutional provisions governing succession have not yet been invoked, and will not be until the governor sends such a letter. Since the time has past when a resignation would generate a requirement for a special election of a new governor on Nov. 2, the procedure will follow the alternate course, assuming the governor actually does resign by mid-November, under which the president of the state senate will become acting governor and a new governor will be elected next year to take office in January 2006. *Afran v. McGreevey*, No. 04–3791. The opinion is available on the court's website.

Federal — 10th Circuit — A unanimous 10th Circuit panel ruled in *James v. Platte River Steel Co., Inc.*, 2004 WL 2378778, that plaintiff Sean James's same-sex workplace harassment case was properly lost on motion before the district court because James never alleged facts to support the conclusion that he was singled out for harassment due to his sex. James alleged that a fellow male employee had subjected him to continuing harassment of a sexual nature, but he testified in deposition that he did not know why the co-worker, John Groth, had singled him out. James also did not allege that he was gender-nonconforming in any way. Under the circumstances, the court concluded that James had failed to satisfy the evidentiary test for same-sex harassment cases drawn from *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). In brief, James had failed to show that he was a victim of harassment because of his sex, even though the harassment was of a sexual nature and took on distinct sexual overtones. A.S.L.

Federal — California — The ACLU of Southern California has filed a lawsuit on Oct. 28 against Los Angeles Unified School District, arising from complaints of anti-gay harassment at Washington Preparatory High School in South Los Angeles. According to students who are serving as plaintiffs in the case, teachers and administrators are openly hostile to gay students, students have been punished and suspends for being gay, and teachers have "outed " students to their parents. The district responded by claiming that it "leads the country" in adopting anti-discrimination policies to protect gay students, but the ACLU suit alleges that such policies are not properly enforced at Washington Prep. *Los Angeles Times*, Oct. 29.

Federal — California — Attorneys from White & Case have filed a federal suit in the Central District of California on behalf of the Log Cabin Republicans seeking a determination that the "don't ask don't tell" policy on gays serving openly in the military is unconstitutional. The case of *Log Cabin Republicans v. United States of America*, CV–048425, was filed in mid-October, and seeks a permanent injunction against enforcement of the policy, contending that recent federal case law including *Lawrence v. Texas* requires the courts to reconsider past rulings on the military policy. The suit also places significant weight on the Supreme Court's 1996 decision in *Romer v. Evans*, in which the high court for the first time held that sexual orientation discrimination, as such, violates the Equal Protection Clause of the 14th Amendment. In this suit, the Log Cabin Republicans contend that the military policy, which was codified in 1993, violates due process, equal protection, and freedom of speech. Several other suits are pending in other federal districts raising the same issues. Military appeals courts have recently decided several cases rejecting the argument that the military sodomy law is unconstitutional in light of *Lawrence*, at least as applied in those cases, which involved sex between military members of different ranks.

Federal — Louisiana — In the typical scenario of a same-sex harassment claim brought under Title VII by a male employee, there is aggressive horseplay, sometimes by a supervisor, sometimes taking on strong sexual connotations, but no evidence that the supervisor is gay. That seems to be the case in *Kreamer v. Henry's Marine*, 2004 WL 2297459 (E.D. La., Oct. 7, 2004), in which the court granted summary judgment to the employer, finding that Thomas Kreamer could not prove that the fellow employee who was giving him such a hard time, Carroll Carrere, was gay and doing it out of sexual interest. Furthermore, Judge Engelhardt found that when Kreamer complained to his superiors about Carrere's conduct, the employer took steps to get Carrere to stop his harassing behavior, albeit not with total effectiveness. In cases where plaintiffs are unable to credibly argue either that a harassing employee is gay or that the plaintiff's gender non-conformity has made him a target for harassment, federal courts are normally not receptive to Title VII sex discrimination claims, and such was the case here, with the court reciting the ritualistic disclaimer about not approving of such workplace conduct, but finding it non-actionable.

Federal — Texas — U.S. District Judge Cummings found that Texas Tech University's policies about student speech violate the 1st Amendment rights of students, in *Roberts v. Haragan*, 200 WL 2203130 (N.D. Tex. Sept. 30, 2004). The case arises from an attempt by Jason Roberts, a student, to make an anti-gay speech on University property. Although the University designates a "free speech area" where students are free to make speeches without getting prior permission, Roberts, evidently set on testing the policy, asked to make a speech in a different location. The University responded that his desired location was not good for traffic reasons (it was right by the entry to campus), but he could give his speech at a location 20 feet away. He agreed to this, then never made his speech. Clearly, he was just trying to test and provoke the University. Shortly after the incident, the University adopted a hate speech policy and policy requiring applications for pre-clearance for student speeches on campus. Roberts filed suit, claiming a violation of free speech rights and seeking a declaration that the new policy is unconstitutional. Judge Cummings found that the University had not violated Roberts' rights with respect to his earlier application to speak, since he had agreed to move the location, to which the University's objection was not content-based. But Cummings found that the hate speech policy is content-based, and that the University's attempt to require advance permission for speeches anywhere on campus was overbroad, not sufficiently narrowly tailored to meet 1st Amendment requirements.

