

# L E S B I A N / G A Y LAW NOTES

May 2012

**126 EEOC Title VII  
Ruling**  
*Gender Identity*

**132 MN Dist. Ct.**  
*Transgender Marriage/  
Health Insurance*

**137 MS Ct. of Appeals**  
*Needle-stick claim*

**128 Diaz En Banc Denial**  
*Prop 8 signal?*

**134 Nevada Same-Sex  
Marriage**  
*Federal lawsuit*

**138 Austrian Court**  
*Criminal Law & HIV*

**129 MS Ct. of Appeals**  
*LGBT Family Dispute*

**135 AK Sup. Ct.**  
*Gender on Driver's  
License*

**139 Kentucky Court  
of Appeals**  
*HIV Disability Pension*

**130 NY App. Div.**  
*School Aide Claim*

**136 Iowa Dist. Ct.**  
*Criminal Transmission  
of HIV*

**140 MO Court of  
Appeals**  
*Ineffective Assistance  
of Counsel*

## DEPARTMENTS

- 141 Civil Litigation Notes
- 143 Criminal Litigation Notes
- 144 Legislative Notes
- 145 Law & Society Notes
- 146 International Notes
- 148 LGBT Professional Notes
- 149 Publications Noted

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THIS MONTHLY PUBLICATION IS EDITED AND CHIEFLY WRITTEN BY PROFESSOR ARTHUR LEONARD OF NEW YORK LAW SCHOOL, WITH A STAFF OF VOLUNTEER WRITERS CONSISTING OF LAWYERS, LAW SCHOOL GRADUATES, AND CURRENT LAW STUDENTS. PROFESSOR LEONARD, LEGAL'S FOUNDER, HAS WRITTEN NUMEROUS ARTICLES ON EMPLOYMENT LAW, AIDS LAW, AND LESBIAN AND GAY LAW. ART IS A FREQUENT NATIONAL SPOKESPERSON ON SEXUAL ORIENTATION LAW, AND AN EXPERT ON THE RAPIDLY EMERGING AREA OF GAY FAMILY LAW. HE IS ALSO A CONTRIBUTING WRITER FOR GAY CITY NEWS, NEW YORK'S BI-WEEKLY LESBIAN AND GAY NEWSPAPER. TO LEARN MORE ABOUT LEGAL, PLEASE VISIT [HTTP://WWW.LE-GAL.ORG](http://www.le-gal.org).

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# EEOC: Title VII Covers Gender Identity Discrimination Claims

In a sharp reversal of its prior rulings, the Equal Employment Opportunity Commission, the federal agency created by the Civil Rights Act of 1964 with principal authority for interpreting and applying Title VII, the federal statute that bans, among other things, sex discrimination in employment, ruled on April 20, that a “complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII.” Overturning its own prior rulings from 1984, 1994 and 1996, which had taken a narrow view of the concept of “discrimination because of sex” under the statute, the Commission unanimously concluded in *Macy v. Holder*, Appeal No. 0120120821, Agency No. ATF-2011-00751, that subsequent developments - especially significant federal circuit and district court decisions - have led to a new understanding of the law.

The ruling came on a complaint by Mia Macy, who is represented in the case by the Transgender Law Center. According to her complaint, Ms. Macy applied for a position for which she was qualified at the Walnut Creek crime laboratory of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, an agency within the U.S. Department of Justice. At the time, she was still presenting as a man. She discussed her interest in the position with the Director of the laboratory, and was told she would be hired pending a background investigation.

Her application was to be processed as a civilian contractor through Aspen of D.C., a government contractor responsible for filling the position. She submitted the relevant paperwork from Aspen on March 28, 2011, which she promptly submitted, and the necessary background investigation was begun.

However, on March 29, Ms. Macy sent an email to Aspen informing them that she was in the process of transitioning from male to female and asked them to inform the laboratory director of this change. On April 3, she was notified by Aspen that they had told the employer about her change in name and gender. Five days later, she received another email from Aspen, stating that due to federal budget

reductions, the position was no longer available. When she followed up with an agency EEO counselor, she was told that actually the position had been filled with a different applicant who was the “farthest along in the background investigation.” Considering this to be a pretext for discrimination, she filed a complaint with the agency’s EEO office.

