Arkansas Supreme Court Strikes Down Adoption/Foster Parent Ban

In *Arkansas Department of Human Services v. Cole*, 2011 Ark. 145, 2011 WL 1319217 (April 7, 2011), the Arkansas Supreme Court struck down as unconstitutional an Arkansas law that prohibited unmarried individuals who were living together as intimate partners from adopting children or serving as foster parents. The ruling, which overturns a law enacted pursuant to a ballot initiative approved in 2008 by fifty-seven percent of Arkansas' voters, represents a major victory for LGBT rights advocates. Associate Justice Robert L. Brown wrote the opinion for the court.

The ballot initiative, referred to as the Arkansas Adoption and Foster Care Act of 2008 or "Act 1," had been in effect since January 1, 2009. Act 1 barred an individual from adopting or serving as a foster parent if that individual is "cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state." Act 1 further provided that the "public policy of the state is to favor marriage as defined by the constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care."

Though the law thus applied equally, on its face, to all intimate unmarried partners, it was clearly designed to prevent same-sex partners from serving as adoptive or foster parents.

An action challenging the law, which culminated with the present decision, was brought by a group of plaintiffs including unmarried adults who wish to foster or adopt children in Arkansas, adult parents who wish to direct the adoption of their biological children in the event of their incapacitation or death, and the biological children of those parents.

The plaintiffs alleged, among other things, that Act 1 violated both the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution and similar provisions of the Arkansas Constitution. The State moved to dismiss the claims. On the same day of the motion, the Family Council Action Committee ("FCAC"), which sponsored Act 1, along with its President, moved successfully to intervene.

The circuit court rejected the State's motion to dismiss concerning all but one count of the complaint; after discovery the parties moved for summary judgment. The circuit court granted plaintiffs' motion for summary judgment on one count and declared the law unconstitutional under the Arkansas Constitution.

Specifically, the circuit court determined that Act 1 infringes upon the fundamental right to privacy guaranteed under the Arkansas Constitution as it "significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage." Accordingly, in reaching its decision, the circuit court determined that strict or heightened scrutiny applied to its analysis of Act 1.

The circuit court, however, granted the State's and FCAC's motion to dismiss and for summary judgment on all the claims asserted under the U.S. Constitution and all other claims under the Arkansas Constitution, which the court determined were no longer necessary to reach. The State and FCAC appealed and the plaintiffs cross-appealed.

As an initial matter on appeal, the Arkansas Supreme Court disposed of the State's and FCAC's contention that the right to adopt or serve as a foster parent is not a fundamental right under the Arkansas Constitution. The State and FCAC had argued that, unlike the former Arkansas sodomy law declared unconstitutional by the same court, Act 1 should survive scrutiny because it prescribed only cohabitation as opposed to private, consensual noncommercial sexual conduct. The court refused to endorse the artificial distinction offered by the State and FCAC.

Instead, the court noted that the words of Act 1 "clearly make the ability to become an adoptive or foster parent conditioned on the would-be parent's sexual relationship." In other words, Act 1 clearly raised the same type of constitutional concerns at issue in the prior sodomy cases and penalized all couples who cohabit and engage in sexual relations by denying them the ability to have children through adoption or foster care.

The court also rejected the argument advanced by the State and FCAC that adopting and fostering children are "privileges" as opposed to "rights" in themselves. The court turned to U.S. Supreme Court precedent in rejecting that distinction and reiterated that constitutional rights do not turn on such characterizations.

The court also went a step further in likening the present case to one addressed previously by the U.S. Supreme Court, which involved the right to religious freedom. In a citation sure to infuriate conservatives who backed Act 1, the court cited as instructive the Supreme Court's decision in *Sherbert v. Verner*, 415 U.S. 651 (1963). *Sherbert* concerned a claim for

Editor: Prof. Arthur S. Leonard, New York Law School, 185 West Broadway, NY, NY 10013, 212-431-2156, fax 431-1804; e-mail: asleonard@aol.com or arthur.leonard@nyls.edu
Contributing Writers: Alan J. Jacobs, Esq., New York City; Bryan Johnson, Esq., New York City; Daniel Redman, Esq., San Francisco; Brad Snyder, Esq., New York City; Eric Wursthorn, Esq., New York City; Kelly Garner, NYLS '12.
Circulation: Administrator, LEGAL, 799 Broadway, Rm. 340, NYC 10003. 212-353-9118; e-mail: info@le-gal.org. Inquire for rates.
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unemployment compensation filed by an individual whose religious faith prevented her from working on Saturdays, which led both to her discharge and to her inability to find new employment. In reversing the lower curt's determination that rejected the plaintiff's claim that the determination of non-eligibility for unemployment benefits under such circumstances did not violate her freedom of religion, the Supreme Court held that the right to free exercise of religion was burdened because the law forced her to choose between her religious observance and her work.

Likening the choice presented here to prospective adoptive or foster care parents who are unmarried to the choice presented in *Sherbert*, the Justice Brown wrote: "Similar to conditioning compensation benefits in *Sherbert* on foregoing religious rights, the condition placed on the privilege to foster or adopt thwarts the exercise of a fundamental right to sexual intimacy in the home free from government intrusion under the Arkansas Constitution."

The court termed this a "pernicious choice," and agreed with the circuit court that Act 1 implicated the fundamental right of privacy and that the burden imposed by the State is direct and substantial. Accordingly, the court similarly applied the heightened-scrutiny standard and found the Act's categorical ban against all cohabiting couples engaged in sexual conduct, not to be narrowly tailored or the least restrictive means available to serve the State's compelling interest of protecting the best interest of the child.

In reaching its decision, the court also disposed of the State's and FCAC's efforts to liken the ban to non-cohabitation agreements that sometimes accompany child custody orders. The court, reiterating the need for case-by-case determinations made in the best interest of the child in such matters, noted that the blanket ban is premised on the "bald assumption" that in all cases it is never in the best interest of the child to be placed with unmarried cohabitating partners.

In further assessing the burden imposed by Act 1, the court again likened it to the former criminal sodomy statute, noting that Act 1 invites State agencies to "police" couples seeking adoption or foster case to determine whether they are sexually active. In essence, like the sodomy statute, Act 1 would penalize certain couples for not being celibate and invite the State to regulate such conduct — that is, where once the threat was arrest and prosecution for intimate conduct now it would be the denial of the right to adopt or foster a child.

Finally, the court addressed head-on the express statement in Act 1 that it is in the best interest of the child to be reared in homes where adoptive or foster parents are not cohabitating outside of marriage. The court cited repeated examples of the State's and FCAC's own witnesses testifying that they did not believe that Act 1's categorical ban promoted the welfare interest of the child. Put another way, such witnesses conceded that there are instances in which children would be best served by being placed with such parents.

The court ultimately affirmed the circuit court's decision and declined to reach, because it was unnecessary to do so, all other claims raised on the cross-appeal.

All told the decision is a devastating critique of the false distinctions and assumptions offered by the Act's supporters about the quality of unmarried couples' relationships and the best interests of children in need of homes. The decision, by placing its analysis squarely in the tradition of the right to privacy as articulated in prior sodomy statute cases, and by its analogy to a U.S. Supreme Court case concerning the fundamental right to free exercise of religion, seems a powerful indication that the court may be skeptical of efforts to establish the same ban through other means.

The victorious plaintiffs were represented by a team of attorneys from the ACLU's LGBT & AIDS Project, the ACLU in Arkansas, and attorneys with Sullivan & Cromwell and Williams & Anderson. *Brad Snyder*

LGBT LEGAL NEWS AND NOTES

A Divided En Banc Fifth Circuit Dismisses Gay Couple's Suit to Amend Adoptive Child's Birth Certificate

On April 12, 2011, the U.S. Court of Appeals for the Fifth Circuit issued a decision *en banc* which reversed and remanded a district court decision that had granted summary judgment in favor of a gay male couple who sought to amend their adopted son's birth certificate. *Adar v. Smith*, 2011 WL 1367493. This decision, the balance of which holds that violations of the Full Faith and Credit Clause may not be redressed in federal district court via 42 USC § 1983, creates a circuit split. The Tenth Circuit has previously permitted a full faith and credit claim to be brought pursuant to § 1983 in *Finstuen v. Crutcher*, 496 F3d 1139 (2007), which struck down an Oklahoma statute that prohibited issuance of birth certificates in similar circumstances to this case.

The plaintiff-appellants, represented by Lambda Legal, are Oren Adar and Mickey Smith, the parents, and J.C.A.-S., their son. The defendant-respondent is Darlene Smith, the Louisiana State Registrar. J.C.A.-S. was born in Shreveport, Louisiana, and Adar and Smith adopted him in New York. After the adoption was made final, Adar and Smith presented a duly authenticated copy of the NY adoption decree to the Louisiana Registrar, requesting that the Registrar issue a corrected birth certificate that accurately lists them as J.C.A.-S.'s parents and otherwise records his true name. Adar and Smith and their son live in Florida. Their only contact with Louisiana involves their request for a birth certificate listing their son's legal parents. The Registrar rejected their request, stating "[w]e are not able to accept the New York adoption judgment to create a new birth record for [J.C.A.-S.]." The Registrar based this conclusion upon the rationale that "Louisiana law allows only single individuals and married couples (1) to adopt (2) in Louisiana, and that this rule should control who may be listed as the parents of an adopted child on his Louisiana birth certificate, irrespective of his state of adoption."

Adar and Smith then filed suit in federal district court. They made two claims under § 1983: (1) that the Registrar violated the Full Faith and Credit Clause by failing to accept the adoption decree because it was held by an unmarried couple; and (2) that the Registrar's refusal violated the Equal Protection Clause by (a) impermissibly classifying Adar and Smith based upon their sexual orientation and marital status; and (b) impermissibly classifying J.C.A.-S. based upon the state's disapproval of his parents.

Judge Jay C. Zainey of the U.S. District Court for the Eastern District of Louisiana granted the plaintiff's motion for summary judgment on their Full Faith and Credit

Claim, and declined to reach the Equal Protection Clause arguments, 591 F.Supp.2d 857 (E.D.La. Dec 22, 2008). The Registrar then appealed the decision. In a panel decision written by Judge Jacques L. Wiener, the Fifth Circuit affirmed the lower court decision, 597 F.3d 697 (5th Cir. Feb 18, 2010).

However, upon rehearing *en banc*, the lower court decision was reversed and the case remanded for entry of judgment of dismissal. A majority of the *en banc* court held that 42 USC § 1983 does not provide the lower federal courts with jurisdiction to afford a remedy for persons aggrieved by an alleged violation of Full Faith and Credit by state actors and that this case should have been brought in state court. Essentially, the court split as follows: Eleven judges signed on to the jurisdictional holding in the majority decision, written by Chief Judge Edith H. Jones. Nine judges went further, finding in the alternative that the Registrar's refusal to issue the birth certificate did not violate the Full Faith and Credit Clause, and went even further to reject the Equal Protection claim asserted by the plaintiffs, which had not been addressed by the District Court. The two judges that parted company with the majority declined to consider the equal protection argument. Finally, five judges dissented entirely, in a decision written by Judge Wiener. They concluded that: (a) 42 USC § 1983 is an appropriate vehicle to bring a claim against a state official sounding in a violation of the Full Faith and Credit Clause; and (b) the Registrar's refusal to issue the corrected birth certificate was improper. The dissent also noted that majority's resolution of the plaintiff's equal protection claim was improper and was otherwise legally unsound.

The majority ultimately held that a state is required to give Full Faith and Credit to a sister state's judgments via its own state courts. The only redress that a private citizen has for a refusal by a state official to afford Full Faith and Credit to a judgment from another state is to go through the state's courts, and if those courts ultimately deny the validity of a sister state judgment, the plaintiff may thereafter appeal to the US Supreme Court. The lynchpin of the majority's opinion is their twisted interpretation of Supreme Court jurisprudence, particularly *dicta* contained in the U.S. Supreme Court's decision in *Thompson v. Thompson*, 484 US 174 (1998).

In *Thompson*, a father sued his ex-wife in federal court, seeking a declaration as to which of two conflicting state child custody determinations was valid, pursuant to the Federal Parental Kidnapping Prevention Act (28 USC § 1738A), which extends the full faith and credit obligation to child custody orders. The Supreme Court held that the PKPA did not create an implied cause of action in federal court, reasoning that "[i]nstructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state law questions that they have little expertise to resolve. This is a cost that Congress made clear it did not want the PKPA to carry (footnotes omitted)."

Relying on *Thompson*, the *Adar* majority concludes that § 1983, which gives the lower federal courts jurisdiction of actions by private citizens for a remedy against state actors in federal court for the violation of federal constitutional and statutory rights, does not apply to violations of the Full Faith and Credit Clause. The dissent, however, pokes holes in this argument by distinguishing *Thompson*. First, *Thompson* was a suit between private parties. Second, as opposed to the PKPA, § 1983 explicitly provides for the remedy that Adar and Smith seek, to wit, redress for the Registrar's violation of their federal constitutional right to have Louisiana give Full Faith and Credit to the New York court's adoption order.

The dissent highlights the jurisprudence behind § 1983 claims. "The Supreme Court has repeatedly pronounced that § 1983 is a remedial statute which is intended 'to be broadly construed against all forms of official violation of federally protected rights.' " The dissent, relying on *Dennis v. Higgins*, 498 US 439 (1991), concludes that suits for violations of the Full Faith and Credit Clause by state officials can be brought via § 1983. In *Dennis*, the Supreme Court concluded that the dormant commerce clause creates a federal right which may be enforced in federal court via § 1983.

The majority also reasons that since state courts are typically the violators of the Full Faith and Credit Clause, this fact further supports the conclusion that the Clause only applies to state courts. The dissent criticizes this argument is unsound. State courts have traditionally been violators of the Full Faith and Credit Clause because the typical method of enforcing an out-of-state judgment is to bring suit in a state court. However, this shouldn't mean that full faith and credit obligations don't apply to other state actors equally. The dissent notes that this reasoning calls into question the constitutionality of state statutory schemes that authorize non-judicial hearing officers to register out-of-state judgments (i.e. LA. Const. Art. V, Sec. 28 ["[i]n each parish a clerk of the district court … shall be ex officio notary public and parish recorder of conveyances, mortgages, and other acts..."].

Also, as the dissent points out, the majority never specifically addresses the rules of statutory construction as applied to the exact language employed in the Full Faith and Credit Clause. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Significantly, the constitutional language itself imposes an obligation on "each State," not narrowly on "the courts of each State." Moreover, the majority's holding implicitly impinges upon state sovereignty, to the extent that the Full Faith and Credit Clause as read by the *Adar* court dictates that states use only their courts to carry out their full faith and credit obligations.

The majority didn't just stop at the question of whether § 1983 provides a mechanism for violations of the Full Faith and Credit Clause. They went on to conclude, in the alternative, that the plaintiffs' claim fails because correcting the birth certificate is an "enforcement mechanism" as opposed to a "recognition" of the New York adoption decree, and asserts that this is important because the Supreme Court has held that the Full Faith and Credit Clause only requires that states recognize final judgments but that enforcement measures do not travel with the sister state judgment. The dissent carefully explains that here, however, Louisiana's refusal to apply its enforcement measures under its birth certificate law to this New York adoption decree means that Louisiana has effectively refused to recognize the force of a disfavored judgment. This, as the Supreme Court explained in *Baker v. United States*, 522 US 23 (1997), Louisiana cannot do. (After this lawsuit was filed, the Registrar offered to issue a new birth certificate listing only one of the fathers. The plaintiffs declined this offer. The majority would have found this suf-

ficient to meet any constitutional requirement; the dissent sarcastically described it as "half faith and credit.")

Nor does the Registrar have *discretion* to apply the enforcement mechanisms contained in the applicable birth certificate law, entitled Record of Foreign Adoptions, LA. Rev. Stat. Ann. Sec. 40:76, insisted the dissent. This statute provides: "When a person [1] born in Louisiana [2] is adopted in a court of proper jurisdiction [3] in any other state or territory of the United States, the [Louisiana] state registrar may create a new record of birth in the archives [4] upon presentation of a properly certified copy of the final decree of adoption... Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing... *The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child*."

The state makes public policy arguments based upon Louisiana's adoption law, which does not permit unmarried couples to adopt, to the extent that public policy should limit the recognition afforded the NY adoption decree. However, as the dissent notes, there is no roving public policy exception to the full faith and credit due foreign-state court judgments.

That leaves the Equal Protection claim, about which the majority's treatment is confusing, to say the least. First, the district court never addressed the equal protection claim, having resolved the matter solely by reference to the Full Faith and Credit Clause. Procedurally, while the plaintiffs moved for summary judgment in their favor, the Registrar never cross-moved for summary judgment, so the District Court only ruled to the extent necessary to grant that motion. Yet despite these two facts, the majority steamrolls ahead and in just three paragraphs, dismisses the Equal Protection claim entirely, applying rational basis review and referring to the state's ban on adoptions by unmarried couples.

The dissent notes that in analyzing this claim, the class which the plaintiffs fall under is unmarried non-biological adoptive parents. In Louisiana, an unmarried couple is statutorily entitled to a birth certificate for their biological child naming both biological parents (L.A. Rev. Stat. Ann. Sec. 40:34 [B] [1] [h] [ii]), while the same is not true for unmarried non-biological parents. However, the majority couches the plaintiffs' equal protection claim upon the classification of unmarried adoptive parents, and in doing so, compares them to married adoptive parents, finding it appropriate to draw a distinction, where the birth certificate statute does not draw such a distinction.