Federal — Texas — U.S. Magistrate Kaplan of the Northern District of Texas (Dallas) rejected a constitutional suit by a former Dallas County Jail inmate, who callenged a jail policy that "homosexual inmates" were segregated from the general population and deprived of participation in rehabilitation programs, computers classes, and religious services. Shaun Tucker's suit requested that the court establish new policies to accommodate the gay prison population. Noting that Tucker had been transferred to a different prison after the suit was filed, Magistrate Kaplan recommended that the suit be dismissed for failure to state a claim. Kaplan observed that "there is no federal constitutional right to participate in rehabilitation or educational programs while in state custody." Furthermore, although Tucker would have a constitutional right to participate in religious services, by the time Kaplan was ruling on the claim, Tucker was no longer incarcerated in the Dallas County Jail, so his request for injunctive relief to attend such services was considered moot by the magistrate. *Tucker v. Dallas County Sheriff's Dept.*, 2004 WL 2296814 (Oct. 13, 2004). A.S.L.

State Civil Litigation Notes

California — In *Los Angeles County Metropolitan Transportation Authority v. Superior Court*, 2004 WL 2360683 (Cal. App. 2nd Dist., Oct. 21, 2004), the court denied the MTA's petition for a writ of mandate against the trial court, which had indicate that an award of a civil pen-

alty against the MTA to a member of the public who had been subjected to homophobic harassment by an MTA employee, to wit, a bus driver, was possible in this case. The real party in interest, Jerrold Lyons, was a passenger on an MTA bus riding on Santa Monica Boulevard in West Hollywood when the driver "made a series of taunting, derogatory and homophobic remarks directed at Lyons," according to the opinion by Judge Croskey. "As Lyons moved to leave, the driver gestured to blow him a kiss 'in a deliberately humiliating and demeaning fashion.' Lyons slapped the driver on his way out of the bus. The driver then grabbed Lyons by the backpack, forcibly restrained him, and began beating him severely. The driver knocked Lyons to the ground and continued to restrain, beat, and kick him and pull his hair. The driver was six feet, four inches tall and weighed about 280 pounds. Lyons was 5' 9" and weighed 135 pounds." Passengers intervened to rescue Lyons, who gathered his belongings and escaped. But the driver overtook him, and resumed beating him, causing numerous severe injuries. In the resulting lawsuit, Lyons sought a civil penalty of $25,000 for violation of his civil rights under the state's Unruh Civil Rights Act. The trial judge rejected the MTA's motion to strike the request for civil penalty, and the MTA applied to the court of appeal for a writ of prohibition. In denying the writ, Judge Croskey worked through the history of the remedial provisions of the statute and found that a state law ban on awarding damages against municipal authorities for purposes of punishment was not implicated here, and that the civil penalty served other functions that were appropriate for this case.

Colorado — On Oct. 25, the Colorado Supreme Court refused to review the court of appeals decision in *In the Interest of E.L.M.C., a Child*, 2004 WL 1469410 (Colo. Ct. App. July 1, 2004). In that case, the court of appeals had affirmed a trial judge's decision to divide custody of an adopted girl evenly between the two women who had been raising her together prior to their separation, even though only one of the women was the legal adoptive parent. The appeals court had remanded the portion of the trial court's order that controversially instructed the adoptive mother not to expose the child to anti-gay teachings, something that had become an issue because the adoptive mother had become a "Christian" who attends homophobic church services. *Rocky Mountain News*, Oct. 26.

Texas — A Galveston district court judge ruled in *Van Stavern v. Hobbs* (Texas 306th Dist. Ct., Oct. 1, 2004), that a second-parent adoption that took place in 2001 could not be challenged years later in a parental rights proceeding, because any challenge to an adoption after six months is precluded under Texas law. Julie Hobbs and Kathleen Van Stavern were domestic partners when Hobbs became pregnant in 1998 through donor insemination. In 2001, Hobbs and Van Stavern filed a joint action seeking termination of the sperm donor's parental rights and establishing Van Stavern as an adoptive parent of the child, which was successful. In March 2004, Hoobs and Van Stavern terminated their relationship. Van Stavern continued to pay child support, and sought a judicial declaration of her continuing parental rights over her adopted daughter. Associate Family Court Judge Stephen Baker ruled on Sept. 9 that an adoption can't be challenged more than six months after it was approved, and District Judge Janis Yarbrough affirmed that ruling on Oct. 1, rejecting the argument that the adoption was void ab initio because Texas adoption statutes don't specifically provide for second-parent adoptions and Van Stavern was not a spouse of Hobbs. *KHOU-TV, TX*, Oct. 1.