Applying rational basis review, the majority concludes that Louisiana has a legitimate interest in treating married and unmarried adoptive parents differently, in light of its "preference for stable adoptive families" and "the state's decision to have its birth certificate requirements flow from its domestic adoption law." The majority cites *Lofton v. Sec'y of Dep't of Children & Family Servs.*, the infamous case in which the Eleventh Circuit held that Florida had a rational basis for prohibiting gays and lesbians from adopting (358 F3d 804 [2004]). The majority inexplicably notes that "[t]o invalidate the latter would cast grave doubt on the former." Perhaps this point serves to highlight the goal-oriented nature of the majority's treatment of Adar and Smith's equal protection claim.

The dissent argues that the Registrar's refusal to issue a corrected birth certificate in the case of an out-of-state adoption will have no way of improving the stability of that family. Indeed, it potentially undermines their stability. The dissent also calls into question any parallels drawn between Louisiana's birth certificate and adoption laws, finding the latter irrelevant to the instant inquiry. The dissent also highlights the fact that with respect to the suspect class defined as unmarried non-biological parents, the Registrar has failed to come forward with a rational basis for drawing this distinction.

In all, this surprising reversal by the Fifth Circuit seems legally unsound, and downright dangerous for individual rights and Section 1983 claims in general. *Eric J. Wursthorn.*

Delaware Lesbian Co-Parent Benefits from Statute Inspired by Her Own Case

The Delaware Supreme Court may have put an end to a contentious, long-running dispute between former lesbian partners by denying reconsideration to its unanimous decision issued last month in the case of *Smith v. Guest*, 2011 Westlaw 899550 (March 14, 2011), affirming a ruling by the New Castle County Family Court that the plaintiff was a de facto parent of the child adopted by her former partner and thus entitled to an award of joint legal custody. The court assigned the parties pseudonyms of Lynn M. Smith (adoptive parent) and Carol M. Guest (de facto parent). Guest's triumph depended on a statute passed by the Delaware legislature in 2009 in response to her prior defeat in the Delaware Supreme Court, which had ruled that the state's custody laws did not recognize the status of de facto parent. The 2009 statute adds "de facto" parents to the relevant provision defining parent-child relationships.

Smith and Guest met in 1994 and began living together in 1995. After living together for five years, they decided their relationship was strong enough and they wanted to have a child. After several attempts by Smith to become pregnant through donor insemination had failed, they decided to adopt. In 2003, Smith adopted a child in Kazakhstan. Guest participated in the process and traveled with Smith to Kazakhstan, but that country does not allow joint adoptions by same-sex partners, so Smith was the sole adoptive parent.

After they returned to Delaware, they sought legal advice about having Guest adopted as a co-parent. They claim they were told that Guest would have to care for the child for at least a year before the Family Court would approve an adoption, and they ended up dropping the matter. Guest played a parental role towards the child over the ensuing year until the parents ended their relationship, and Guest moved out at Smith's request in May 2004. A few weeks later, Smith cut off Guest's contact with the child and Guest filed suit for joint custody. The Family Court granted her petition, based on a de facto parent theory, but the Delaware Supreme Court reversed that ruling in a decision issued in February 2009, then titled *Smith v. Gordon*, 968 A.2d 1.

The Supreme Court pointed out that this issue was controlled by statute, and the Delaware Uniform Parentage Act identified only two kinds of parents who could seek custody: birth parents or adoptive parents. The court reviewed at length the history of Delaware's legislation on this issue, concluding that the omission of de facto parents was not inadvertant, while noting that several other states had adopted this concept in light of social changes in family

life. The court concluded that whether to allow de facto parents to seek custody was a legislative policy decision for the General Assembly to make.

Media coverage of the decision caught the legislature's attention, and it moved promptly to amend the statute, passing S.B. 84, amending the Delaware Uniform Parentage Act to add "de facto parent" to the section titled "Establishment of parent-child relationship" (Del. Code Title XIII, Section 8-201), and setting out a fact-specific test for determining whether a person was a de facto parent, focusing on how their relationship with the child was established and the nature of such relationship. The provisions are consistent with the tests established in other jurisdictions that recognize de facto parent status. The statute also provided that its provisions "shall have retroactive effect" and that "No Court decision based upon a finding that Delaware does not recognize de facto parent status shall have collateral estoppel or res judicata effect."

Collateral estoppel and res judicata are legal concepts intended to produce finality in litigation. Under collateral estoppel, parties may not re-litigate in one forum an issue that they have already litigated to a conclusion in another forum. Under res judicata, once a court finally decides a legal dispute between the parties, the matter is closed and may not be reopened through a new lawsuit.

The day S.B. 84 went into effect, July 6, 2009, Guest filed a new lawsuit seeking joint custody of the child. Smith argued that the statute was an unconstitutional violation of her rights as a legal parent, and also sought to raise collateral estoppel and res judicata arguments. She seized upon a technicality: Under Delaware law, after a statute is passed the "reviser" of the Delaware Code extracts relevant provisions to be codified. The provisions to be codified - formally published in the state's statutory code - are the substantive provisions. Provisions dealing only with issues of interpretation are not codified. Thus, the amended version of Section 8-201 that appears in Title XIII of the Delaware Code does not include the provisions of S.B. 84 dealing with retroactivity, collateral estoppel and res judicata.

The Family Court rejected Smith's arguments, found that the statute was constitutional and that Guest qualified as a de facto parent and, consistent with the best interests of the child, awarded her joint custody. Smith appealed.

In its unanimous ruling, the Supreme Court decisively rejected both state and federal constitutional challenges to the statute.

Smith based her state constitutional argument in part on the doctrine of separation of powers, arguing that it was inappropriate for the legislature to reverse a decision of the Supreme Court because it disagreed with the court's interpretation of a statute. The court responded that the legislature's action was not a reversal of the court, but rather a decision to consider the policy issues raised by the court. The legislature's action did not say that the court had misconstrued the statute. Rather, it said that the legislature had decided to redefine the concept of parental status, having reconsidered the policy concerns that led to the prior statute. The court also rejected an argument by Smith that the statute violated a state constitutional ban on multi-issue legislation.

More significantly, the court rejected Smith's federal constitutional argument premised on the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), a decision that had struck down a state law under which a court awarded visitation rights to a child's paternal grandparents over the objection of the child's mother, the widow of their son. The Supreme Court had ruled in that case that the constitutional due process rights of a parent would be violated by ordering them to allow access to their child to a "third party" non-parent.

The Delaware Supreme Court rejected the argument that *Troxel* made S.B. 84 unconstitutional. Writing for the court, Justice Jack B. Jacobs pointed out that Guest was not suing as a "third party" but rather as a "de facto parent," a status that the grandparents in *Troxel* could not satisfy. "This is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (e.g., the child's grandparents) seeks visitation rights," he wrote. "Guest is not 'any third party.' Rather, she is a (claimed) de facto parent who (if her claim is established, as the Family Court found it was) would also be a legal 'parent' of ANS. Because Guest, as a legal parent, would have a co-equal 'fundamental parental interest' in raising ANS, allowing Guest to pursue that interest through a legally-recognized channel cannot unconstitutionally infringe Smith's due process rights. In short, Smith's due process claim fails for lack of a valid premise."

Smith also argued that S.B. 84 violated her equal protection rights, contending that the legislature had inappropriately acted specifically to overturn her victory in the prior lawsuit. But the court was unconvinced, since the legislature had rethought a basic policy issue and amended the statute to apply to all people who might claim de facto parent status, not just Guest. The new law was made retroactive for all cases, not just her case. Although, in fairness, the court strains a bit when it comes to the last provision of the statute, which provided that no court decision premised on Delaware's failure to recognize de facto parents should have collateral estoppel or res judicata effect, since that provision looks an awful lot like a legislative attempt to give Guest a second shot at gaining a custody order. On the other hand, any other potential de facto parent who had lost their claim before the Family Court on this basis would also be benefited by that provision. As the court points out, the statute does not specifically name or specifically confer a cause of action on Guest.

The court also decisively rejected Smith's argument that the provisions on retroactivity, collateral estoppel and res judicata were not part of the statute due to their omission from the codified version. As long as a bill is passed and signed into law, the entire bill becomes part of the law of Delaware, said the court. Furthermore, because Guest's custody claim was previously rejected on standing grounds, her status as a de facto parent was never litigated on the merits, so the use of collateral estoppel or res judicata to preclude her new lawsuit would be inappropriate in any event.

Justice Jacobs ended the court's decision with an expression of empathy for the parties who have been litigating over this for so long. "We also are sensitive to the emotional considerations and frustrations that both parties have experienced throughout this process," he wrote. "The General Assembly, however, has made a public policy decision to recognize persons, such as Guest, as legal 'parents' who are entitled to seek custody of their minor children. Our judicial role requires us to give full meaning and effect to those legislative changes."

Perhaps it is not entirely coincidental that the General Assembly legislated in favor of establishing civil unions for same-sex couples just after the court issued its new ruling in this case, reflecting the changed legal environment for LGBT people in Delaware.

Because the court rejected Smith's federal constitutional argument, it remains open to Smith to seek review in the United States Supreme Court of the federal constitutional question. Given the long odds against that court granting review, however, it is possible that this case is near its end.

Guest is represented by the ACLU of Delaware. Richard Morse and Michael Arrington of Parkowski, Guerke & Swayze argued the case on behalf of the ACLU. Morse praised the decision to a reporter from the News Journal, in an article published on April 19, saying that it was important to "preserving the rights of children in non-traditional families and ensuring them stable, long-term relationships with the people who raised them."

Smith was represented by Michael P. Kelly of McCarter & English. She reacted bitterly to the court's decision, telling the News Journal that it was part of a larger gay rights social agenda. "Parental rights have been dismantled," she said. "It will take a few years for people to realize what it means, but parents don't have the right to care and custody of their children any more. Another individual now has the right to sue you for rights to your children. It's downright scary." Her attorney, Kelly, said he was "troubled" by the ruling, but said he had great respect for the Delaware Supreme Court. "I am just a dumb Irishman," he said. "What do I know?" The *News Journal* reported that attempts to contact Guest for comment had been unsuccessful. *A.S.L.*

Seventh Circuit Rejects Religious Discrimination Claim by Terminated Anti-Gay Apostolic Christian Wal-Mart Employee

The U.S. Court of Appeals for the Seventh Circuit has affirmed a District Court's ruling that Wal-Mart Stores was entitled to summary judgment against an Apostolic Christian employee who had claimed religious-based discrimination in violation of Title VII of the Civil Rights Act of 1964 when she was fired for violating Wal-Mart's discrimination policy by making anti-gay comments to a gay employee. *Matthews v. Wal-Mart Stores*, 2011 WL 1192945 (9th Cir., March 31, 2011) (unpublished).

Matthews, an Apostolic Christian, had taken part in a conversation with coworkers during which she "screamed" that a gay employee was "going to hell" and "not right in the head." After complaints were lodged about the incident, Wal-Mart conducted a 3-month investigation pursuant to its Discrimination and Harassment Prevent Policy and subsequently terminated Matthews, concluding that she had engaged in serious harassment in violation of the Policy. Matthews brought suit in federal District Court, asserting race and religious-based claims under Title VII.

The U.S. District Court for the Northern District of Illinois granted summary judgment for Wal-Mart, and Matthews appealed only the religious discrimination issue to the Court of Appeals. A panel of the court, including Chief Judge Posner, first rejected Matthews' claim that Wal-Mart must "permit her to admonish gays at work to accommodate her religious belief," as she had not advanced the argument before the District Court, and because forcing this accommodation on Wal-Mart would cause undue hardship and "place Wal-Mart on the 'razor's edge' of liability by exposing it to claims of permitting workplace harassment."

The panel next rejected Matthews' indirect argument, stating that she had to prove that similarly situated employees outside of her protected group were treated more fairly. The panel held that since no other employees in the conversation had "commented on 'someone's individual status, homosexuality or race,' and there [was] no evidence in the record that other Wal-Mart employees had violated the harassment policy and not been fired," that Matthews had failed to make a prima facie claim of Title VII discrimination. The panel further held that Matthews claims that Wal-Mart's reasons for her termination were pretext could not be reached because of her failure to make a prima facie claim.

Finally, the panel rejected Matthews' claims of ineffective assistance of counsel and that her trial counsel "sabotaged" her case, stating that "counsel's allegedly negligent behavior is a malpractice action, not another shot at a trial against Wal-Mart." *Bryan C. Johnson*

California Appellate Court Sustains Discharge of Tenured Gay Teacher Who Placed Sexually-Explicit Personal Ad on Craigslist

A San Diego middle school teacher, Frank Lampedusa, placed an extremely explicit advertisement on Craigslist, seeking sex with other men. The advertisement included photographs of Lampedusa's face, body, genitals, and anus. His superintendent and principal were informed of the ad and terminated him. However, the state's Commission on Professional Competence overruled the local school officials, and allowed Lampedusa to continue teaching. The superior court upheld the commission's decision, but a unanimous 3-judge panel of the 4th District Court of Appeal overturned that decision and ordered that Lampedusa be dismissed. *San Diego Unified School District v. Commission on Professional Competence (Lampedusa)*, 2011 WL 1234686 (Cal. App., 4th Dist., Div. 1, April 4, 2011).

The advertisement was quite typical of those found in the "Men Seeking Men" section of Craigslist. Its title was "Horned up all weekend and need release," and it read: "In shape guy, masc, attractive, 32 waist, swimmer's build, horny as fuck. Looking to suck and swallow masc guys, also looking to get fucked. Uncut and huge shooters jump to head of line. Give my [sic] your loads so I can shoot mine. White, black, Hispanic, European, all good. No fats, fems, queens, asians. NO BELLIES. Have pics when you email." Lampedusa's ad included four photos, two of which showed his face, which enabled Lampedusa to be recognized by a parent of a student at Lampedusa's school, who anonymously reported the ad to the police. The police reported the ad to the superintendentof schools, who informed the principal of Lampedusa's school, Susan Levy. Principal Levy viewed the ad, and eventually dismissed Lampedusa, alleging unfitness for service and immoral conduct under the California Education Code.

Lampedusa appealed his dismissal to the Commission on Professional Competence. The Commission found that Lampedusa's "conduct in placing this sexually explicit ad was vulgar and inappropriate and demonstrated a serious lapse in good judgment," and it "strongly condemned" his behavior. Nevertheless, the evidence didn't establish that Lampedusa was unfit to teach, in the

opinion of the Commission. It found that there was "little likelihood that [Lampedusa's] conduct adversely affected students or fellow teachers since none of them learned of the incident and, therefore, there was no notoriety associated with the incident." The Commission found that Lampedusa had tried to mitigate any damage by removing the ad, and he now "understands he made a mistake and has learned from it."

The school district appealed the Commission's decision to Superior Court, which found that the weight of the evidence supported the Commission's decision. The district then appealed to the Court of Appeal, which had quite a different view. Appellate review was based on an abuse-of-discretion standard, and the issue, as stated by the Court of Appeal, was whether the Commission's finding was supported by substantial evidence.

The court stated that not only was there no substantial evidence to support the Commission's decision, but there was, rather, substantial evidence that Lampedusa was unfit to serve as a teacher, which constituted adequate grounds to fire him.

The court recited a list of seven factors relevant to a teacher's unfitness for service (Cal. Educ. Code 44932(a)(5)), as set down by the California Supreme Court in *Morrison v. State Board of Educ.*, 1 Cal. 3d 214 (1969), and gave Lampedusa a failing grade on each of them. The factors, and the Court's pronouncement on each, are:

(1) *Likelihood that the conduct adversely affected students or fellow teachers, and degree of adversity:* The Commission found that, had a parent or fellow educator viewed the ad, it would have "washed over" into Lampedusa's professional life and interfered with his ability to serve as a role model. The Court of Appeal noted that both a parent and a fellow educator had seen the ad, thus the effects had "washed over." In particular, the relationship with the principal, a fellow educator, had been irreparably impaired.

(2) *Proximity or remoteness in time of the conduct:* At the time of the hearing, the conduct was not remote at all; it had occurred only one year before.

(3) *Type of teaching certificate held by the party involved:* The posting of the "pornographic ad" is inconsistent with teaching in middle school.

(4) *Extenuating or aggravating circumstances surrounding conduct:* The court noted that Lampedusa had posted ads prior to the one in question, and had stated that he did not believe he had acted immorally. He shifted responsibility to parents to prevent students from seeing the ads. Thus, in the view of the court, the situation was aggravated.

(5) *Praiseworthiness or blameworthiness of motives resulting in the conduct:* The court found Lampedusa's conduct blameworthy.

(6) *Likelihood of recurrence of questioned conduct:* Lampedusa had stated that he would continue in the future to post ads soliciting sex, and did not believe he had done anything immoral. Thus, the court found that such an incident is likely to recur.

(7) *Chilling effect on constitutional rights of teachers*: The court found that Lampedusa's termination would not have a chilling effect, citing the U.S. Supreme Court's decision in *City of San Diego v. Roe*, 543 U.S. 77 (2004), in which termination of a police officer for his off-duty sales of sexually explicit videos was upheld, as his actions were "detrimental to the mission and functions" of a city police officer.