Utah — One D. Berg, not further identified in the court's opinion, has been trying very hard to get the Utah sodomy law declared unconstitutional, but has been having little success in getting a court to entertain his claims. In *Berg v. State of Utah*, 2004 WL 2187563 (Utah Ct. App., Sept. 30, 2004), the court upheld a trial court dismissal on standing grounds. Berg has not been prosecuted, and claims only to be engaging in private, consensual adult heterosexual conduct that violates the literal terms of the statute. The Attorney General's motion to dismiss asserts that based on Berg's factual allegations he would not be targeted for prosecution; although the statute on its face reaches private consensual adult sodomy, prosecuting attorneys would not bring charges, even if such conduct came to their attention, due to the U.S. Supreme Court's decision in *Lawrence*. Therefore, Berg does not have a reasonable fear of prosecution and lacks standing to invoke the court's jurisdiction to obtain a declaratory judgment on the constitutionality of the statute. A prior attempt by other parties to get the law struck down in a federal declaratory judgment was similarly unsuccessful, see *D.L.S. v. State*, 374 F.3d 971 (10th Cir. 2004). A.S.L.

Legislative Notes

Federal — The U.S. Department of Education has proposed regulations to implement the Boy Scouts Equal Access Act of 2002, a measure approved by Congress to place the federal government on the side of the Boy Scouts of America in ongoing controversies about whether public school systems should provide a venue for Scouting activities, when the Scouts engage in discriminatory practices that would be unconstitutional if engaged in by the public schools, such as discriminating against religious non-believers and gay people. After the Supreme Court ruled in *Boy Scouts of America v. Dale* (2000) that the Scouts have a freedom of association right to exclude gay people, some school districts decided they should no longer allow the Scouts to use their premises, and some courts upheld those exclusions. Outraged that their favorite discriminatory organization was losing its prefered position, Congress decided to intervene and score points with anti-gay forces. The 2002 law gives a handful of named "youth" organizations the right to use public school facilities at the lowest fees charged to any other group, and on an equal basis with other groups, in any schools that receive federal financial assistance, which means virtually all public schools. According to one news report we saw, the proposed regulations appear to go beyond the strict legislative mandate, by adopting the view that Boy Scouts are a curriculum-related activity, a designation of significance under the Equal Access Act, since a school could avoid allowing the Scouts on campus by banning all non-curricular-related activities. (See *Christian Science Monitor*, Oct. 20). Lambda Legal, which has represented several gay student groups in litigation against school districts that did not want to allow such groups to meet on campus, pointed out the discordance between a federal law requiring accommodation of discriminatory groups and the barriers facing gay student groups. *Gay City News*, Oct. 28.

Federal — A military appropriations bill enacted in October adopts the broad definition of the scope of the Solomon Amendment that the military has been taking recently, making clear that military recruiters are entitled to access to students "equal in quality and scope" to that provided to other employers, or else colleges and universities out of compliance will lose funding from a variety of federal programs. In litigation now pending on the Solomon Amendment in two federal courts, the challengers argue that the military's current interpretation goes beyond the scope of the prior legislation. *Chronicle of Higher Education*, Oct. 11.

New York — On Oct. 1, Gov. George Pataki, a Republican, announced that he had signed into law more than a week earlier a bill that requires all health care institutions in the state to recognize domestic partners of patients for purposes of visitation rights in the hospital. In those jurisdictions, mainly cities and downstate counties, in which domestic partners can register and obtain a certificate, such a document would serve as evidence of entitlement to this right, but the bill also laid out a functional test that can be used by those who have not registered their partnerships, a necessary feature in upstate New York where registration is not available in most areas. *New York Times*, Oct. 2. A.S.L.

Law & Society Notes

Major Transsexual Policy Breakthrough — Transgender rights activists are hailing a major

breakthrough on the insurance front. In a Clinical Policy Bulletin issued on October 15, Aetna Insurance has concluded that sex reassignment surgery should be considered a medically necessary treatment under certain specified circumstances. In a discussion reflecting wide consultation with public medical sources, the Bulletin concludes that an adult (at least 18 years old) who has met all the scientific criteria of "true transsexualism" and has been judged suitable for such treatment should be covered for it, unless the procedure is specifically excluded under the insurance policy. Since many government regulators require that medical insurance policies sold within their jurisdiction provide coverage for all medically necessary procedures, Aetna's conclusion on medical necessity may have important real-world consequences for transsexuals who want the surgery but have not been able to forward it under existing policy exclusions. (Insurance companies have generally maintained that sex reassignment surgery is elective cosmetic surgery, in order to avoid paying for it.) The proof will be in the pudding, of course, and it is now up to those who purchase such insurance, including employers and associations, as well as state insurance regulators, to make sure that such coverage is available to those who are qualified for it and need it for their psychological and physical well-being. Aetna Clinical Policy Bulletin No. 0615, *Subject: Sex Reassignment Surgery*, Oct. 15, 2004.

Another major transsexual breakthrough — On Oct. 15, the National School Boards Association released a new guide providing practical advice to school administrators on dealing with student sexual orientation, gender identity and expression issues, including manner of dress. The guide advises that there is no legal justification for taking action against students who cross-dress if their doing so does not disrupt the educational process, and that it is appropriate to make exceptions to any school dress codes to accommodate student gender identity issues. Gender PAC, a group that lobbies on gender-identity rights, applauded release of the guidelines.

Believe it or not.... — According to an article in the October issue of *Journal of the Acoustical Society of America*, gay people have a distinctive way of pronouncing vowels. A report published on October 23 in the *National Post*, a Canadian newspaper, states that researchers from the University of Minnesota and Northwestern University have found a significant correlation between sexual orientation and certain idiosyncracies of pronunciation. Said J. Michael Bailey, a psychologist who is co-author of the journal article on which the news report is based, "It is not news that people believe homosexuality and certain speech styles are related. What is news is that there seems to be some basis for the belief." According to the news report, Bailey is a bit controversial whose prior work has been criticized on methodological grounds. The study does not contend that people are born gay, but rather concludes that speech patterns are "likely rooted in nurture rather than nature," and could be learned in adolescence as a person who is beginning to discover his or her sexuality begins to identify with a GLBT peer group. Jean Bobby Noble, a professor at the University of Victoria and a spokesperson for the Canadian Lesbian and Gay Studies Association, criticized the study as failing to take into account key factors related to speech patterns such as race, class, background and vernacular. "We would laugh if we saw a study [suggesting] the existence of a heterosexual accent," Noble commented. Actually, your editor laughed out loud on first reading this story. There goes the closet....

Fertile Moms Spur Homosexuality.... — Well, there's an incendiary headline. According to an Oct. 15 article in the *Hindustan Times*, an Italian research team has determined that the mothers and sisters of gay men have more children than the average mom, thus helping to explain the survival of male homosexuality (since gay men tend to have fewer children)... if one believes in a genetic link to homosexuality. The operative theory is that genes affecting this trait are carried on the X chromosome. A.S.L.

International Notes

Australia — The General Synod of the Anglican Church in Australia, meeting in Perth early in October, voted to reject proposals to allow blessings for same-sex marriages and ordination of gay ministers who are living in same-sex relationships. This came days after the Synod voted to reject a proposal to allow women to serve as bishops. The Synod also voted to commend the federal Parliament for its recent enactment of a law clarifying that marriage in Australia is only a union between a man and a woman. *The Age*, Oct. 8.

Belgium — Journalist Rex Wockner reported on 365Gay.com that a gay American couple working for NATO in Brussels were married on October 9 in Enghien. Phillip Sorensen and Christopher Staker were the first to take advantage of a change in Belgian law that allows foreign same-sex couples to marry there if at least one member of the couple has lived in the country for at least three months. Prior to Oct. 1, same-sex couples who were not Belgian residents could only marry there if they reside in a country that allows same-sex marriages, which practically limited things to the Netherlands and, possible, Canada. Sorensen and Staker, both health care professionals, are from New Hampshire. Resident same-sex couples have been able to marry in Belgium since 2002.

Brazil — The nation maintains a ban on public officials being succeeded in office directly by their spouses, and this policy applies to same-sex partners, according to the nation's top electoral court, ruling in the case of Eulina Rabelo, who was campaigning to succeed her lesbian partner, Astrid Maria Cunha e Silva, to be the mayor of Viseu in the state of Para. *Reuters*, Oct. 1.