The California Education Code also permits dismissal of a teacher for "immoral or unprofessional conduct" (Cal. Educ. Code 44932(a)(1)), amply exemplified, said the court, by Lampedusa's postings.

Thus, the Court of Appeal ordered the Superior Court to render a decision consistent with its decision: Lampedusa must be terminated. *Alan J. Jacobs*

New York Appellate Division Revives Challenge to Adult Zoning Ordinance

A unanimous panel of the New York Appellate Division, First Department, ruled in *For the People Theatres of NY v. City of New York*, 2011 N.Y. Slip Op. 02816, 2011 WL 1325604 (April 8), that opinions rendered last year by New York Supreme Court Justice Louis B. York, rejecting constitutional challenges to the NYC Zoning Resolution concerning location of adult businesses, were so terse that they lacked the necessary findings of fact that would enable the appeals court to determine whether Justice York's conclusions were supported by the factual record in the case. Consequently, the court reversed the decisions, vacated Justice York's finding that the Zoning Resolution is constitutional with regard to bookstores, video stores, topless night clubs and bars, and sent the case back to Justice York for reconsideration.

Thus begins a new chapter in a long-running saga that began during the Rudolph Giuliani Administration almost twenty years ago. Giuliani strongly advocated "cleaning up the city" by closing as many adult businesses as possible. Under the 1st Amendment of the U.S. Constitution, however, there are limits to what the government can do in its regulation of sexually-oriented businesses, so long as the business's goods and services don't cross the line into constitutionally-unprotected obscenity. The city can impose restrictions on the location of adult businesses so long as it can show that their presence has undesirable "secondary effects," and the U.S. Supreme Court has accepting the contention that a zoning plan backed up by studies showing such secondary effects - crime, including drug dealing and prostitution, and negative effects on property values - can be constitutional, so long as it leaves enough locations so that those who want to purchase such goods and services can do so.

In 1993, the City Planning Department carried out a study of secondary effects of adult establishments in the City, generating a report that provided the basis for the 1995 Amendment to the city's Zoning Resolution. The 1995 Amended Zoning Resolution barred adult businesses from all residential zones and most commercial and manufacturing districts, defining an "adult business" as a commercial establishment in which a "substantial portion" of the establishment includes "an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof."

This was not a definition that could be readily applied without more specific guidance, and the City Planning Commission came up with a rule of thumb that defined "substantial portion" as 40 percent, specifying that any commercial establishment with "at least 40 percent of its accessible floor area used for adult purposes qualifies as an adult establishment or adult bookstore." Operators of such businesses that wanted to remain open in their existing locations and not be exiled to remote locations altered their premises and their stock to try to comply with what became known as the 60/40 rule.

City inspectors brought actions against such businesses despite their techni-

cal compliance, contending that it was a "sham" and they were still "adult businesses" that could not operate where they were located. This didn't play well in the courts, since these businesses were technically in compliance with the 60/40 rule, leading the City Council to adopt further amendments to the Zoning Resolution in 2001. The 2001 Amendments spelled out that compliance with the 60/40 rule was not sufficient to avoid the label of "adult business" if (1) customers had to pass through adult material to reach the non-adult section, (2) any material exposed one to adult material, (3) non-adult material was only for sale, while adult materials was for sale or rent, (4) more adult printed materials were available than non-adult ones, (5) minors were restricted from the entire store or from any section offering non-adult material, (6) signs or window displays of adult matter were disproportionate to signs and window displays featuring non-adult matter, (7) one or more individual enclosures were available for viewing adult movies or live performances, and (8) purchasing non-adult material exposed the buyer to adult material.

In October 2002, new lawsuits were filed challenging the constitutionality of the 2001 Amendment. Trial judges issued temporary injunctions against the new Amendment being enforced while the cases were under litigation, so the 60/40 establishments continue to operate. Meanwhile, the cases wound their way through the courts, eventually hitting the Court of Appeals (the state's highest court) in 2005. That court found that the plaintiffs were entitled to a hearing of their constitutional claim, which boiled down to the contention that the original study of adult businesses carried out by the City Planning Commission in 1993 could no longer support the current version of the Zoning Resolution as it applied to the reconfigured 60/40 businesses, because these reconfigured businesses as substantially different from the adult businesses that operated in the City back then.

The Court of Appeals said that the City did not have to carry out an entirely new study, although certainly it could do so. Its burden, however, was to create an evidentiary record so that the trial court could determine "that the City has fairly supported its position on sham compliance -- i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed." If the nature of the businesses hasn't really changed, goes the logic of the decision, then the original study on secondary effects is sufficient to uphold the constitutionality of the Resolution.

After the case went back to Justice York from the Court of Appeals, he granted a further preliminary injunction against enforcement of the Resolution pending the outcome. After considering further evidence, Justice York ruled early in 2010 that the amended definition of "adult establishment" was constitutional as applied to adult bookstores and live entertainment establishments, but not as applied to "adult theaters." His brief decisions emphasized the Court of Appeals' comment that the burden on the City was relatively light, and that no new study of secondary effects was necessary if the City showed that the essential nature of the businesses had not changed as a result of their 60/40 configuration.

Writing for the Appellate Division panel, Justice Rolando T. Acosta pointed out the shortcomings of Justice York's opinion. "In its extremely terse decision," he wrote, "Supreme Court did not elaborate on the criteria by which it determined that the plaintiff's essential nature was similar or dissimilar to the sexually explicit adult uses that were analyzed in the DCP Study or other studies and case law from across the country. Moreover, it failed to state the particular facts on which it based its judgment. Supreme Court simply detailed the City's evidence and arrived at legal conclusions. This was insufficient to answer the question posed... from the Court of Appeals -- namely, whether the 60/40 establishments are similar in nature to adult establishments that have been shown by means of empirical data to cause negative 'secondary effects.' As Supreme Court did not provide any direction for the parties or this Court to adequately review, analyze, or understand the ruling, its decision is 'manifestly inadequate' and violates the dictates" of the statute governing the content of trial court decisions.

The problem for the Appellate Division is that its job is to determine whether Justice York's legal conclusions are supported by the factual record. Without a more detailed explanation from Justice York about how his conclusions are based on particular facts in the record, the Appellate Division is unable to perform this task.

Justice Acosta devoted the balance of his opinion to describing the evidence that would be necessary to support the constitutionality of the Resolution, either on its face or as applied to particular establishments. Part of the problem with the trial court's decision was that it seemed based on broad generalizations about the 60/40 businesses rather than detailed factual findings about the actual businesses that are contesting the City's application to them of the label "adult business." "Supreme Court's decision states very few, if any, facts that can be used by this Court to resolve plaintiff's as-applied challenge," commented Justice Acosta, noting that Justice York had been dismissive of evidence offered by the plaintiffs to show that their businesses differed in relevant ways from others whose characteristics were entered into evidence.

Justice Acosta pointed out that "neither the decision nor the judgment makes any factual findings to help resolve the question of whether only some of the clubs were found to have a predominantly sexual focus or whether all of them were.... The result of Supreme Court's decision is that some of the non-sham clubs could be put out of business by a law that, in fairness, many not apply to them."

The Appellate Division's opinion does not specify a deadline for Justice York to render a new decision, but the clear implication of the ruling is that further evidentiary submissions will be required to provide a factual basis for rendering a decision that complies with the court's requirements, and that Justice York would need to produce a detailed set of factual findings to bolster his conclusions, so this may take some time. Meanwhile, the preliminary injunctions remain in effect.

Attorneys for the plaintiffs challenging the Zoning Resolution include Herald Price Fahringer, Erica L. Dubno and Nicole Neckles of Fahringer & Dubno, and Edward S. Rudofsky of Zane & Rudofsky. The City Law Department is defending the Zoning Resolution. *A.S.L.*

Oregon Court Finds Same-Sex Lesbian Partner to be a Parent

In a letter ruling issued to the parties in *Shineovich v. Kemp*, Multnomah County,

Case Number 0703-63564, on March 31, 2011, Oregon Circuit Judge Katherine Tennyson ruled that Sondra Shineovich and Sarah Kemp were a "same-sex couple" as that term was used by the Oregon Court of Appeals in its precedent-setting decision in *Shineovich v. Kemp*, 214 P.3d 29 (Or. App., 2009), and thus as Shineovich had consented to donor insemination of Kemp while they were a couple, she has the status of a parent of the resulting children, and can seek custody and/or visitation on the basis of legal parental status.

Sarah Kemp had argued that the idea of having children was hers alone and that she had never intended sharing parenting of the children with Shineovich. She had also contested the nature of their relationship, arguing that it did not qualify for the "equal treatment" decreed by the Court of Appeals in this case.

Shineovich and Kemp had lived together for ten years, during which time Kemp became pregnent through donor insemination twice. When the relationship ended, Kemp was pregnant with their second child. Shineovich went to court to establish her parental rights after they split up, but Judge Tennyson had dismissed the case, finding that Shineovich had no valid legal theory to assert parental status. The couple had not entered into any kind of formal written agreement during their years together governing the relevant issues, and Oregon at the time of their break-up had no pertinent express statutory law. (There is now a domestic partnership law that could cover this situation for those who are registered partners.)

The Court of Appeals responded to Shineovich's appeal of the dismissal of her case by determining that a statute under which the husband of a woman who gives birth to a child conceived through donor insemination is the legal parent of the child if he consented to the insemination for the purpose of having a child would be improperly discriminatory on the basis of sexual orientation if the law was not construed to provide the same privilege to the same-sex partner of a woman who gives birth through donor insemination. The Court of Appeals remanded the case to Judge Tennyson for a determination whether the relationship of Shineovich and Kemp fell within the parameters of the court's ruling, and whether Shineovich had consented to the insemination with the idea of being a parent of the resulting children.

In her March 31 letter ruling, Judge Tennyson found in favor of Shineovich on both points, reciting a long list of factual findings bolstering the conclusion that this case met the test set out by the Court of Appeals. She wrote that "the focus of the inquiry here is whether or not these two had a committed partnership which intended, in additional to financial interdependence, to produce and raise children together. The weight of the evidence answers that question as an overwhelming 'yes.' Further, it is also overwhelming [sic] apparent from all credible evidence on this record, that the parties worked together to achieve the goal of conceiving and raising children. There is no question that Shineovich consented to this process. She contributed with her actions, money and emotions. This goal was a topic of discussion between Shineovich and Kemp and was a joint effort between them. These children were an integral part of their partnership."

The judge found that Kemp's version of events was "simply not believable" in light of the documentary evidence about the relationship and the testimony of other witnesses, including Kemp's aunt, who had broken with Kemp over how she had acted regarding the parentage of the children. Having concluded that the test set forth by the court of appeals was met, Tennyson directed Shineovich's attorney to prepare a judgment reflecting the ruling and further directed that the parties schedule a conference with the court to set dates to resolve the custody and visitation issues. As Shineovich and Kemp would have equal standing as legal parents of the children, the remaining issue in the case concerns what custody and visitation arrangements would be in the best interests of the children.

Shineovich has been represented at the trial level by David W. Owens and Jodie M. Sneller of Owens, Sneller, Pinzelik & Wood, P.C., in Portland, and on appeal by Mark Johnson of Mark Johnson Roberts. *A.S.L.*

Montana Trial Court Dismisses Suit Seeking Equal Legal Rights for Same-Sex Couples

Montana District Court Judge Jeffrey M. Sherlock has granted the state's motion to dismiss in *Donaldson v. State of Montana*, Cause No. BDV-2010-702 (April 19, 2011), a suit filed by the American Civil Liberties Union of Montana on behalf of several same-sex couples seeking equal access to the various rights provided under state law to married different-sex couples through some formal legal status. Judge Sherlock found that it would be an "inappropriate exercise" of the court's power to order the legislature to enact a law providing domestic partnerships or civil unions for same-sex couples.

The Montana courts have had a rather progressive record on LGBT rights over the recent past. In 1997, the Montana Supreme Court invalidated the state's ban on consensual gay sex in *Gryczan v. State*, 942 P.2d 112. More recently, that court ruled in *Snetsinger v. Montana University System*, 104 P.3d 445 (2004), that the state university's policy of denying insurance coverage to same-sex domestic partners of gay employees violated the equal protection requirements of the state constitution. On the other hand, Montana voters have not been as progressive, voting in 2004 to enact Article XIII, Section 7, of the Montana Constitution, which provides: "Only a marriage between one man and one woman shall be valid or recognized in this State."

The plaintiffs, pursuing a strategy that LGBT rights groups have devised for state constitutional litigation in jurisdictions that constitutionally ban same-sex marriage, argued that the marriage amendment was irrelevant to their claim, as they are not seeking a right to marry from the court. Rather, noting the many ways in which state law denies rights to same-sex couples that are made available to different-sex couples who can marry, they are seeking a declaration that the state is obligated by its constitutional equality guarantee to provide a way for same-sex couples to access the same rights. They also argued that failing to provide equal access to such rights through some sort of a legally-recognized status violated their rights to privacy, dignity, and to pursue life's basic necessities, all rights mandated in the Montana Constitution (Article II, sections 3, 4 and 10).

The plaintiffs called the court's attention to several important decisions from other state supreme courts. In Alaska, the Supreme Court ruled in *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (2005), that despite the passage of a state constitutional amendment banning same-sex marriage,

the state was violating its constitutional guarantee of equal protection by not extending employment benefits coverage to same-sex partners of state employees. In Vermont and New Jersey, the state supreme courts ruled that denying the rights and benefits of marriage to same-sex couples violated state constitutional equality guarantees, which could be remedied by passage of alternative structures such as civil unions or domestic partnerships. *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

Acknowledging these rulings from other states, Judge Sherlock found them distinguishable in relevant ways. He pointed out that the Alaska Supreme Court was not asked to order the state legislature to adopt a formal legal structure for same-sex couples. In the Vermont and New Jersey cases, he noted, the people of those states had not amended their constitutions to include a specific ban on same-sex marriage.

Judge Sherlock observed that the plaintiffs presented the court with a list of Montana statutory provisions that provide benefits or entitlements to married couples that are not available to same-sex couples, and had presented evidence of "real life scenarios where these laws have affected them." He commented, "In addition to these statutory arrangements, there appears little doubt that Plaintiffs have been subject to private prejudice, discrimination, and even violence in Montana." He conceded that the court should not consider "personal, moral, or religious beliefs about whether persons should enter into intimate same-sex relationships or whether same-sex individuals [sic] should be allowed to marry" in making his decision, and that it was the court's "duty to preserve the constitutional rights of all parties regardless of how unpopular they may be or unpopular may be their cause." "Indeed," he wrote, "this Court finds itself quite sympathetic to the plight of Plaintiffs."

However, he concluded, it was just not appropriate to award the relief that Plaintiffs were seeking. "In sum, Plaintiffs seek this Court's order requiring the Montana legislature to enact a domestic partnership or civil union arrangement. In other words, Plaintiffs want this court to direct the legislature to enact a set of statutes. This Court finds that to be an inappropriate exercise of this Court's power," he wrote, citing the state constitution's provision on separation of powers between the branches of government.

While Judge Sherlock indicated he would have no problem using the equal protection clause in a case presenting a specific instance of statutory discrimination, such as the employee benefits policy upon which the Montana Supreme Court ruled in the Snetsinger case, it struck him as an entirely different matter for the court to address the issue by ordering the legislature to create a particular statutory scheme such as a civil union law. "For this Court to direct the legislature to enact a law that would impact an unknown number of statutes would launch this Court into a roiling maelstrom of policy issues without a constitutional compass," he declared.

While conceding that the marriage amendment, standing alone, would not preclude the relief plaintiffs were seeking, Sherlock insisted that the existence of that amendment "plays into the jurisprudential decision that Plaintiffs' requested relief constitutes an impermissible sojourn into the powers of the legislative branch. He noted that during the referendum campaign that produced the amendment, both proponents and opponents had referred to more than just the label of marriage as being at stake. "Indeed," he wrote, "the proponents and opponents seem to both acknowledge that the marriage amendment would have something to do with benefits and obligations that relate to the status of being married."

Ultimately, Sherlock concluded, granting the relief requested by the plaintiffs "would violate the constitutional separation of powers existing in the state of Montana," so he granted the state's motion to dismiss and denied the plaintiffs' motion for summary judgment.

According to press reports, the ACLU of Montana was "evaluating all of our options" and did not consider that its "advocacy on this point was at an end." The national ACLU Lesbian & Gay Rights Project, reporting about the case on its website, indicated that they had 60 days to file an appeal and that "the journey for fairness is far from over." *A.S.L.*

Minnesota Appeals Court Upholds Travel Expense Award for Third-Party Visitation

The Court of Appeals of Minnesota ruled on April 26, 2011, that a district judge had appropriately ordered a lesbian mother who had relocated with her child to Arizona to pay half the costs of transporting the child between Arizona and Minnesota to effectuate the third-party visitation rights of the mother's former partner. The unanimous ruling in *Hay v. King*, 2011 WL 1546586 (unpublished), found that the lack of specific statutory authorization for the award of such expenses was no barrier to the district court's exercise of equitable powers in aid of the best interest of the child.

The opinion for the court by Judge Edward Toussaint, Jr., unfortunately does not relate in detail the underlying facts of the case. Apparently, after the women's relationship ended the co-parent sued for joint custody and visitation, eventually withdrew her demand for custody, and ultimately obtained a third-party visitation order from the district court. After the visitation order went into effect, the legal mother moved with the child to Arizona, and the petitioner, Ms. Hay, applied to the court for financial assistance for travel expenses necessary to make it possible for visitation to continue.

The district judge then amended the visitation order, providing, in relevant part: "With respect to visits with [the child] in Minnesota, it is equitable to order the parties to equally share [the child's] airfare costs to and from Minnesota for court-ordered visits with [respondent]. It is in [the child's] best interests to continue to have a relationship with [respondent], and it is inequitable to require [respondent] to pay the entire cost of maintaining that relationship, especially when [appellant] unilaterally moved [the child] across the country knowing [respondent] had court-ordered visitation with [the child]. [Appellant] has demonstrated an ability to contribute to the cost of flying [the child] to and from Minnesota by her own frequent trips to and from Minnesota during the course of this proceeding."

Ms. King, the legal mother, argued that the court lacked authority to make this award because Hay had withdrawn her custody petition, so the statutory custody provision, which could support such an

order, was not relevant, and the provision on visitation by itself did not support any such monetary award. The appeals court pointed out that the district judge was not relying on statutory authority to make this award. "Instead," wrote Judge Toussaint, "the district court made such an order because it considered it 'inequitable' not to do so, given the circumstances of appellant's departure to Arizona, and that it was in the child's best interests to continue to have a relationship with respondent." The court of appeals observed that lack of statutory authority for a trial court to order a party to defray the other party's visitation costs would not preclude an award that was in the best interest of the child.

The court noted a prior case, *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. App. 2000), *review denied* (Minn., May 16, 2000), in which a parent was ordered to defray travel expenses necessary for their former spouse to have visitation with the child after a move, and commented that refusal to award such relief for lack of express statutory authorization would be "inconsistent with the district court's common-law authority to grant equitable relief 'as the facts in each particular case and the ends of justice may require.'" Even though LaChapelle did not involve a third-party visitation award, the court insisted that "this distinction has no bearing on the propriety of apportioning visitation expense." The court also rejected the argument that this award could be characterized as a child support payment, and emphasized the "extensive discretion" of the district court in deciding visitation questions, asserting that "a reviewing court will not reverse a district court's resolution of such questions absent an abuse of that discretion."

The court of appeals found that the district court's findings "indicate the rationale for the decision to divide the child's travel expenses" and thus there was no abuse of discretion.

Hay is represented by Karim G. El-Ghazzawy and Jody M. Alholinna, of the El-Ghazzawy Law Offices in Minneapolis. King is represented by M. Sue Wilson and James T. Williamson, of the M. Sue Wilson Law Offices, also in Minneapolis. *A.S.L.*

Federal Court Rejects Anti-Gay Minister's Claims Against Philadelphia in Demo Actions

In a recent case brought by the leader of an anti-homosexual ministry against the City of Philadelphia (the City), the U.S. District Court for the Eastern District of Pennsylvania granted the City's motion for summary judgment. *Marcavage v. City of Philadelphia*, 2011 WL 1213166 (E.D. Pa., March 31, 2011). Michael Marcavage, the leader of the ministry group Repent America, filed several claims against the City, as well as several police officers as individuals, asserting that his First, Fourth, and Fourteenth Amendment rights had been violated during his protest of gay pride parades and events. In an opinion by District Judge Robreno, the court held that Marcavage's constitutional rights were not violated when he was required by police officers to move away from parade participants and protest from a distance.

Marcavage, who has brought four similar suits against the City since 2006, leads a group of evangelical Christians who condemn homosexuality and regularly protest gay pride events with signs containing Biblical passages. The group also uses bullhorns to preach, and passes out pamphlets. The events concerned in this particular suit occurred at Pridefest on June 10, 2007, Pridefest on June 8, 2008, a Proposition 8 Demonstration on November 15, 2008, and the Equality Forum on May 3, 2009. At each event, Marcavage and members of his ministry were asked by the police to remain a certain distance away from the parade or event participants.

During the Proposition 8 Demonstration, Marcavage at one point became surrounded by demonstration participants and tried to continue preaching although several police officers, all included individually as defendants in the lawsuit, told him he needed to move away because the police could not protect him. Marcavage refused to move, and was finally physically removed by the police to a safer distance away from the participants.

During the Equality Forum, a shoving match broke out between one of the members of Repent America, Jake Gardner, and a forum participant, after Gardner stepped into the parade being conducted by the forum participants. When the police removed Gardner from the parade, Marcavage began arguing with the police, asserting that his group could not be removed. When a police officer, Sergeant Craig Smith, physically moved Marcavage away from the parade, a struggle occurred between Marcavage and several officers after the officers spotted a "silver object" in Marcavage's hand. At one point, Smith placed Marcavage in a choke hold. The altercation lasted only around 10 seconds, and once the object, a camera, was retrieved from Marcavage, Smith released him. Marcavage's camera was then returned to him. Marcavage and the police officers then parted ways after a brief argument, wherein Marcavage again insisted that his group be allowed to participate in the march.

Marcavage brought a series of constitutional claims against the City of Philadelphia and the police officers involved in the altercations, as well as an assertion that the officers had violated his rights under Pennsylvania's Religious Freedom Protection Act, and under 42 U.S.C. § 1983, which "provides a cause of action [to] an individual whose constitutional or federal rights are violated by those acting under [the] color of law." While the City brought a motion for summary judgment on all counts, Marcavage chose to abandon his claim brought under the Religious Freedom Protection Act. The opinion by District Judge Eduardo C. Robreno therefore discusses only Marcavage's constitutional claims, focusing primarily on his assertion that the City violated his right to free speech and free exercise of religion.

In analyzing a free speech claim, courts apply a three prong analysis which "first, [examines] whether the speech is 'protected by the First Amendment;' second, determin[es] 'the nature of the forum;' and third, [establishes] whether the government's 'justifications for exclusion from the relevant forum satisfy the requisite standard.'" As there was no challenge put forth to religious speech being protected by the First Amendment or to the parade grounds being public forums, Judge Robreno addresses only the last step of the analysis: whether the Philadelphia police had reasonable justification for moving Marcavage and his group members away from the parade grounds.

Relying on the Third Circuit's decision in a similar suit brought by Marcavage in 2008, the court found that the police officers were justified in their restriction of

Marcavage's movements during the events. *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008). The facts in *Startzell* are very similar to the case at issue. Marcavage alleged in that case that his right to free speech had been violated during a pride event, OutFest, when the police arrested the members of Repent America after the group refused to move away from the event participants. Marcavage and his group were causing a disturbance through their preaching, which included bullhorns. The Third Circuit found that when a group without a permit protests a group that has received a permit to march or congregate in a public area, the rights of the group with the permit take precedent. The non-permitted group cannot be stopped from protesting entirely, but "the right of free speech does not encompass the right to cause disruption," so that "when protestors move from distributing literature and wearing signs to disruption of the permitted activities, the existence of a permit tilts the balance in favor of the permit-holders."

Judge Robreno applied the same reasoning here, reaffirming the principle that protestors do not have an unlimited right to free speech. At each of the events, Marcavage did not have a permit to protest the pride events and was asked to move away from the protesters when his speech began to incite the event participants in a manner that not only disrupted the event but also endangered Marcavage's safety. The police officers were acting within the interest of the city, as "the City has a legitimate interest in preventing Marcavage—as a counter-protestor of a permitted event—from interfering with the message of the permit holder and ensuring the safety of both the participants as well as Marcavage and his group."

The court found the police officers' actions to not only be justifiable, but also reasonable. To reasonably restrict a person's free speech, a state action "must be: '[1] justified without reference to the content of the regulated speech, . . . [2] narrowly tailored to serve a significant governmental interest, and . . . [3] leave open ample alternative channels for communication of the information.'" Here, the court found that the police officers did not restrict Marcavage's movement based on the character of his speech, but because his message was causing a disturbance. The city has an interest in protecting its citizens and ensuring public peace, therefore moving Marcavage and his group away from the event participants was an action narrowly tailored to the purpose of the police: avoiding a public disturbance. Additionally, Marcavage was never completely silenced at any of these events. While he was asked to move, or physically moved, by the police to a location slightly removed from the center of the events, Marcavage was still allowed to preach to the participants. Factoring in both the city's justifications for restricting Marcavage's movements and the means by which the police achieved these purposes, the court held that Marcavage's right to free speech, as well as his right to free exercise of religion, were not violated.

Finally, Judge Robreno turned to Marcavage's remaining claims: that the city violated both his right to be free from unreasonable seizure and from unreasonable force under the Fourth Amendment, and his right to freedom of travel under the Fourteenth Amendment. Marcavage argued that the police seized him during the Proposition 8 Demonstration in 2008 without provocation and did so with an unreasonable amounts of force. Here, there was video evidence of the scuffle that took place between the police and Marcavage over Marcavage's camera. It was this video footage that played a principal role in the court's decision that the officers acted reasonably in seizing Marcavage and removing him from the parade, and used only reasonable force to do so. Generally, police officers need "only a 'minimal level of objective justification'" to seize a person for a short time. The police officers in this situation removed Marcavage physically from the parade after he stepped forward to protest their removal of Gardner. In trying to regain order, Smith had justification to remove Marcavage, whom he viewed as someone who could potentially escalate the disruption. The court further found that the force Smith and the other police officers used in restraining Marcavage while they attempted to retrieve his camera, was neither unreasonable nor excessive. The officers did not know what the "silver object" was that Marcavage had in his hands, and given the fact that he had just been forcibly moved away from the parade, it was reasonable for the officers to use force to restrain him and take the object. Although Smith placed Marcavage in a choke hold, the court characterizes the choke hold as "loose" and points out that not only did Smith let go of Marcavage as soon as the object was retrieved, and revealed to be a camera, but that the officers at no time used any weapons against Marcavage.

As to Marcavage's assertion that his right to freedom of travel under the Equal Protection Clause of the Fourteenth Amendment was violated, Judge Robreno states that, like the right of free speech, this right is not limitless: a person "does not have boundless rights to travel where he pleases in a manner disruptive of public, permitted events." The court also found that Marcavage failed to assert a valid claim. To establish that one's rights to equal protection were violated, a person must prove that he or she "was treated differently compared to similarly situated persons . . . that Defendants did so intentionally, and . .. that there was no rational basis for the treatment." While the police did intentionally treat Marcavage differently from the parade participants, the court states that he was not a similarly situated person. The parade participants had a permit to congregate and speak in a public forum, whereas Marcavage and his group were counter-protestors with no permit. Also, the police officers' actions were rationally based on the fact that Marcavage was a counter-protestor who was disrupting the permitted event as well as the general peace. *Kelly Garner*

Federal Court Refuses to Dismiss Sexual Orientation Discrimination Claim Against Ohio County

U.S. District Judge James S. Gwin rejected a motion to dismiss a sexual orientation discrimination claim asserted by a lesbian employee against an Ohio county in *Hutchinson v. Cuyahoga County Board of County Commissioners*, 2011 WL 1563874 (N.D. Ohio, April 25, 2011). Although he dismissed some of plaintiff Shari Hutchinson's claims as time-barred, and also rejected an ancillary claim regarding the amount of monetary credit for opting out of the county's health insurance program, Judge Gwin found that Hutchinson's complaint that she suffered discriminatory denials of promotion and other unequal treatment in violation of the 14th Amendment's Equal Protection Clause during the two years prior to filing her 42 USC § 1983 complaint were sufficient to survive the motion to dismiss.

The County argued, somewhat incredibly in light of accumulated case law, that sexual orientation employment discrimination claims by a public employee are not actionable under the 14th Amendment because the federal courts within the 6th Circuit have adopted the analytical framework developed by the Supreme Court for analyzing complaints filed under Title VII of the Civil Rights Act of 1964 when they received discrimination complaints from public employees. According to the County, because sexual orientation is not a forbidden ground for discrimination under Title VII, such claims cannot be asserted against a public employer that is subject to Title VII.

Judge Gwin rejected this contention out of hand. "This logical leap," he wrote, "requiring imposition of all Title VII's standards and limitations in the employment-based equal protection context, is largely unsubstantiated. The Defendants exclusively rely on Title VII case-law to support their argument. And, for the proposition that an employee's sexual orientation discrimination claim under [42 USC sec. 1983] must fail because Title VII provides no right of action based on sexual orientation, the Defendants cite a single case: the Seventh Circuit's opinion in *Schroeder v. Hamilton School District*, 282 F.3d 946 (7th Cir. 2002). The Defendants do not mention, however, that the *Schroeder* court explicitly declined to import Title VII standards into its equal protection analysis. Id. at 951. Indeed, the Defendants misrepresent *Schroeder*'s holding, which works against their argument by applying a traditional equal protection analysis to the plaintiff employee's sexual orientation discrimination claim."

Judge Gwin pointed out that the *Schroeder* court ultimately rejected the plaintiff's claim "because the plaintiff had not demonstrated the disparate treatment necessary to maintain an equal protection claim." He also pointed out that there were cases from within the 6th Circuit, precedential for a federal district court in Ohio, allowing gay public employees to assert equal protection claims.

Acknowledging that in the 6th Circuit the Title VII analytical framework is applied, Judge Gwin pointed out that the initial burden is on Hutchinson to allege facts suggesting that she was denied the promotions due to her sexual orientation, which burden he found to be met by the factual allegations in her complaint. This would shift the evidentiary burden to the County to articulate non-discriminatory reasons for its actions. If it met this burden, Hutchinson would lose the case unless she could show that the County's reasons were pretextual.

The Defendants also argued that Hutchinson's complaint failed to allege facts showing that the denials of her promotions were due to an "illegal policy or custom" of the County, which would be required to place liability on the County as such under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). "At this early stage of the proceedings," wrote Judge Gwin, "and taking Hutchinson's factual allegations as true, the Court cannot say that Hutchinson can prove no set of facts that would support her entitlement to relief on a *Monell* claim against the County." He concluded that requiring her to plead more specific facts prior to discovery "would inappropriately burden" the plaintiff. "Particularly because imposing municipal liability depends on evidence of a municipality's often internal authorization or decision-making practices, the Court declines to place such a burden on Hutchinson at the pleading stage."

Hutchinson was unsuccessful, however, in her discrimination claim based on the health insurance credit program. If an unmarried County employee opts out of participation in the health insurance program, they receive a $50 credit against withholding per paycheck. If a married County employee opts out because they are participating in coverage under their spouse's insurance, they get a $100 credit. Hutchinson has a domestic partner whose employer provides partner coverage, and she opted out of the County plan to be covered under her partner's plan. But the County only extended to her the $50 credit accorded to unmarried employees. Ohio bans same-sex marriage and does not provide for civil unions or domestic partnerships. Hutchinson asserted that denying her the full $100 per paycheck credit was discriminatory, but Judge Gwin disagreed, accepting the County's argument that the line it was drawing was based on marital status, not on sexual orientation, and that different-sex domestic partnerships were treated no differently from Hutchinson's partnership. "Although this facially neutral policy may, at some level, disparately impact homosexual employees," wrote Gwinn, "it is not without a rational basis. In addition, to the extent that Hutchinson's claim really targets her inability to qualify for the $100 credit by legally marrying her domestic partner, that challenge is one better directed at the Ohio legislature's ban on same-sex marriage." *A.S.L.*

Who Is Defending the Defense of Marriage Act?

In mid-April, the House of Representatives' Office of Legal Counsel hired Paul Clement, then head of Appellate Practice in the D.C. Office of King & Spalding, a large Atlanta-based firm, to defend Section 3 of the Defense of Marriage Act (which provides that the federal government will not recognize same-sex marriages as valid for any purpose under federal law) against a constitutional challenge in *Windsor v. United States*, 10 Civ. 8435, pending before U.S. District Judge Barbara Jones (S.D.N.Y.), as well as other pending DOMA cases. The plaintiff, Edie Windsor, is suing for a refund of taxes that she had to pay after the death of her wife (Canadian same-sex marriage), due to the refusal by the Internal Revenue Service, constrained by Section 3 of DOMA, to recognize the marriage for estate and inheritance tax purposes.

The Justice Department, which would normally present the government's defense of the statute, concluded that Section 3 is unconstitutional and that no reasonable legal arguments can be made in its defense, the standard that has been articulated in the past when the Justice Department has decided not to defend a statute. The Justice Department's conclusion, in which President Barack Obama concurred, was also supported by last summer's ruling by the U.S. District Court in Massachusetts in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (July 8, 2010), now on appeal before the 1st Circuit. The Justice Department informed the 1st Circuit that it will no longer argue that Section 3 is constitutional in that appeal, so presumably Mr. Clement will appear in that case as well as the other pending trial level cases. (A February 28 letter from the Justice Department to Speaker Boehner listed ten pending cases, and more are likely challenging DOMA's application to immigration issues.)

Several news reports about the retention of Mr. Clement noted that during his confirmation hearing as Solicitor General in 2005, he was questioned about the Bush Administration's refusal to defend several provisions of federal law that were under attack in the courts, and he articulated this same standard for a refusal by a current administration to defend a statute enacted during a prior administration. Under the representation contract between King & Spalding and the House's Office of Legal Counsel, Clement and two partners would be working on the case with an expectation that fees would amount to $500,000 or more, and *all employees of the firm* would be forbidden from advocating for repealing Section 3 of DOMA. Questioned about how the costs were being covered, House Speaker John Boehner indicated that money would be diverted from the Justice Department appropriation for this purpose, and came under strong criticism by Minority Leader Nancy Pelosi for diverting substantial money to defending an unconstitutional statute.