Canada — The Supreme Court of Canada heard oral arguments on the federal government's reference of questions to the court concerning a proposed federal statute on same-sex marriage. The arguments were held October 6 and 7, and representatives of more than two dozens institutions and organizations spoke to the court. The first three questions, which had been posed by the outgoing government of Prime Minister Jean Chretien, asked whether the federal government had authority to adopt a statutory definition of marriage that would be binding on the entire country and whether the proposed statute adequately preserved religious freedom for dissenting churches. Prime Minister Paul Martin added a question on whether the current common law definition of marriage violates the Charter rights of same-sex partners as a tactic to delay the court's consideration until after national elections, that were held in June. Martin's government survived the elections but failed to achieve a parliamentary majority, so is functioning as a plurality government in coalition with groups to its left (which support same-sex marriage). Some of the Justices expressed some irritation about the addition of the final question, which could more directly have been posed had the federal government appealed any of the provincial court of appeal rulings on the question, and representatives of gay groups told the court that it should not even respond to the additional question, because the government had conceded the point by not appealing any of those rulings. There was widespread agreement among observers that the court will answer the references affirmatively, putting the ball back in the government's court. An early-October leak of cabinet discussions led to reports in the Canadian press that the government might stall in bringing its bill up for a vote, to push matters past a new election, but this was denied by the Justice Minister, who stated that a bill would be brought forward promptly after the court rules. The court's ruling is expected to come early in 2005. (Synthesized from numerous Canadian newspaper and TV reports on October 6 and 6.)

Canada — In a ruling that side-stepped possible applications to same-sex partners, the Supreme Court of Canada held that when a common law couple are no longer cohabiting and one dies, the survivor is not entitled to a survivor's pension. *Hodge v. Attorney General of Quebec*, 2004 SCC 65 (Oct. 28. 2004). Justice Binnie began the court's opinion by observing,

"A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison." The court found that when common-law partners separate, their relationship is extinguished, and that the status situation is not directly comparable to separated marital partners, who still have a legal relationship that merits different treatment. Betty Hodge was complaining that she was denied a survivor's pension, having lived many years with the same man and separated just months before his death; she claimed an equality violation in violation of the Charter of Rights and Freedoms because when married partners separate but have not yet divorced, they remain entitled to claim a survivor's pension if the other spouse dies. Justice Binnie observed that the analogy was not appropriate, and reserved the question whether a different analysis might apply to same-sex couples who had been denied the right to marry for much of their partnership, an issue raised by the AIDS Society of Canada as an intervenor. "Until such time as the issue of same-sex marriage has been resolved, it is possible that different considerations would apply to gay and lesbian relationships in respect of a survivor's pension because, at least in the past, the institution of a legal marriage has not been available to them," said the court. The AIDS Society had been concerned to preserve the right to a survivor's pension in situations where extended hospitalization has produced a de facto termination of cohabitation. The court had also made the point that cohabitation was not, in all cases, the equivalent of living together; two people can be living together without being consider cohabitants but merely roommates, while cohabitants could be living apart for extending periods of time due to occupational necessity or other family duties.

Canada — The *Associated Press* reported on Oct. 23 that the Canadian Council of Churches had announced its inability to reach consensus on the issue of legalizing same-sex marriage, as the issue was being considered by the nation's Supreme Court. While the United Church of Canada has come out squarely in favor, the Roman Catholic Church, the Mormon Church, the 7th Day Adventists, Islamic congregations and some others testified before the Court that legalization could jeopardize the religious freedom of those faiths that continue to condemn homosexuality.

European Union — It is no longer "politically correct" to be openly anti-gay at the level of the European Union's government agencies. Late in October, when Commission President-designate Jose Manuel Barroso of Portugal was to have presented his proposed line-up of commissioners for approval by the European Parliament, a controversy arose from remarks made by Rocco Buttiglione, a conservative Italian designated by his government to be one of the commissioners. Barroso had assigned Buttiglione to be the Justice Minister, whose function, among other things, involves overseeing compliance with non-discrimination policies, including those forbidding sex and sexual orientation discrimination. At a hearing into the nomination, Buttiglione made stereotypical comments about women and indicated his belief that homosexuality is sinful, while asserting that he would put his personal views aside in carrying out his duties. Buttiglione is know to be close to Pope John Paul II and to have extreme conservative social views. Many members of the Parliament asserted that it was inappropriate to place a homophobe and mysogenist into the head of the Justice Ministry, and opposition began to mount. Ministers are confirmed or rejected as a group, not as individuals, and it looked like Barroso's proposed cabinet would go down in flames. Barroso withdrew his entire proposed slate and began behind-the-scenes maneuvers to figure out a way to get a government confirmed while not mortally offending the conservative Italian government. *Wall Street Journal*, *New York Times*, Oct. 28, 2004.

Germany — The parliament gave initial approval on Oct. 29 to a bill that would expand some of the rights of same-sex partners who are registered under national law. For the first time, one partner could legally adopt children brought into the "marriage" by the other partner, and financial security guarantees for pensions would be strengthened under the measure. Gay rights groups in Germany welcomed the bill, and called for Chancellor Schroeder to sign it into law promptly after final passage in the Bundestag. Denial of adoption rights as a couple is one of the major differences between same-sex registered partners and married couples in Germany. *DPA via Expatica*, Oct. 29.