The retention of King & Spalding, a firm with a strong LGBT diversity policy (and one of whose lawyers in the Atlanta office is president of the LGBT bar association in Atlanta), provoked substantial adverse criticism from Human Rights Campaign and Lambda Legal (for whom K&S had become a significant donor and cooperating attorney on pro bono cases) and other places. After a week of such criticism, K&S announced that it was withdrawing from the case. Clement submitted his resignation from K&S, and announced that he would continue to represent the House of Representatives as a partner at Bancroft PLLC, a small Washington, D.C., right-wing boutique firm founded by former Bush Administration lawyers. By April 25, when Clement's resignation from K&S was announced, his name appeared as a partner on Bancroft's website. The capability of this small firm to take on the full volume of pending DOMA defense work has not been addressed publicly. K&S's withdrawal brought a stream of editorial recriminations from leading media outlets, echoing comments from Clement's resignation letter chiding K&S for abandoning representation of a client that was asserting an unpopular position *A.S.L.*

Federal Civil Litigation Notes

California — The Proponents of Proposition 8 filed a motion with U.S. District Judge James Ware, seeking to vacate the ruling previously issued by now-retired Chief District Judge Vaughn Walker holding that Proposition 8 (which amended the California Constitution to provide that only a marriage between one man and one woman would be valid or recognized in California) violated the 14th Amendment of the U.S. Constitution. See *Perry v Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010). The motion was filed after Walker finally spoke openly about being a gay man and living with a long-term same-sex partner. After Judge Walker's retirement, the case was reassigned to Judge Ware for any further action on the matter, which is now pending before the U.S. Court of Appeals for the 9th Circuit (and, by certification of a question concerning standing of the putative appellants, before the California Supreme Court). As of now, Judge Walker's final order in the case has been stayed by the 9th Circuit pending resolution of the appeal. In their motion to vacate, Proponents argued that Judge Walker's previously undisclosed status as a man in a long-term same-sex relationship subjected his impartiality to reasonable questioning (the standard for recusal under the federal judicial code) because he would have a personal interest in the resolution of the question before the court, and that his failure to disclose these facts deprive Proponents of the information necessary to file such a motion prior to the trial. They disclaimed any argument that the motion was based solely on Judge Walker's sexual orientation. Judge Ware set a deadline of May 13, 2011, for responses to the motion, and May 24, 2011, for any replies by movants to the responses, and set a hearing for June 13, 2011. News reports about the motion led to editorials almost uniformly criticizing the movants, and pointing out that nobody would suggests that African-American judges recuse themselves from race discrimination cases or that female judges recuse themselves from sex discrimination cases. * * * Judge Walker also managed to set off a kerfluffle by using some clips from the video of the Prop 8 trial to illustrate a lecture he was giving. When news spread about this, the Proposition 8 proponents loudly protested that this violated the Supreme Court's decision that the trial should not be broadcast. Judge Walker had the trial taped anyway for the use of himself and the parties preparing post-trial motions and briefs and the opinion, and took the tapes with him when he retired. The Proponents filed a motion in the 9th Circuit seeking an order requiring Walker and the plaintiffs' attorneys to surrender the tapes. Attorneys for the plaintiffs, alternatively, sought permission for public release of the tapes, and various media entities filed amicus briefs in support of their position. The 9th Circuit sent this matter to Judge Ware as well.

California — Lambda Legal and Morrison & Foerster LLP announced April 14 that they were filing an amended complaint in U.S. District Court on behalf of Karen Golinski, an employee of the 9th Circuit Court of Appeals, alleging that denial of health insurance benefits coverage for her same-sex spouse under the insurance program for Circuit employees violates the 14th Amendment. Golinski had filed a grievance with the Circuit's internal dispute procedure, and won a ruling from Chief Judge Alex Kozinski, sitting as a referee under that procedure, that the relevant laws could be construed to allow coverage for her partner, to avoid the serious constitutional questions that would be raised by a denial, but the Executive Branch's Office of Personnel Management instructed the insurance company that underwrites the policy to reject Golinski's application, and Lambda's attempt to secure enforcement of Kozinski's order from the U.S. District Court foundered on the District Judge Jeffrey White's conclusion that the court lacked authority to issue such an order. However, Judge White granted the plaintiff leave to file an amended complaint directly contesting constitutionality of the denial, which is what the new complaint in Golinski v. Office of Personnel Management does. This passage from Judge White's order dismissing the earlier complaint suggests his openness to the constitutional argument: "The parties do not dispute, and the Court finds, that the Plaintiff has a clear right to relief… The court would, if it could, address the constitutionality of both the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages or address the conflict regarding the Executive's

decision not to defend the constitutionality of a law it has determined appropriate to enforce." Judge White gave the plaintiff until April 15 to file the amended complaint. *A.S.L.*

State Civil Litigation Notes

California — The 2nd District Court of Appeal affirmed an award by Los Angeles County Superior Court Judge Amy D. Hogue of $60,400 in attorney fees to plaintiffs who had prevailed on their claim of hostile environment sexual harassment based on their sex and sexual orientation but who had been awarded only nominal damages by the jury. *Lorenzen v. Vermont Restaurant*, 2011 WL 1534538 (April 25, 2011)(not officially published). Jed and Wyatt Lorenzen were hired as waiters by defendant restaurant. They claimed to have been subjected to a hostile environment in violation of the California Fair Employment and Housing Act based on their sex and sexual orientation. Their allegations included discriminatory discharge, claims of unwanted sexual advances by two men, and that they were required to participate in a four-day training program without pay, forced to forgo statutorily mandatory meal and rest periods, and were not paid wages owed them upon discharge. The jury ruled in their favor only on the issue of harassment, and the court entered a verdict awarding nominal damages of $1,000 to each of the plaintiffs. Then the battle over attorney fees began. Plaintiffs sought $566,510; defendants countered that they should only receive fees related to the claims on which they prevailed, and also urged a substantial reduction in light of the nominal damages. Judge Hogue ultimately settled on $60,400 in light of all the circumstances. The plaintiffs appealed, contending that they should have been awarded much more. The court of appeal pointed out that California trial courts are not required to explain the basis for their fee calculations. The opinion is long and detailed, going into the mechanics of civil litigation fee calculation, ultimately affirming Judge Hogue's fee award in the amount she specified.

Maine — The Maine Human Rights Commission voted to uphold its investigator's recommendation of a finding of unlawful discrimination by Tisdale Management Company of Clinton, based on a complaint by JackieRay Mays, a transsexual who claims that the respondent company discriminated in handling her application to rent one of their apartments. According to Mays, the company delayed in mailing her an application after she viewed the a`partment, then denied having received it, and rented the unit in question to another couple who had viewed it after Mays expressed interest in renting. The investigator concluded that Mays had lost a fair opportunity to apply for the apartment and was subjected to "less favorable terms and conditions of the rental application status" due to her transgender status. The Maine Human Rights Act has forbidden sexual orientation discrimination in housing since 2005, but this reportedly the first housing discrimination case brought by a transgender plaintiff to have gotten to the level of a Commission vote, according to an April 12 article about the case in the *Kennebec Journal*.

Maine — The *Bangor Daily News* (April 21) reported that Penobscot County Superior Court Justice William Anderson rejected a motion to dismiss a discrimination claim brought by a transgender elementary school student over restroom access at Orono Elementary School. Although Justice Anderson dismissed part of the lawsuit asserting that administrators were obligated under the Maine Human Rights Act to allow a student identified as male at birth but who self-identifies as female to use the girls' bathroom rather than a staff bathroom, he said that other discrimination claims in the case on behalf of the student, who no longer attends that school, can go forward. Contending that the main issue in the case was bathroom access, the school proclaimed victory. According to the newspaper report, Justice Anderson, rejecting the claim that the student should be allowed to use the girls' bathroom, wrote: "This accommodation claim would impose upon Superintendent Clency and the various school entities defending this suit an obligation to accommodate [the child's] transgender status by allowing her to continue using the girls bathrooms consistent with her gender identity. Neither the language of the [Act], the language of the [Commission's] own internal regulations, nor prevailing case law interpreting the Civil Rights Act requires this type of accommodation." A bill is pending in the Maine legislature to amend the Act to provide that the operator of a restroom or shower facility have the authority to decide who may use which gender's restroom.

Michigan — Chris Armstrong, the openly-gay student body president at University of Michigan, filed suit in Washtenaw County Circuit Court against Andrew Shirvell, a former assistant state attorney general who allegedly stalked Armstrong and posted defamatory statements on a blog about him, as part of a campaign by Shirvell to discredit Armstrong. Shirvell was fired by the attorney general for his actions. Armstrong seeks $25,000 damages for emotional distress. The state bar's Attorney Grievance Commission is considering petitions by Armstrong and his attorney to have Shirvell disbarred, although the University police department's request to a county prosecutor to bring stalking charges against Shirvell was declined, purportedly on the ground that Shirvell was exercising protected First Amendment free speech rights. Such rights, however, do not necessarily extend to defamation with actual malice, which is the essence of Armstrong's charge against Shirvell. Armstrong v. Shirvell, Case No. 2011-369 CZ (Washtenaw Co., Filed April 1, 2011).

New Jersey — The *New Jersey Law Journal* reported on April 4 that a Hudson County Superior Court jury had found on January 25 that a gay man who was called a "faggot" by a security guard in a retail store when he refused to check his handbag while shopping as required by store policy had no claim for damages under the state's Law Against Discrimination. The factual allegations in *Lee v. C.H. Martin Inc.*, HUD-L-4941-08 (Hudson Co. Superior Ct., Velazquez, J.) were that Jesse Lee, who had shopped in the store for many years and was familiar with its policy, had failed to check his personal handbag when he went into the shore to stop. When security guard Damian Barrett demanded that he check the bag, Lee refused, saying that he had the same right to carry a personal handbag in the store as women who were not required to check their handbags. Barrett demanded Lee's compliance with store policy, stating, "Fuck you faggot. You have to check the bag," and they got into a physical confrontation. Lee left the store and flagged down a police officer, stating that he was gay and was being harassed and discriminated against by the store. The police

officer told Lee if he wanted to shop there he had to comply with their rules. Barrett, who claimed he didn't know Lee was gay until Lee told the police officer, apologized to Lee and, when Lee demanded it, put his apology in writing. Nonetheless, Lee complained to the store's management, and Barrett was discharged by the store. Lee then sued for public accommodations discrimination, seeking compensatory and punitive damages. Although his claim survived a summary judgment motion, the jury found no cause of action. He was represented at trial by Thomas L. Ferro, of Ridgewood.

New Jersey — In an unusual test of the reach of laws forbidding employment discrimination on the basis of sex or gender identity, a New Jersey man who was assigned female sex at birth and subsequently went through complete gender transition has filed suit alleging unlawful discrimination upon being denied a job that was open only to men. El'Jai Jordan Devoureau was born in Georgia, assigned female sex at birth, but identifies as male and sought medical treatment, undergoing sex reassignment surgery in 2009. He obtained a new birth certificate from Georgia indicating male gender, and new social security records and a new driver's license, reflecting his new name and male gender. On June 7, 2010, Devoureau interviewed for a job as a urine monitor with Urban Treatment Associates, a company that administers urinalysis tests as part of substance abuse treatment. The job requires observing men providing urine samples for analysis, and the employer will only hire men to do this work. Devoureau presented himself as a male applicant, accepted a job offer, and received training on June 8, 2010. However, upon reporting for work on June 9, 2010, he was told that an "unnamed person" who purported to know him personally had told somebody at the company that Devoureau was female. He insisted that he was male, but refused to answer when he was asked whether he had undergone reassignment surgery, and was discharged, never having been paid for the time he spent in training. New Jersey law protects the medical confidentiality of individuals who undergo gender reassignment. Devoureau filed suit under the New Jersey Law Against Discrimination, which bans employment discrimination based on sex and gender identity. He also pled disability discrimination, as the New Jersey statute, unlike the federal Americans with Disabilities Act, does *not* preclude a claim that discriminating against somebody because of transsexuality is disability discrimination. *Devoureau v. Camden Treatment Associates, LLC t/a Urban Treatment Associates, Inc.* is pending in Camden County Superior Court, where the complaint was filed on April 8. Stein, McGuire, Pantages & Gigl of Livingston, N.J., represents Devoureau, with Gibson, Dunn & Crutcher LLP and the Transgender Legal Defense & Education Fund, Inc., associated as counsel in the case.

New York — In a letter to the editor published in the *New York Law Journal* on April 22, attorneys Jeff S. Korek and Edward H. Gersowitz wrote to commend Supreme Court Justice Manuel J. Mendez (New York County) for allowing their client's life partner of 27 years to remain present in the courtroom during a proceeding in which a request for exclusion of non-party witnesses had been made. Normally, the spouse of a party is allowed to stay in the courtroom in these circumstances. According to the transcript of proceedings quoted in the letter, Justice Mendez stated, "It's a longstanding relationship of twenty-five [plus] years, and I don't think a quirk in the law that fails to recognize their relationship should prevent him from being next to his partner at this time." The case is *Loiacano v. National Psychological Association for Psychoanalysis Inc. and Consolidated Edison Company of New York*.

Oregon — In *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 2011 WL 1565360 (April 27, 2011), the Court of Appeals of Oregon, reversing a circuit court decision, ruled that a congregation of the Presbyterian Church that was breaking away from the national church over the issue of LGBT rights was governed by the national constitution of the church, providing that real property owned by a congregation was held in trust for Presbyterian Church (U.S.A.). Thus, the breakaway church could not retain title to the real property. A.S.L.

Criminal Litigation Notes

Indiana — Monroe County jurors convicted Michael Griffin on murder charges on April 14 in the death of Indiana University Professor Don Belton in December 2009. Griffin, a former marine, admitted killing Belton two days after they had sex. Griffin claimed that Belton had raped him on Christmas after heavy drinking at Belton's home, and that he killed him in a rage when he confronted him about the alleged sexual assault. The jury found that the killing was intentional and not committed in the heat of anger, so Griffin faces a potential sentence of between 45 and 65 years. Indystar.com, April 16.

Maryland — Two teenagers who attacked a transgender customer on April 18 in a McDonald's restaurant in Rosedale, a suburb of Baltimore, were arrested by police and may be charged with a hate crime. Chrissy Lee Polis was attacked after using the women's restroom in McDonald's, in an assault that was captured on the restaurant's security camera and soon went viral on youtube.com, leading to national attention to the case. According to her account and evidence drawn from the video, McDonald's employees aware of what was happening did nothing to intervene, and a McDonald's employee who captured the event on video and seemed to be laughing as the assault was unfolding was subsequently discharged. McDonald's released a statement promptly calling the attack "unacceptable, disturbing and troubling," an interesting word order. . . Whether Polis will seek to hold McDonald's liable for her injuries has yet to be announced.

New Jersey — A Middlesex County grand jury issued a 15-count indictment against Dharun Ravi, or Plainsboro, including a hate crime charge, involving bias intimidation, invasion of privacy, witness and evidence tampering, and other charges arising out of the suicide in September of Tyler Clementi, a Rutgers University freshman who committed suicide after learning that Ravi and another student, Molly Wei, had allegedly used a webcam to spy on Clementi as he was romantically engaged with another man in the dormroom that he shared as a roommate with Ravi.

Texas — Police in Austin, Texas, announced the arrest of Jose Alfonso Aviles, who allegedly murdered his daughter's girlfriend and the girlfriend's mother — Norma Hurtado and Maria Hurtado — because he was distraught about his 18-year-old daughter's sexual orientation. The April 19 arrest received widespread press coverage. At deadline, the Travis County District Attorney's office was still investigating the case preparatory to decid-

ing whether to categorize it as a hate crime. *Austin American-Statesman*, April 20.

Vermont — A Federal Bureau of Investigation (FBI) agent pursuing the disappearance of Lisa Miller and her daughter, Isabella Ruth Miller-Jenkins, has sworn out a federal criminal complaint against Timothy David Miller, a Tennessee evangelical Christian pastor, who is charged with aiding in the international parental kidnapping of Isabella by Lisa, who was seeking to avoid complying with first a visitation order and then a custody order on behalf of her former Vermont civil union partner, Janet Jenkins. *United States v. Timothy David Miller*, Case No. 2:11-MJ-28-1 (D. Vt., filed April 1, 2011). Isabella was conceived through donor insemination of Miller when Miller and Jenkins were living as a couple. When their relationship ended, Miller initiated a proceeding in Vermont to dissolve their civil union in that state, thus submitting herself and Isabella to the jurisdiction of the Vermont court. In that proceeding, the court awarded custody of the child to Miller with visitation rights for Jenkins. Miller, who was living with Isabella, "got religion" and renounced her homosexuality; she thwarted Jenkins' visitation, resulting in litigation in both Virginia and Vermont, culminating in conclusions by the courts of both states that the original visitation order was valid and enforceable. When Miller continued to denying Jenkins visitation, the Vermont court ordered a change of custody to Jenkins. Miller then disappeared with Isabella, her whereabouts long a mystery. Now it is alleged that Timothy David Miller assisted Lisa Miller in leaving the country and resettling with Isabella in Nicaragua, where they are allegedly living in the home of a man related to an employee of Liberty Counsel, the religious public interest law firm that has been representing Miller. The criminal complaint provides an e-mail trail linking Timothy Miller to the case, while indicating that the relationship, if any, between Timothy Miller and Lisa Miller is not known. Much more to come, certainly.… Liberty Counsel denied having any knowledge about the abduction or the flight from the jurisdiction. Mathew Staver, dean of Liberty University Law School and chairman of Liberty Counsel, claimed that the organization lost touch with Miller, and told a reporter that allegations that Liberty Counsel had anything to do with this were "absurd." *A.S.L.*

Delaware Legislature Approves Civil Union Law

The Delaware House of Representatives voted 26-15 on April 14 to approve S.B. 30, a bill previously approved by the Senate on a vote of 13-6, which will make available civil unions for same-sex partners effective January 1, 2012. The civil unions will provide the state law rights currently accorded to married couples. Governor Jack Markell, a long-time gay rights advocate in his political career, pledged that he would sign the measure "as soon as a suitable time and place are arranged." The vote came after a day of debate during which Republicans proposed a series of amendments intended to weaken the symbolic import of the bill and strengthen resistance to any eventual move by the state to allow same-sex marriages. The measure will make Delaware the eighth U.S. state to create a state law institution for same-sex couples parallel to marriage. U.S. Jurisdictions that allow same-sex marriage include Massachusetts, Connecticut, Vermont, New Hampshire, Iowa and the District of Columbia. Prior to the Delaware action, the most recent passage of a civil union bill was in Hawaii. News Journal, April 15. A.S.L.

Legislative Notes

Federal — ENDA: The latest introduction of the Employment Non-Discrimination Act (S.811/H.R.1397) took place in April. Lead sponsors in the Senate, where the bill was formally filed in the 112th Congress on April 14, are Sens. Jeff Merkley (D-Ore), Mark Kirk (R-Ill.), Tom Harkin (D-Iowa), and Susan Collins (R-Maine). The lead sponsor in the House is Rep. Barney Frank (D-Mass), who presented the bill with 120 co-sponsors on April 6. As in the 111th Congress, the current version of the bill would ban intentional employment discrimination based on sexual orientation or gender identity by employers subject to Title VII of the Civil Rights Act of 1964, although this would be stand-alone legislation rather than an amendment to Title VII. The measure prohibits preferential treatment or quotas, and prohibits retaliation for opposing discrimination on these grounds. Religious organizations and the Armed Forces are not required to comply, and the EEOC would not be allowed to collect data about the sexual orientation or gender identity of employees — a departure from the approach under other federal civil rights laws, which allow the EEOC to collect data on race or color, religion, sex, national origin, age and disability for purposes of monitoring compliance and generating information necessary to analyze disparate impact claims. Although one might at first blush think that this data collection restriction solely reflects a concern for individual privacy, it also may relate to the bill's eschewal of disparate impact claims, and disavowal of any intention to require employers to provide benefits to same-sex partners of employees. On the most contentious issues surround gender identity discrimination, the bill provides that it does not require employers to construct new or additional facilities, but does require that the employer "provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later." The measure also provides that employers can maintain reasonable dress or grooming standards during working time. Introduction in the 112th Congress is largely symbolic, since the Republican-controlled House is unlikely to give the measure a hearing or a vote, despite a small number of Republican members signing on as co-sponsors. A prior version of the bill that omitted coverage for gender identity passed the House in 2007. No version of the bill has ever passed the Senate. *BNA Daily Labor Report*, 72 DLR A-11 (April 14, 2011).

Federal — On April 14 Congressional advocates for LGBT rights introduced the newest version of the Uniting American Families Act, which would make family-based immigration rights inclusive of binational same-sex couples. It is generally expected that UAFA is unlikely to be enacted as a stand-alone measure, especially given the current balance of political control in Congress, but that its features might well be included as part of a more wide-ranging immigration reform bill. Also on April 14, a letter on behalf of 48 members of the House of Representatives went to Attorney General Eric Holder and Secretary of Homeland Security Janet Napolitano, asking that in light of the administration's

determination that Section 3 of the Defense of Marriage Act (barring recognition of same-sex marriages) is unconstitutional, the administration put "on hold" the deportation of foreign nationals who are partners of legal U.S. residents while lawsuits challenging DOMA work their way through the courts. Zoe Lofgren (D-Calif.), ranking minority member of the House Subcommittee on Immigration Policy and Enforcement, called for suspension of deportation proceedings and a temporary hold on green card adjudications. Twelve Senators had previously sent a similar letter to Holder and Napolitano. Although it had briefly looked like the administration might be following this route, ultimately the Executive Branch seems to be holding firm to the position that despite its doubts about the constitutionality of DOMA Section 3, it was bound to continue enforcing the statute until it is finally declared unconstitutional by the courts or repealed by Congress.

Arizona — Governor Jan Brewer signed into law S.B. 1188, which requires that adoption agencies give primary consideration to adoptive placement with a married man and woman, with all other criteria being equal. The bill does not ban adoptions by gay people or same-sex couples, as such. Critics of the measure pointed out that about a third of the adoptions of children in foster care in Arizona are by single people, making nonsense out of this legislative "preference." The bill goes into effect 90 days after its April 18 signing. **AZCentral.com**, April 18.

California — The California Senate approved a bill that would mandate that contributions of gays and lesbians in the state and country be included in the social studies curriculum for the public schools. The legislature approved a similar bill in 2006, but it was vetoed by Governor Schwarzenegger, who said that curricular matters should be left to local school boards, but who did not take the opportunity to propose repealing all of the subject matter mandates for the public schools in state law. The measure is widely expected to pass the legislature and to be signed into law by Governor Jerry Brown. According to a *New York Times* article about the measure published on April 16, the San Francisco and Los Angeles school districts have already implemented this on their own.

Hawaii — The legislature gave final approval on April 18 to H.B. 546/S.D. 1, which would ban discrimination on the basis of gender identity or expression in employment, housing, and public accommodations. It was widely expected that Governor Neil Abercrombie will sign it into law. Under the bill, the concept of "sex discrimination" under the existing human rights statute would be amended to include "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth." When this measure is signed into law, Hawaii will become the 13th state to ban gender identity discrimination. *BNA Daily Labor Report*, 75 DLR A-9 (April 19, 2011).

Illinois — When the recently-enacted civil union law goes into effect on June 1, will religious adoption agencies that refuse to consider same-sex couples as adoptive parents face potential liability for discriminating by refusal services to couples in civil unions? While state officials were considering whether they would consider such a refusal to be a violation of state anti-discrimination laws, some members of the legislature were pushing a bill that would exempt religious adoption agencies from complying with anti-discrimination laws. Ironically, one of the sponsors of the adoption measure was also a sponsor of the civil union law, Senator David Koehler, a former minister and the father of a lesbian daughter. Koehler said that he had promised civil union opponents that if that measure passed, he would craft an amendment that would protect faith groups from having to recognize such unions. *Chicago Tribune*, April 13. However, it was subsequently reported that the measure was rejected in a Senate committee by one vote.

Maryland — The Gender Identity Anti-Discrimination Act was sent back to committee by the Maryland Senate in a 27-20 vote on April 11, ending hopes that the measure might be enacted during 2011. The bill had passed the House in March by a vote of 86-52. *The Advocate*, April 11.

Minnesota — Now that Republicans control both houses of the state legislature, a measure to put an anti-same-sex marriage constitutional on the ballot for 2012 is underway with some chance of passage. A bill to that effect was introduced in the Senate on April 26. Prior attempts by Republicans to pass such a measure through the legislature had been blocked by the Democrats when they were in control. Although the governor, a Democrat, opposes the proposed initiative, he would not have anything to say about the matter, because the Minnesota procedure for putting proposed amendments on the ballot rests on the legislature and does not give the governor a role. The proposed amendment would be essentially identical to California Proposition 8, just substituting "Minnesota" for "California." A statute already provides that marriages between persons of the same sex are prohibited in Minnesota, but sponsors of the initiative argue that the Minnesota Supreme Court could not be counted upon to defend traditional marriage should the question come before it. (It seems to make no difference to the proponents that Minnesota's Supreme Court was the first in the nation to reject a same-sex marriage claim, in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972)). *Pioneer Press*, April 26.

Nevada — State Senate Bills 368 and 331, which would outlaw gender identity discrimination in housing and public accommodations, were approved on April 25 by votes of 13-8 and 11-10. However, Senate Bill 180, which would add gender identity and expression to the hate crimes law, was defeated 10-11, when one senator, Democrat John Lee of North Las Vegas, crossed party lines to join ten Republicans in opposition, evidently agreeing with the Republicans that the legislature should not discourage members of the public from beating up transsexuals, an old Nevada tradition. The Assembly was expected to take up 368 and 331 quickly, having voted 29-13 on April 20 in favor of Assembly Bill 211, which would add gender identity to the list of forbidden grounds of employment discrimination. *ReviewJournal.com*, April 18 & 25.

New Mexico — The Clovis, N.M., school board voted on April 26 to forbid non-academic clubs from meeting during the school day in the district's schools. Students contended that the measure was intended to prevent a gay-straight alliance from forming. The new rule was seen as a

compromise between those who wanted to ban non-curricular clubs entirely (in order to avoid having to allow a GSA to exist at the high school) and those who contended that under the federal Equal Access Act a GSA should be allowed under the existing school policies permitting any non-discriminatory club to function. Under the terms of this "compromise," a GSA can be formed but can meet only before or after regular school hours. *Albuquerque Journal*, April 27.

Rhode Island — Announcing that opposition in the state Senate would make it impossible to enact a marriage equality bill this year, openly gay Rhode Island House Speaker Gordon Fox announced that instead he would sponsor a civil union bill, since the Senate's President, Teresa Paiva Weed, who has opposed marriage quality, had announced she would support such a measure. Fox and Weed are both Democrats. *Associated Press*, April 27.

Tennessee — On April 25, the Tennessee House passed by a vote of 73-24 and sent to the Senate a bill that would override a Nashville city ordinance that prohibits discrimination on the basis of sexual orientation by city contractors. Rep. Glen Casada (R-College Grove), the sponsor of the bill, HB600, described it as necessary to assure "uniformity" for businesses statewide, which might be confused if they were required not to discriminate against gay people when doing business with Nashville but allowed to do so when dealing with other customers. This would be too complicated for simple-minded Tennessee government contracts to comprehend, evidently. *Knoxville News-Sentinel*, April 26. The Nashville City Council passed the ordinance on April 5 by a vote of 21-15. It requires companies doing business with the city to sign affidavits promising not to discriminate on the basis of sexual orientation or gender identity. *Tennessean.com*, April 6. * * * On April 20, the Tennessee Senate Education Committee voted to approve SB 49, proposed by Sen. Stacey Campfield, a Knoxville Republican, that would prohibit public school teachers from discussing homosexuality in kindergarten through eighth-grade classrooms after a study by the state Board of Education to determine whether such activities are taking place. This measure was nicknamed the "don't say gay" bill. *Knoxville News-Sentinel*, April 21. We're trying to figure out how this will work in practice. Perhaps, if puzzled students have questions about homosexuality based on what they've seen in the movies, on TV, or on-line, and pose their questions to their classroom teachers, the teachers are supposed to respond: "My lips are sealed. Call up Senator Campfield, who can answer all your questions."

Texas — Dallas County commissioners voted on April 26 to amend the county's antidiscrimination policy to add "transgender, gender identity and gender expression" to the list of forbidden grounds for discrimination by the county. The commissioners had previously voted on March 22 to add "sexual orientation" to the list, and were immediately met by questions about why they had not also included transgender protection. The vote was 3-2 along party lines. We leave it to readers to guess which party supported which position, just to inject a little suspense and mystery into the news. *Dallas News*, April 26.

Texas — The Texas House of Representatives has approved an amendment to a budget bill that would require any public collece that maintains a student center on "alternative sexuality" to also provide equal funding for a new student center to promote "traditional values." The vote in favor of adding the amendment to the bill was 110-24. A center on "alternative sexuality" is defined as a center "for students focused on gay, lesbian, homosexual, bisexual, pansexual, transsexual, transgender, gender questioning, or other gender identity issues." Young Conservatives of Texas, which worked with the measure's sponsor, Rep. Wayne Christian, to garner support, expressed their hope that schools would response to the measure by defunding the "alternative sexuality" centers, or by cutting their funding in half in order to provide funding for "traditional values" centers without increasing their overall spending. A derisive column about the amendment was published in The Texas Observer, beginning: "Imagine the plight of the heterosexual student stepping on to a college campus for the first time. How will he fit in? Should he tell his new roommate about his alternative hetero lifestyle? Will he be bullied, just like he was in high school, where he was mercilessly teased for being a sexual deviant? Where does a straight person turn?" *InsideHigherEd.com*, April 25.

Virginia — The State Board of Social Services voted on April 20 to strip out anti-discrimination provisions from proposed standards for private foster care and adoption agencies. Under the original proposals, such agencies would not be allowed to discriminate in their placement activities based on an extensive list of forbidden grounds, including sexual orientation. Attorney General Ken Cuccinelli, a dedicated anti-gay activist, advised the Board that it lacked authority to include grounds that were not covered by federal or state law. Since neither the federal government nor the state of Virginia forbids sexual orientation discrimination, the board heeded Cuccinelli's admonition and removed the anti-discrimination language before approving the- standards. Pressure to remove the anti-discrimination language was also brought on behalf of numerous faith-based agencies in the state that were concerned they would be required to consign to hell the souls of orphans who might have to be placed with gay foster or adoptive parents, including — heavens — couples! They were also concerned that the anti-discrimination provisions might interfere with their policies of discriminating based on religion in making placements, as the faith-based agencies preferred to place children with adults of the same religious persuasion. *Associated Press Report* (with our editorial emendations).

Washington — Reacting to reports that Evergreen State College had offered a queer studies curriculum and sponsored a "porn week," an organization called Time to Clean House has filed a proposed initiative measure with the secretary of state, No. 1146, that would close down Evergreen State College. If the measure is placed on the ballot and passed, the school would be required to cease operating as a state college at the end of the 2011-12 academic year, and to make sure that it could not be continued under another name, the initiate requires that all of the school's "assets" be sold. The measure would also repeal all references to the college in state laws, including, of course, any that would authorize or recognize its existence or provide funding for it. The introductory section of the Initiative explains its rationale: "Taxpayers are supportive of liberal art studies; however, they will no longer tolerate that a state-funded institution hosted a porn week and has a history of bizarre behavior such as a course curriculum in queer studies. As a result, taxpayers are of the opinion that the

board of trustees and the governor use The Evergreen State College for the purpose of nurturing political support from the extreme left at the expense of taxpayer dollars." *A.S.L.*

Law & Society Notes

Transgender Rights — On April 27 the White House Office of Public Engagement hosted a meeting with transgender rights activists, said to be the first time that such a meeting solely devoted to transgender issues was held by White House officials. Although some transgender rights advocates have been included in wider-ranging meetings devoted to LGBT issues, this focused attention to trans issues was said to be a first for any presidential administration. (Historical note: The first White House meeting with advocates devoted to lesbian and gay issues was convened by presidential assistant Midge Costanza early in the administration of Jimmy Carter, in the late 1970s.)

ROTC — Some major universities that have long excluded the Defense Department's Reserve Officer Training Corps (ROTC) from conducting programs on their campuses have been reconsidering the exclusion in light of the passage in December 2010 of the Don't Ask Don't Tell Repeal Act, which is expected to go into effect before the end of 2011. Although some such exclusionary policies date back to the Vietnam War era and were premised on opposition to the war, the continuing exclusion has been largely based on military policies in conflict with university non-discrimination policies that cover sexual orientation. Harvard and Columbia are among major universities that are expected to welcome ROTC back, perhaps as early as the coming academic year. At Stanford, a faculty vote became contentious because the university's non-discrimination policy encompasses gender identity, and the implementation of the DADT Repeal Act will not end the military's rules against service by transgender people. Some student and faculty advocates mounted a campaign to reject ROTC over this issue, but the Faculty Senate approved the proposal to reinstate ROTC by a vote of 28-9 with three abstentions after what was described as "an emotional two-hour debate." *Los Angeles Times*, April 29. The transgender exclusion is not statutory, but rather is included in regulations adopted by the Defense Department covering medical grounds for deferral of service. Thus, it could be changed unilaterally by the Defense Department and would not require Congressional action. We have noted news reports that the Australian military accepts transgender personnel, and has even paid for gender reassignment treatment.

Sexual Minorities in ICE Detention Centers — The Heartland Alliance National Immigrant Justice Center filed complaints on April 13 with the Department of Homeland Security alleging mistreatment of sexual minorities being detained in Immigration & Customs Enforcement (ICE) facilities pending removal proceedings. Advocates for sexual minorities noted the problems that DHS has had in protecting vulnerable individuals in custody from abuse, and urged that some alternative method be found for dealing with those subject to deportation. The DHS Office for Civil Rights and Civil Liberties acknowledged the filings and promised a prompt investigation. *Legal Times Blog*, April 13.