Honduras — Reacting to the government's recent decision to grant legal recognition to three gay rights groups in the country, the congress of Honduras voted on Oct. 28 to approve a constitutional amendment that would ben gay marriages and adoptions by gay people if approved by the next elected session of the congress. The vote was unanimous. The chief sponsor, Celin Discua, of the governing National Party, explained the need for the law: "This makes it clear that homosexuals cannot marry." Other members of Congress, commenting on the need for the law, indicated that "marriage is a natural tie that fulfills the primordial function of the human species: procreation.… Anything else cannot be considered matrimony."

Kuwait — On Oct. 11, the Court of Appeals reversed a historic trial court ruling that would have allowed a transsexual Kuwaiti who has undergone sex reassignment surgery to officially register in her desired sex. Judge Younis Al-Yassin issued the verdict without any accompanying explanation, but a written opinion was expected to be issued at a later date. Adel Al-Yahya, attorney for the applicant, said that an appeal would be taken to the nation's highest court. *Kuwait Times*, Oct. 12.

Nigeria — Taking note of the ongoing controversy within the Anglican church over last year's installation of an openly gay head of the church in New Hampshire, President Olusegun Obasanjo of Nigeria stated support for African Anglican bishops who are threatening to break away from the English mother church over this issue. "I have followed with keen interest your principled stand against the totally unacceptable tendency toward same-sex marriages and homosexual practice," he announced in a speech in Lagos before an Anglican conference. "Such a tendency is clearly unbiblical, unnatural and definitely un-African. Surely the good Lord who created us male and female knew exactly what he was doing. To my understanding of the divine scripture, any other form of sexual relationship is a perversion of the divine order." *National Post, from Agence France-Presse*, Oct. 28.

United Kingdom — The government has agreed to modify the pending Civil Partnership Bill to provide equal pension rights for surviving same-sex partners. The original bill would make such rights available only prospectively and not take account of years of pre-registration partnership, but advocates for full equality prevailed to produce the amendment. The bill is expected to pass the House of Commons, but is expected to encounter a more skeptical reception from the House of Lords. *The Independent*, Oct. 28.

United Kingdom — Keele University in Staffordshire has established a new research center on the way that gay men, lesbians and transsexuals are treated by the law. According to a report in the *Birmingham Post* on Oct. 25, Baroness Hale of Richmond, the first female Law Lord, delivered a lecture on progress towards equal treatment for sexual minorities and the effectiveness of anti-discrimination laws to mark the launching of the center. A.S.L.

AIDS & RELATED LEGAL NOTES

Georgia Appeals Court Rejects Emotional Distress Claim Against McDonald's in "Bloody Fries" Case

When Luenell Wilson determined that two red spots on the inside of the container of an order of fries from McDonald's were blood from the finger of a restaurant employee, she developed severe emotional distress and sued her local McDonald's. Wilson has never tested positive for HIV. A trial court granted summary judgment to McDonald's on the emotional distress claim, and on Oct. 7 the Court of Appeals of Georgia affirmed, in *Wilson v. J & L Melton*,

Inc., d/b/a McDonald's Restaurant, 2004 WL 2251018. Writing for the court, Judge Eldridge found that the grant of summary judgment was proper "in that the record shows that Wilson failed to support her alleged damages for emotional distress by evidence of more than her 'fear' that she had been exposed to HIV or hepatits," citing Georgia authority that an emotional distress plaintiff in this sort of negligence case must show actual exposure to HIV or some other pathogen, otherwise her fear will be seen as unreasonable under the circumstances. A.S.L.

Washington Appeals Court Dismisses AIDS Discrimination Charge

The Washington State Court of Appeals affirmed the dismissal of a man's discrimination claim that he was fired after his employer learned that he has AIDS. *Shields v. Western Partitions*, 2004 WL 2154023 (September 27, 2004) (unpublished). Mark Shields, a journeyman taper, was laid off on June 13, 2001 by Western Partitions, and brought back to work on June 25, 2001. On July 3 he was laid off for the second time and he claims it was because he told his foreman, Chris Bartoy, that he has AIDS. The employer, Western Partitions explains the layoffs as "typical of the construction industry." Acting Chief Judge Ellington wrote for the court.

In May 2001, Shields was dispatched by his union to Western Partitions. When he was laid off on June 13, it was with a "no rehire" notation because he failed to show up for work for two days. However, once the company needed more tapers, Shields was brought back to work. According to Shields, he was then laid off because on June 28 he had told his foreman that he has AIDS. Shields claimed discrimination under the Americans with Disabilities Act (ADA) and federal and state discrimination laws. At trial, Shields presented deposition testimony from two employees who say the foreman told then that his boss ordered him to fire Shields because he has AIDS. The trial court struck most of this evidence as hearsay.