Conjugal Visits for Gay Prisoners — The *New York Daily News* reported on April 23 that New York State Department of Corrections has belatedly responded to former governor David Paterson's mandate to state agencies about recognition of same-sex marriages by adopting a new policy of recognizing same-sex marriages, civil unions or equivalent domestic partnerships legally contracted in other jurisdictions for eligibility to participate in prisoner conjugal visit programs. Directive No. 4500 of the Department of Corrections, issued April 21, 2011, added the following statement to the eligibility requirements for participation in what is officially called the "family reunion" program: "In addition, for purposes of this directive the term "spouse" shall also include a person who is the same sex as the inmate if the same-sex marriage or civil union was performed in an outside jurisdiction that recognizes such marriages or civil unions. Counsel's Office may be consulted to determine whether the outside jurisdiction does authorize same-sex marriages or civil unions." According to the *Daily News* report, 20 of the state's 67 correctional facilities currently have family reunion programs. A spokesperson for DOC told the news that he was unaware that any prisoner had yet requested a family reunion with a same-sex spouse.

Prison Housing — The *Windy City Times* reported April 6 that Cook County (Chicago, Illinois) Sheriff Tom Dart had announced a new policy, effective March 21, under which transgender detainees would be house based on their gender identity, rather than their sex as assigned at birth. The policy was thought to be the first of its kind in the United States. The policy provides that transgender detainees may consult with the Gender Identity Panel of physicians and therapists before being placed into male or female housing. Correctional staff are directed to allow inmates to dress consistent with their gender identity, and provides sensitivity training for correctional staff on transgender issues. *A.S.L.*

International Notes

Australia — The Honorable Michael Kirby, retired from Australia's High Court, the first openly-gay lawyer to serve on the highest court of any nation, is now the subject of a biography by A.J. Brown, published by Federation Press in Sydney late last year. The book was the subject of a lengthy review in the *Canberra Times* by Editor-at-Large Jack Waterford, published on April 16. Waterford describes the book as somewhat of an "authorized biography" because Justice Kirby gave the author access to his papers and is participating in publicizing the book, but Waterford writes that it is not a hagiography and manages to take a sometimes critical stance towards its subject. Justice Kirby is a long-time human rights advocate, and has written and lectured extensively on LGBT rights.

Austria — Rechtskomitee LAMBDA (RKL), the Austrian gay rights organization, reports success in getting the Supreme Court to apply for a ruling by the Constitutional Court to overturn a statutory ban on the use of donor insemination by lesbian couples. When Austria established registered partnerships for same-sex couples, effective January 1, 2010, it included in the law a provision banning medically-assisted procreation for lesbian couples, even though same-sex couples have a right to adopt in Austria. Christina Buaer, an Austrian citizen, and Daniela Bauer, a German citizen, became registered partners in Germany in 2008 and then moved to the Austrian city of Wels. Christina wants to have a child through donor insemination

with the agreement of Daniela, but under the statute doing so could subject them to criminal prosecution, with potential punishment of a fine and a short prison sentence. They have sued in both the regular courts and the constitutional court. In the regular courts, the claim is that the restriction violates the European Convention on Human Rights, and in the Constitutional Court that it violates individual rights guaranteed in the Austrian Constitution. The Supreme Court, rejecting the view of the District Court and the Regional Court of Wels, agreed with the applicants, finding that the right to conceive a child and make use of medically assisted procreation for that purpose are protected by Article 8 of the Convention. At the national level, however, only the Constitutional Court has authority to declare the statute unenforceable. If it does so, there will be no need to bring the matter to the European Court of Human Rights. The ruling by the Supreme Court was issued March 22 in OGH 22.03.2011, 3 Ob 147/10d. (Austrian cases do not cite the names of parties, referring to cases only by docket numbers, according to our source, Dr. Helmut Graupner of RKL.)

Canada — The Assembly of Catholic Bishops of Ontario and the Ontario Catholic School Trustees' Association has issued a memorandum to Catholic high schools in Ontario indicating that students will be allowed to form groups that address "bullying related to sexual orientation." While continuing to oppose allowing students to form Gay-Straight Alliances, the Catholic leaders have reportedly bowed to pressure from gay students to allow the formation of clubs to help students who are bullied because they are gay. *Brampton Guardian*, April 28. It is not entirely clear what distinction is being drawn here. Presumably, the clubs will not be able to advocate that homosexuality is "normal," but will be able to advocate that bullying gay students is "wrong." As usual, the church likes to split hairs in its dealing with gay issues.

China — The *New York Times* reported on April 5 that more than sixty employees and patrons at a gay bar in Shanghai were arrested in a police raid early on April 4 and were held for more than 12 hours by police. The local press reported that police were investigating reports that a male go-go dancer in the club had presented a "pornographic" show. Some of the patrons claim that they were pressured to sign statements that were untrue about what was going on in the club, known as Q Bar.

Germany — The government ordered the expulsion from Germany of a visiting Islamic preacher, Bilal Philips, after he gave an open-air address in Frankfurt stating that homosexuals should be condemned to death. Immigration authorities instructed the Jamaican, a 60-year-old Islamic convert, to leave Germany within three days, asserting that his statements violated German law, which provides for the expulsion of visitors who "incite hatred against parts of the population" or advocate the use of violence against particular groups. Philips advocated the death penalty against homosexuals on the ground that homosexuality was "evil and dangerous to society," according to an article posted on his website. *Deutsche Welle*, April 21.

Hungary — A new draft constitution to replace Hungary's communist-era constitution has been criticized for failing to include sexual orientation or gender identity as specified prohibited grounds for discrimination, for including a definition of marriage limited to the union of a man and a woman, and for protecting "human life" from conception, thus effectively banning abortion, showing Hungary to be out of step with newer trends on the European continent. Nonetheless, the president of the country, Pal Schmitt, signed it into law on April 25. Amnesty International criticized the new constitution as being insufficiently protective of human rights and violating international and European human rights standards. *Deutsche Welle*, April 25.

India — Several parties filed appeals from the historic decision by the Delhi High Court holding unconstitutional India's criminal sodomy law. A hearing had been scheduled by the Supreme Court for April 20, but the bench announced on that date that the matter was being adjourned without specifying a date for the next hearing, saying only that the matter would be taken up again after the court's summer vacation. In the meantime, the High Court's order barring enforcement of the sodomy law, derived from British colonial criminal law, remains in effect. *Daily Pak Banker*, April 20.

Ireland — The Irish High Court granted an annulment of a marriage to the wife of a transsexual, finding her marriage should be treated as void where her former spouse had failed to disclose his transsexuality prior to the marriage and she would not have consented to marry had she known about it. The judgment in *B. (formerly known as M.) v. L.*, (2009) IEHC 623, delivered by Mr. Justice Henry Abbott on July 17, 2009, was summarized on April 4, 2011, in the Irish Times. M. and L. married in 1978. The couple separated in 1993, but M. did not initiate divorce proceedings until 2005, after having undergone sex reassignment treatment. L.'s defense in the divorce proceeding was to seek a declaration of nullity on grounds of inability to enter and sustain a marriage. The court found that as the husband had hidden the true nature of his sexual identity from his wife, "there was a lack of consent on the part of the petitioner wife because of the presence of gynephilic transvestism which was present throughout the marriage but was concealed before and after by the husband. The lack of consent rendered the marriage void rather than voidable." The court found that the wife "lacked capacity to enter into and sustain a marriage to a person in the husband's condition; to this extent the parties lacked the capacity to sustain a marriage with each other, and the wife did not give a full, free and informed consent to her purported marriage." The newspaper provided no explanation as to why it was reporting in April 2011 about a judgment rendered in 2009.

Ireland — The Equality Tribunal has awarded 35,000 euros to Louise Hannon, a transgender woman from Dublin, whose employer ordered her to dress as a man for client meetings, to avoid using the women's restroom, and to work at home because her presence at the office "created a bad atmosphere." Angela Kerins, chair of the Equality Tribunal, made a statement in connection with the decision: "Transsexual people are born into a society which is not structured to cater for their own identity. The journey undertaken by transsuxal people to recognize their own identity, as being different from their assigned identity, involves a process and decision-making that is both courageous and beyond the capacity of many to fully appreciate." *Advocate.com, quoting Independent.ie*, April 22.

Japan — For the first time in Japan, an openly gay candidate has won political office. *The Japan Times* reported on April 26 that Taiga Ishikawa, a 36-year-old writer and activist, won a seat on the Toshima Ward Assembly in Tokyo in an election

held on April 24. Ishikawa is the former secretary to Social Democratic Party leader Mizuho Fukushima. He published a "coming out" book, "Where Is My Boyfriend?" in 2002, and in 2004 started a non-profit group to provide a meeting place for gay people. Reacting to his election, he stated, "I hope this news will give hope to lesbian, gay, bisexual and transgender people who still feel isolated from the society. I will do my best to make Toshima Ward more friendly to LGBT people, young people and foreigners."

Russia — Nikolay Alexeyev, organizer of gay pride activities in Moscow, announced that Moscow authorities have informed the parade organizers that they have permission to hold a gay pride event in Moscow on May 28. The rally, entitled "Moscow Gay Pride Parade: Homosexuality in the History of World Culture and Civilization," is authorized for an attendance of up to 500 people. Such events had been banned by the administration of former Mayor Yury Luzhkov, who was recently removed from office by the President of the Russian Federation. *Interfax-religion.com*, April 26.

Scotland — An Employment Tribunal in Glasgow awarded 10,000 UK pounds in damages to Tracey West, a former police officer, finding that she had been subjected to homophobic harassment by Sergeant Michael Service over a period of six months. West claimed the harassment was so severe that she had to quit her job and ultimately moved to Australia. Service, who has since left the police force, claimed that West made up her claims in order to collect damages to defray her costs of moving to Australia, but the Tribunal found her more credible. The damages were divided, 7500 being assessed personally against Service and 2500 being assessed against the Galloway police force. *Glasgow Daily Record*, April 5.

Spain — The battle is on over access to fertility treatment for lesbians seeking to have children in Spain. Silvia Garcia, who went to a hospital seeking assistance in becoming pregnant through donor insemination, was turned away, told that they had orders from the Asturias Regional Health Department "not to accept lesbians or single women." Catalonia and Murcia also reportedly exclude lesbians from fertility programs. The Asturias government takes the position that these programs are for people who have clinical problems, not for health people who refuse to become pregnant the old fashion way. On the other hand, the Health Minister, Leire Pajin, said that the national health system should not discriminate against anybody based on sexual preferences. *El Pais* (English edition), April 27.

Uganda — Contrary to an Associated Press story that received some play late in April, David Bahati, the moving force behind the draconian anti-gay criminal bill pending in the Ugandan Parliament, was not planning to remove the death penalty from the bill in hopes of making it more palatable for legislators, according to several late-April on-line reports, mostly notably one on the website Box Turtle Bulletin (April 26). Some speculated that putting out the story about reducing penalties under the bill was a ruse by Bahati to secure legislative hearings, which have been stalled due to international protests. Even if the death penalty were removed, the alternative would be life imprisonment in a Ugandan prison for engaging in consensual gay sex — broadly defined. The deadline for passage in this session of the Parliament would be May 12, so the first few weeks in May are a critical time. Bahati stated with confidence that if he could get the matter put to a vote, the bill would pass.

United Kingdom — The Leeds-based Catholic adoption agency, Catholic Care, which sought an exemption from laws banning discrimination based on sexual orientation, lost its battle before the Charity Tribunal. *The Guardian* (April 27) reported that on April 26 the Tribunal affirmed a prior decision by the Charity Commission, holding that the agency was not entitled to a religious exemption from the 2007 Sexual Orientation Regulations, and will be required to considers gay and lesbian couples on an equal basis with non-gay couples as prospective parents.

Uruguay — Rex Wockner's International News email letter reported April 11 that gay rights activists in Uruguay, inspired by legalization of same-sex marriage in Argentina last year, have had a similar bill introduced in their country's Parliament by a member of the ruling Frente Amplio coalition, Deputy Sebastian Sabini of the People's Participation Movement party. An April 10 report from an on-line Australian source, starobserver.com.au, indicated that the measure was expected to come to a vote in the Chamber of Deputies in the next few months, and in the Senate before the end of the year. Uruguay decriminalized gay sex in 1934, long before most western countries, and was the first county in South America to legislate civil unions for same-sex couples, in 2007. *A.S.L.*

Professional Notes

Massachusetts Governor Deval Patrick has nominated Associate Justice **Barbara A. Lenk** of the Massachusetts Appeals Court to a seat on the Supreme Judicial Court. Lenk married her same-sex partner after the Supreme Judicial Court ordered marriage equality in the state, and would be the first openly gay justice on the state's highest court. A native of New York, Lenk earned a PhD in political philosophy from Yale and a JD from Harvard. She is known as a specialist in civil litigation and First Amendment issues.

ACLU of Southern California LGBT rights staff attorney **Christine Sun** has resigned to become Deputy Legal Director at the Southern Poverty Law Center in Montgomery, Alabama.

Lambda Legal has announced that staff attorney **Camilla Taylor** will be the new director of the organization's Marriage Project. Taylor was lead counsel for Lambda in *Varnum v. Brien*, in which the Iowa Supreme Court ruled unanimously in favor of same-sex marriage rights under the state constitution. She was previously employed as a staff attorney at the Criminal Appeals Bureau of the Legal Aid Society of New York, and prior to that an associate with Shearman & Sterling. Taylor earned her B.A. from Yale and her J.D. from Columbia. She replaces **Jennifer C. Pizer**, who recently resigned as Lambda Legal's Marriage Project Director to become the Legal Director for the Williams Institute at UCLA Law School, an LGBT rights think-tank.

Lambda Legal has announced the hiring of **Ivàn Espinoza-Madrigal** as a staff attorney in its national headquarters office in New York. Madrigal comes to Lambda from the Mexican American Legal Defense and Education Fund in San Antonio, where he focused on constitutional rights of immigrants. For Lambda, he will be developing an initiative on behalf of LGBT people of color, LGBT immigrants, and low-income LGBT communities. Before working at MALDEF he was a litigation

associate at Fried, Frank, Harris, Shriver & Jacobson LLP. Madrigal graduated from NYU Law School and clerked for Judge Eric Clay (U.S. Court of Appeals, 6th Circuit) and Judge Ronald Ellis (U.S. District Court, S.D.N.Y.).

On April 7, the U.S. Senate Judiciary Committee unanimously endorsed President Obama's nomination of **J. Paul Oetken**, a senior V.P. and Associate General Counsel at Cablevision, to a seat on the U.S. District Court for the Southern District of New York. Oetken is one of the president's handful of openly-gay judicial nominees. *A.S.L.*

HIV/AIDS Legal Notes

NY Court Finds Longer of Two Statutes of Limitations Applies to HIV-Confidentiality Law Suit Against City Hospital Corporation

Ruling on a question of first impression, New York State Supreme Court Justice Lawrence Knipel rejected a motion to dismiss as time-barred an action filed against the New York City Health and Hospitals Corporation (HHC) for an HHC employee's breach of the state's HIV confidentiality law, Public Health Law Article 27-F, finding that a damage claim founded on such a violation did not fall within the scope of the shortened statutory notice and filing requirements applicable to personal injury claims against HHC. *Doe v. Belmare*, 15908/10, NYLJ 1202490617574, at *1 (N.Y.Sup.Ct., Kings Co., March 31, 2011). The ruling was reported in the New York Law Journal on April 20, 2011.

According to Justice Knipel's opinion, the "Jane Doe" plaintiff was admitted to Kings County Hospital for treatment of a stomach ulcer and phoned several people to let them know about the admission, including her former boyfriend, Joseph Belmare. Two days later, Belmare's mother, an HHC employee, visited the plaintiff in the hospital, asked for her last name, and used that information to access her hospital medical records, which contained the information that plaintiff was HIV+. The opinion does not indicate whether plaintiff knew about her HIV status prior to her hospitalization, but implies that in any event she had not herself previously disclosed this information to Joseph or his mother. Mrs. Belmare allegedly disclosed the information to Joseph. Plaintiff claims that as a result of this disclosure, she was "harassed and threatened by Joseph and his friends," leading her to obtain an order of protection against Joseph. Further, as a result of this unauthorized disclosure, plaintiff "claims to have lost friends, suffered threats and menacing behavior, and suffered emotional harm and mental anguish."

The plaintiff filed this Jane Doe lawsuit on June 25, 2010, just within three years after the date of the alleged wrongful disclosure of her HIV status, asserting a violation of Article 27-F and its implementing regulations, and alternatively claiming a breach of fiduciary duty by the hospital and HHC by revealing her confidential HIV status to Joseph. An essential element of the claim is that Mrs. Belmare's actions are attributable to HHC under the theory of *respondeat superior*, by which an employer is made to answer for acts committed by employees within the scope of their employment.

The hospital moved to dismiss on the ground that as a unit of HHC it was not amenable to suit as a distinct entity. Doe agreed to dismissal on that ground, leaving Mrs. Belmare and HHC as codefendants.

HHC moved to dismiss, arguing that Mrs. Belmare was acting in her individual capacity and not as an HHC employee when she disclosed the information to her son, so the claim founded on *respondeat superior* should be dismissed as a matter of law on that basis. Doe argued that there was strict liability for violation of 27-F, regardless of how the information got out of the hospital's records to an unauthorized person, and also that she should have an opportunity to conduct discovery in support of the *respondeat superior* theory. Justice Knipel found that this motion should not be decided prior to discovery; in essence, application of *respondeat superior* may turn on disputed facts.