Shields claimed disparate treatment, not failure to accommodate. However, the court pointed out that Shields alleged he was laid off not because he was disabled but because of his employer's perception of his "condition." Shields' HIV status is an "abnormal condition," but Judge Ellington stated that the issue was whether taking the evidence in the light most favorable to Shields, a reasonable jury could find that his status was a substantial factor in his discharge. Shields failed to present evidence showing the he was not wanted on the job after informing the foreman of his condition. The court decided that there was not a question of fact for the jury.

Western Partitions maintained the same defense throughout. Part of the construction business is that layoffs occur on a regular basis. Even on the date that Shields was discharged, six other tapers were laid off. Additionally, more tapers were laid off in the following weeks.

Shields also appealed the trial court's awarding of fees to Western Partitions under the ADA for his frivolous and unfounded claims. The court of appeals upheld the award. It should be noted that Shields knew the layoffs were coming and that is why he had already signed up for dispatch to another job with the union. Shields also did not claim to have suffered any specific economic damages. *Tara Scavo*

AIDS Litigation Notes

Federal — 11th Circuit — Georgia — In a rare litigation victory for a prisoner living with HIV, an 11th Circuit panel ruled on Oct. 18 that John Ruddin Brown may pursue his claim under 42 USC section 1983 against a prison administrator and a prison doctor concerning deliberate indifference to his medical needs. *Brown v. Johnson*, 2004 WL 2335187. Brown recounted the usual frustrating tale that one confronts in reading about prison litigation over HIV treatment, of careless or unfeeling prison personnel who think it is no big deal for an HIV+ prisoner to miss his medication for sometimes prolonged periods of time due to carelessness about keeping inventory up to date, but in this case the person who seemed to think it was no big deal was, according to Brown, a prison doctor who suspended his medication. The court held that the deliberate indifference standard for an 8th Amendment violation could be met in this case, where Brown was not complaining about differences of opinion concerning the medication he should have, but rather a total withdrawal of medication that left him susceptible to serious complications from his HIV infection. The trial court, which had rubber-stamped the prison's arguments, was reversed, and the case remanded to give Brown a chance to prove his claims.

Federal — Connecticut — U.S. Magistrate Smith of the federal district court in Connecticut has remanded a social security disability claim by person living with AIDS for immediate review by the Commission, on the ground that the ALJ had failed to show that the applicant, Juan A. Quiles, had available jobs that he could perform. *Quiles v. Barnhart*, 2004 WL 2241003 (Sept 29, 2004). Although the Magistrate found support in the record for the conclusion that Quiles was not disabled from working, as such, despite his symptomatic AIDS, Smith concluded that the testimony on the record did not support the conclusion that there were available jobs for which a person with Quiles' medical condition and other qualifications would be suited. Further evidence is needed on this point. Actually, reading through this opinion, one is struck by the lack of compassion built into the Social Security disability regulations regarding people suffering from diseases such as AIDS.

Texas — The Texas Court Of Appeals in Dallas has affirmed the life sentence imposed on Francisco C. Martinez, a person living with HIV, for his sexual assault of an eleven-year-old boy. *Martinez v. State of Texas*, 2004 WL 2378359 (Oct. 25, 2004) (not officially published). Martinez claimed ineffective assistance of counsel and errors by the trial court in making evidence available to the jury and charging the jury. Most of those errors revolved around the issue of his HIV status. He claimed the jury had been improperly informed of his HIV status during the guilt phase, and that it had been improperly instructed concerning this element during the sentencing phase. The court found that most of his allegations were far-fetched, and those that weren't were nonetheless not significant enough (or legally compelling enough) to raise any doubts about his conviction or sentence. Of particular note, the court rejected Martinez's claim that the fact of his HIV status would have to be shown beyond a reasonable doubt under the punishment phase, as likened to an "extraneous crime or bad act." The court noted that evidence in the record showed without a doubt that he was HIV positive and knew this at the relevant time. A.S.L.

International AIDS Notes

The U.S. Department of Labor announced on Oct. 20 the award of $9 million in grants to implement workplace-based HIV/AIDS education programs in several countries in Africa and Asia. *BNA Daily Labor Report*, No. 204, 10/22/04, p. A–7. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Event Announcement

Same-Sex Marriage Debate at NYU Law School — NYU Law School's Melvyn and Barbara Weiss Public Service Forum and Annual Fall Lecture on November 15 will be devoted to the topic "What is a Family" and will feature as speakers The Honorable John M. Greaney, justice of the Massachusetts Supreme Judicial Court (who voted in the majority in the *Goodridge* case) and N.Y. Supreme Court Justice Honorable Barry A. Cozier. Both judges are

NYU alumni. Visiting Professor William Eskridge, Jr., author of numerous books and articles on same-sex marriage issues, will be moderating the program. The program begins at 6 pm, is free and open to the public, and will earn attendants 2 CLE credits. On-site check-in begins at 5:30 pm. RSVP's and preregistration are not required.