Most significantly, however, HHC has also moved to dismiss on grounds of the statute of limitations. Characterizing Doe's claim as essentially a personal injury tort claim, HHC argued that under NY Unconsolidated Laws Section 7401, personal injury claims against HHC are subject to a relatively short notice of claim requirement, and an abbreviated statute of limitations of one year plus 90 days. Doe had never filed a notice of claim, and sued almost three years after her claim accrued. Doe argued that her claim against HHC was not a common law personal injury tort claim, but rather was based on a statute, PHL Article 27-F, and should be analogized to civil rights claims filed against HHC under the State Human Rights Law, which are not subject to the Section 7401 requirements.

The court sided with Jane Doe on this point. "Public Health Law Article 27-F was enacted upon the recognition that 'maximum confidentiality protection' for HIV related information was 'an essential public health measure" and that 'strong confidentiality protections can limit the risk of discrimination and the harm to an individual's interest in privacy.' It provides that any person who discloses confidential HIV related information in violation of section 2782 shall be subjected to a civil penalty, and that any person who willfully does so shall be guilty of a misdemeanor. These are characteristics of a claim based on a statute, akin to a claim pursuant to the Executive Law for discrimination, and not a standard claim for personal injury. It is apparent to this court that Public Health Law Article 27-F was enacted to protect a vulnerable class of individuals and in this regard, is dissimilar to a standard personal injury action to which Unconsolidated Laws section 7401 applies. Thus, the requirement of the Unconsolidated Laws for service of a notice of claim within a shortened statute of limitations does not apply to this action."

In effect, suing based on the statute vindicates a public policy concerning protection of the confidentiality of HIV-related information, because of the discrimination and that might flow from unauthorized disclosure (as allegedly occurred in this case), and is thus not merely a personal injury claim.

Jane Doe is represented by Suzanne Skinner, an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP. HHC is represented by Toni Gantz, Assistant Corporation Counsel from the City Law Department. *A.S.L.*

HIV/AIDS Litigation Notes

California — In a complicated case involving construction of the Full Faith and Credit Clause, Art. IV, Sec. 1 of the U.S.

Constitution, the California 2nd District Court of Appeal affirmed a decision by Los Angeles Superior Court Judge John A. Kronstadt dismissing a suit by HIV+ California domestic partners against their health insurer for breach of contract and related claims, due to full faith and credit owed to a prior Missouri decision in a declaratory judgment action brought by the insurer. *R.S. v. Pacificare Life and Health Insurance Co.*, 2011 WL 1367039 (April 12, 2011). The case is factually and procedurally complex and would merit lengthier treatment if this were a newsletter about full faith and credit and its application in commercial litigation. Briefly stated, the plaintiffs bought health insurance policies from the defendant, a Missouri corporation, in 2004, disclosing in their applications that they were HIV+. After they had submitted claims, the defendant, realizing its "mistake" in issuing the policies, stopped paying benefits and, in June 2008, filed a declaratory relief action in Missouri state court, seeking rescission of the policies, claiming as grounds misrepresentation of state residency, fraudulent submission of multiple claims, and misrepresentation about the existence of other insurance coverage. While that case was pending, plaintiffs filed a counterclaim for breach of contract, and obtained a preliminary injunction ordering the insurer to resume paying on their claims, retroactively and prospectively. Plaintiffs claim that defendants refused to resume making the payments. In June 2009, plaintiffs voluntarily dismissed their counterclaim and filed an action in California state court on claims that the insurer's failure to pay benefits had damages plaintiffs' health because they could not afford to pay for medication and health care, asserting legal claims of breach of contract, breach of implied covenant of good faith and fair dealing, and unfair business practices. The insurers got the California action stayed while the Missouri action was pending. In February 2010, the Missouri court entered judgment for plaintiffs, rejecting every argument by the insurer in support of rescission and ordered payment on all valid claims past, present and future. Then the California court lifted the stay, and the insurer moved to dismiss, citing the full faith and credit clause and a Missouri statute mandating the assertion of all counterclaims that a respondent might have in a declaratory judgment action. The California trial court granted the motion, and was affirmed in this ruling by the Court of Appeal. The court rejected appellants' argument that the court's full faith and credit obligation extended only to the substance of the Missouri court's ruling, finding that it was obligated to give that ruling the effect it would have under Missouri law, which included precluding any counterclaims that were required to have been presented and resolved as part of the case. The opinion by Acting Presiding Judge Rubin is lengthy and detailed, and would make interesting reading for scholars of the full faith and credit clause.

New Jersey — The Appellate Division ruled on April 13 that the Civil Service Commission had improperly ordered the reinstatement of an HIV+ corrections officer who had tested positive in a drug screening. In the Matter of R.J., Department of Corrections, 2011 WL 1376313 (unpublished). R.J. began working as a corrections officer for the state in 1988. He was diagnosed as HIV+ in 2003, and takes a mix of medications several times a day. "Those medications," wrote the court, "along with his illness, negatively affect his immune system, making him susceptible to respiratory infections and bronchitis that require him to take additional medications." On February 17, 2006, he was selected for a random drug screen pursuant to department policy, and tested positive for cocaine and negative for all other tested substances including opiates. Before testing, he had completed a form listing some of the medications he was taking. (He was taking so many that there was not room on the form to list them all.) After a confirmatory test also showed positive for cocaine, Department of Corrections moved to dismiss him. He submitted a letter from his physician, who suggested a specimen mix-up might have occurred, as R.J. denied using cocaine. DOC did not do further testing, preferring to rest on the results it had obtained. The case then turned into a battle of "experts," although, according to the court, R.J.'s medical testimony did not come from individuals with relevant expertise, and the state's experts persuasively showed that the positive result could not have been due to the prescription medications R.J. was taking. The ALJ found that DOC erred in not obtained a complete list of R.J.'s medications prior to administering the drug screen, thus making the result flawed, and the Commission adopted the ALJ's findings, relying on letters submitted by R.J.'s doctors. The court found that there was "no residuum of legal and competent evidence in the record supporting the hearsay conclusions" in the letters from R.J.'s doctor, and thus "it was error for the ALJ to have made factual findings based on those hearsay letters," and that both the judge and the Commission had improperly relied on testimony from a doctor without relevant expertise. "There is no scientific evidence whatsoever that R.J.'s medications, either individually or in combination, could have affected the test results in any way or produced a false positive for cocaine," wrote the court, finding irrelevant that the medical review officer did not obtain a complete list of R.J.'s medications before administering the test, since there was no evidence any of those medications would produce a false positive for cocaine. Consequently, the evidence on the record showed that "R.J. tested positive for cocaine because he ingested it."

New York — Housing Works reported that U.S. Magistrate Judge Cheryl Pollak announced at an April 27 hearing on compliance with the continuing court order in *Henrietta D. v. Bloomberg*, 246 F.3d 176 (2d.Cir. 2001), order on remand, 2001 WL 1602114 (U.S. Dist. Ct., E.D.N.Y., Dec. 11, 2001), that cuts in staffing for New York City's HIV/AIDS Services Administration (HASA) that had been announced by New York City may not be implemented. In *Henrietta D.*, the court mandated a staffing level for HIV/AIDS services of at least one case manager for every 34 agency clients. The proposed cuts announced by the Bloomberg Administration would have required the layoff of 254 case managers, seriously inflating the client-to-case- manager ratio above the level mandated by the court and violating Local Law 49. Housing Works reports that the agency currently serves approximately 45,000 individuals, all of whom are either low-income persons living with HIV or dependents of those living with HIV. The proceeding before Judge Pollak was initiated by an application for a temporary restraining order filed by Housing Works and co-counsel Matthew Brinckerhoff, the HIV Law Project, and attorney Virginia Shubert. According to the press release issued by Housing Works, Mayor Bloomberg attempted to cut the agency's staff by one-third last year as a budgetary measure, but backed down after a similar motion was filed with Judge

Pollak. The judge told city attorneys at the April 27 hearing that if they do not provide evidence to show that staffing will be maintained within 30 days, she will issue an enforcement order that would subject the City to contempt charges if it did not comply.

Australia — The Adelaide Magistrate's Court sentenced Stuart McDonald to six years in jail for lying about his HIV+ status to several sexual partners who seroconverted after having unprotected sex with him. McDonald told a reporter that he thought it was unfair to require an HIV+ person to disclose his status. "Once you get tested, you go on a register and then you can't have unprotected sex with anyone anymore," he complained to reporter Sean Fewster in a conversation on the courthouse steps just prior to his trial. *The Advertiser* (April 9). "It's awful, not being able to have unprotected sex — sex with condoms really isn't good," he insisted, rejecting the idea that a person who knows he is HIV+ has a duty to the community to avoid spreading the virus. McDonald insisted that thousands of gay men in Adelaide were infected with HIV, having been tested out-of-state so they would not be on the local register and could continue having unprotected sex in Adelaide. *A.S.L.*

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Position Available — The ACLU Foundation LGBT & AIDS Project in New York has a staff attorney position available in the New York office. The position involves constitutional and statutory litigation and policy work on LGBT and HIV-related issues nationwide. Federal litigation experience is preferred, as well as familiarity with LGBT rights and HIV/AIDS and other civil liberties issues. Full details are available on the Project's website. Interested persons should submit a cover letter, resume, legal writing sample, three references, and a law school transcript by email to hrjobs@aclu.org — Reference [LGT-14] in the subject line, or by surface mail to: Human Resources, ACLU Re: [LGBT-03], 125 Broad Street, 18th Floor, NY NY 10014. Applications will be accepted until the position is filled, which will not be before May 11, 2011. Please indicate in your cover letter how you learned of the job opening.

LGBT & RELATED ISSUES

Bhagwat, Ashutosh, *Associations and Forums: Situating* CLS v. Martinez, 38 Hastings Const. L. Q. 543 (Spring 2011).

Blain, Simon, and Anna Worwood, *Alternative Families and Changing Perceptions of Parenthood*, 41 Fam. L. 289 (UK) (March 2011).

Bodensteiner, Ivan E., *Congress Needs to Repair the Court's Damage to § 1983*, 16 Tex. J. on C.L. & C.R. 29 (Fall 2010).

Brennan, Carey, Perry v. Schwarzenegger*: A Large Step in the Direction of Marriage Equality in California*, 20 L. & Sexuality 121 (2011).

Brownstein, Alan, and Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 Hastings Const. L. Q. 505 (Spring 2011).

Cahill, Courtney Megan, *Disgust and the Problematic Politics of Similarity* (Review essay), 109 Mich. L. Rev. 943 (April 2011) (review of *From Disgust to Humanity: Sexual Orientation & Constitutional Law*, by Martha C. Nussbaum).

Calo, M. Ryan, *The Boundaries of Privacy Harm*, 86 Ind. L.J. 1131 (Summer 2011).

Camp, Max V., O'Donnabhain v. Commissioner*: Treatment Costs for Gender Identity Disorder Are Tax-Deductible Medical Expenses*, 20 L. & Sexuality 133 (2011).

Capers, I. Bennett, *Home is Where the Crime Is* (Book Review), 109 Mich. L. Rev. 979 (April 2011) (review of *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy*, by Jeannie Suk).

Connolly, Catherine, *Gay Rights in Wyoming: A Review of Federal and State Law*, 11 Wyoming L. Rev. 125 (2011).

Cruz, David B., *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 Harv. Civ. Rts. — Civ. Lib. L. Rev. 51 (Winter 2011).

Driver, Justin, *The Consensus Constitution*, 89 Tex. L. Rev. 755 (March 2011) (contests the conventional wisdom that the Supreme Court doesn't wait for a popular consensus to form before marking out new constitutional ground, using *Loving v. Virginia* and *Brown v. Board of Education* as examples, and suggests that same-sex marriage litigation aimed at the Supreme Court is not premature).

Emens, Elizabeth F., *Regulatory Fictions: On Marriage and Countermarriage*, 99 Cal. L. Rev. 235 (February 2011).

Ericsson, Kate, Book Review, *From Disgust to Humanity: Sexual Orientation and Constitutional Law by Martha C. Nussbaum*, 26 Berkeley J. Gender L. & Just. 179 (Winter 2011).

Eskridge, William N., Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (Spring 2011).

Goldman, Lee, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395 (April 2011).

Goldstein, Tom, and Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making* (Book Review), 109 Mich. L. Rev. 963 (April 2011) (review of *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, by Barry Friedman).

Green, Sonia Bychkov, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. Pa. J. L. & Soc. Change 53 (2011).

Harrington, Peter J., *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. Civ. Rts. & Econ. Dev 323 (Winter 2011).

Houlihan, Annette, *When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent and Sadomasochism Case Law*, 20 L. & Sexuality 31 (2011).

Huffman, M. Blake, *North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statute Post*-Lawrence v. Texas, 20 L. & Sexuality 1 (2011).

Jacobs, Charles F., and Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 Santa Clara L. Rev. 743 (2011) (Notes significance of Justice Stevens' assignment of *Romer* and *Lawrence* to Justice Kennedy to write for the Court, thus shaping the Court's gay rights jurisprudence even though Stevens did not write in those cases).

Kaley, Regina N., *Can Taxpayers Stand Discrimination? Lack of Standing and the Religious Freedom Restoration Act Permits the Executive Branch to Fund Discrimina-*

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Lindgren, Yvonne F., *Personal Autonomy: Towards a New Taxonomy for Privacy Law*, 31 Women's Rts. L. Rep. 447 (Summer 2010).

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Luther, Robert, III, *Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals*, 38 Hastings Const. L.Q. 673 (Spring 2011) (considering scope of CLS v. Martinez).

Maldonado, Solangel, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (April 2011).

Maruri, Silpa, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 Cornell J.L. & Pub. Pol'y 807 (Spring 2011).

Massaro, Toni M., Christian Legal Society v. Martinez*: Six Frames*, 38 Hastings Const. L. Q. 569 (Spring 2011).

Miller, Emmalee M., *Are You My Mother? Missouri Denies Custodial Rights to Same-Sex Parent*, 75 Missouri L. Rev. 1377 (Fall 2010).

Nackenoff, Carol, Book Review, *Landmarks, Portents, or Just Curves in the Road?*, 45 Tulsa L. Rev. 659 (Summer 2010) (includes comment on David A.J. Richards' book on the Supreme Court's sodomy cases).

Nice, Julie A., *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 Hastings Const. L.Q. 631 (Spring 2011).

Olson, Christine L., *Transgender Foster Youth: A Forced Identity*, 19 Tex. J. Women & L. 25 (Fall 2009).

Pearson, Kim H., *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 Yale J. L. & Feminism 53 (2010).

Perju, Vlad, *Cosmopolitanism and Constitutional Self-Government*, 8 Int'l J. Const. L. 326 (July 2010).

Reeves, Edward J., and Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & Sexuality 61 (2011).

Ritter, Michael J., *Quality Care for Queer Nursing Home Residents: The Prospect of Reforming the Nursing Home Reform Act*, 89 Tex. L. Rev. 999 (March 2011).

Ritter, Michael J., *Teaching Tolerance: A Harvey Milk Day Would do a Student Body Good*, 19 Tex. J. Women & L. 59 (Fall 2009).

Seehusen, Sonja, *Same Sex Marriage: Does the Constitution or State Constitution Support Same-Sex Marriages?*, 14 U. D.C. L. Rev. 133 (Spring 2011).

Silhan, Caitlyn, *The Present Case* Does *Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual and Transgender Youth*, 20 L. & Sexuality 97 (2011).

Smith, George P., II, and Gregory P. Bailey, *Regulating Morality Through the Common Law and Exclusionary Zoning*, 60 Cath. U. L. Rev. 403 (Winter 2011).

Sohaili, Tina, *Security Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 L. & Sexuality 79 (National LGBT Bar Association Michael Greenberg Writing Competition winner).

Stirnitzke, Audrey C., *Transsexuality, Marriage, and the Myth of True Sex*, 53 Ariz. L. Rev. 285 (2011).

Walker, Anders, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 Fla. St. U. L. Rev. 345 (Winter 2011).

Williams, Ryan C., *The Ninth Amendment as a Rule of Construction*, 111 Colum. L. Rev. 498 (April 2011).

Specially Noted:

Vol. 38, No. 3 (spring 2011) of the *Hastings Constitutional Law Quarterly* contains several articles examining the tension between associational freedom and nondiscrimination arising from the Supreme Court's ruling in Christian Legal Society v. Martinez, concerning a state university's decision to deny legal recognition to a student organization whose membership rules exclude "unrepentant" homosexuals and non-Christians. Individual articles are noted above.

Symposium: Predators, Porn & the Law: America's Children in the Internet Era, 61 Syracuse L. Rev. No. 3 (2011).

HIV/AIDS and Related Issues

Houlihan, Annette, When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent and Sadomasochism Case Law, 20 L. & Sexuality 31 (2011).

Meier, Benjamin Mason, and Alicia Ely Yamin, *Right to Health Litigation and HIV/AIDS Policy*, 39 L., Medicine & Ethics Special Supplement to Vol. 39:1, 81 (Spring 2011).

Specially Noted:

C. Everett Koop, MD, ScD, *The Early Days of AIDS, As I Remember Them*, 13 Annals of the Forum for Collaborate HIV Research No. 2 (March 29, 2011) (Dr. Koop, Surgeon General during the Reagan Administration, provides a blunt, plain-spoken account of how the socially conservative politics of the Reagan Administration stood in the way of an appropriate response as the first signs of the HIV epidemic began to surface. Fascinating reading, available free from http://www.hivforum.org).

EDITOR'S NOTE:

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