Movement Position Announcements

Gay & Lesbian Advocates & Defenders, New England's GLBT and HIV public interest law firm, is accepting applications for a full-time attorney to do litigation and appellate advocacy in the state and federal courts of the New England states, in a position that will begin early in 2005. Eight or more years of legal experience is preferred. A willingness to learn about GLBT and HIV legal issues is required and a familiarity with some facet of these issues is preferred but not required. New England bar admission preferred. Salary depends on experience; full benefits. Send confidential resume, cover letter and writing sample to: Gary Buseck, GLAD, 30 Winter Street, Suite 800, Boston, MA 02108 or by email to gbuseck@glad.org. Applications will be considered on a rolling basis until November 30 or until the position is filled.

The New York Civil Liberties Union is accepting applications for the position of Director of its Reproductive Rights Project, which defends women's rights to make their own reproductive choices. The director oversees the program, including litigation, advocacy, public education and fundraising, is a member of NYCLU's senior staff and reports directly to the Executive Director. Qualifications include a minimum of four years litigation experience or the equivalent; salary based on experience, full benefit package. NYCLU is an affirmative action/equal opportunity employer. Mail or fax a letter of interest, resume and recent legal writing sample to: NYCLU, Box RRP, 125 Broad Street, 17th Floor, New York NY 10004, fax 212–344–3318, or email to: jobs@nyclu.org, with "Director RRP" on the subject line. Applications will be received until the position is filled.

Human Rights Campaign is accepting applications for a Staff Counsel position in its Legal Department. The primary duties will include providing legal research and analysis to state and federal legislative advocacy programs, collaboring with HRC lobbyists, field staff and coalition allies on policy initiatives, handling corporate legal maters, and helping supervise the law fellows program. There is a preference for attorneys with two to three years of experience in legislative lawyering, but applications from entry-level candidates will be considered. Admission to practice in D.C. is necessary, so candidates from elsewhere must take the D.C. bar or be eligible to waive in. Traveling and public speaking are also involved. For information on submitting a resume and application, please visit http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=23137.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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Balkin, Jack, *What Brown Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537 (Oct. 2004) (part of a 50th anniversary symposium about Brown v. Board of Education; includes extended comparison of Brown and Lawrence v. Texas).

Blumberg, Grace Ganz, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. Rev. 1555 (August 2004).

Currah, Paisley, *The Transgender Rights Imaginary*, 4 Georgetown J. Gender & L. 705 (Spring 2003).

Davis, Lisa, and Ruza Kesari, *The New Indecency Law Landscape*, 50 The Practical Lawyer No. 5, p. 27 (Oct. 2004).

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Jurand, Sara Hoffman, *Sexual Privacy is Not a Right in Eleventh Circuit, Despite Lawrence*, 40–OCT Trial 87.

Levi, Jennifer I., *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 Georgetown J. Gender & L. 721 (Spring 2003).

Medina, M. Isabel, *Of Constitutional Amendments, Human Rights, and Same-Sex Marriages*, 64 La. L. Rev. 459 (Spring 2004).

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Muller-Peterson, Jane, *Expanding the Definition of Parenthood: Why Equitable Estoppel as Used to Impose a Child Support Obligation on a Lesbian Domestic Partner Isn't Equitable: A Case Study*, 4 Georgetown J. Gender & L. 781 (Summer 2003).

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Miluso, Bonnie, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Couples*, 36 Geo. Wash. Int'l L. Rev. 915 (2004).

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Woods, Jane T., *Due Process Right to Privacy: The Supreme Court's Ultimate Trump Card*, 69 Missouri L. Rev. 831 (Summer 2004).

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Specially Noted:

Vol. 4, No.2 of the Georgetown Journal of Gender and the Law (Spring 2003), just published, reports the proceedings of the Fifth Annual Gender, Sexuality, and the Law Symposium at Georgetown Law School. Individual articles are noted above. • • • The October 2004 issue of the British journal *Family Law* (Vol. 34) includes an report summarizing the new Gender Recognition Act 2004, which went into effect over the summer. The Act, Britain's response to the *Goodwin* decision by the European Court of Human Rights, establishes a mechanism for transgendered individuals to acquire a certificate of gender identity and to live their lives in their preferred gender with full civil rights, including the right to marry.

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