On the formal complaint form, Macy checked off “sex” and “female” and typed in “gender identity” and “sex stereotyping” as the basis for her complaint, and wrote that she was discriminated against on the basis of “my sex, gender identity (transgender woman) and on the basis of sex stereotyping.” In the letter responding to her complaint, the agency said that because “gender identity stereotyping cannot be adjudicated” before the EEOC under Title VII, her claim would be processed “according to Department of Justice Policy.” (All federal civilian employment at present takes place under an Obama administration policy of non-discrimination based on gender identity, pursuant to a policy statement by the president - not an executive order or a formal regulation.)

Dissatisfied with this response, Macy’s attorney contracted the agency insisting that her entire complaint should be processed under Title VII. The agency’s response was that it would process her complaint “based on sex (female)” as a Title VII complaint, and her complaint based on “gender identity stereotyping” under the agency’s “policy and practice.” Macy’s attorney submitted a notice of appeal, taking the question before the Commission, a five-member body that serves in an appellate capacity regarding decisions by executive branch EEO offices, asserting that EEOC has jurisdiction over her entire claim, and that the agency’s “reclassification” of her claim was, in effect, a dismissal of her gender identity claim under Title VII.

The Commission, made up of both Democratic and Republican appointees, unanimously agreed that Macy’s entire claim is subject to Title VII’s ban on sex discrimination. Although the Commission had issued several decisions in the past rejecting the argument that gender

identity discrimination was a form of sex discrimination in violation of Title VII, federal courts have come to disagree with that view.

Most recently, the 11th Circuit Court of Appeals, based in Atlanta, ruled late last year in *Glenn v. Brumby*, 663 F.3d 1312 (2011), that discrimination by a government agency against an employee who was transitioning male-to-female was sex discrimination in violation of the Equal Protection Clause of the 14th Amendment, citing with approval prior rulings by the 6th Circuit upholding a sex discrimination claim under Title VII by a transgender fire fighter in Ohio and by the 9th Circuit recognizing a cause of action under the federal Violence Against Women Act by a plaintiff who was victimized due to gender identity.

These federal courts were relying, in turn, on the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, in which that Court, ruling in a partnership decision case brought by a woman whose rejection suggested gender stereotyping by the employer, said, “Congress’ intent to forbid employers to take gender into account in making employment decisions appear on the face of the statute.” The Price Waterhouse court accepted the plaintiff’s argument that evidence of sex stereotyped thinking by an employer would support a claim of intent to discriminate on the basis of sex.

Wrote the EEOC, “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’ This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that ‘an employer

may not take gender into account in making an employment decision.”

There are only two exceptions under federal discrimination law where an employer can take gender into account: when it is a “bona fide occupational qualification,” a narrow exception that usually relies on safety issues, or in an affirmative action program used to remedy past discrimination.

“To be sure,” the EEOC conceded, “the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in *Oncale v. Sundowner Offshore Services, Inc.*: ‘Statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws

case of sex discrimination. The EEOC compared this to an employer who would reject an applicant because the applicant had converted from Islam to Christianity, and would then face a charge of discrimination on the basis of religion.

At this stage, Macy’s complaint is still just that, a complaint, and given the procedural position of the case, the EEOC was not rendering a final decision on the merits of her claim. Instead, it sent the case back to the agency for further processing as a Title VII sex discrimination claim, as such claims are now broadly construed under the EEOC’s ruling in this case to include claims of gender identity discrimination. In a footnote, EEOC mentioned that it had previously taken the same position on this issue in an amicus (friend-of-the-court) brief that it had filed in a case pending in the U.S. District Court for the Western District of Texas, *Pacheco v. Freedom*

federal sex discrimination bans, it is possible to argue that the Supreme Court is not inclined to intervene as this doctrine is being developed in the lower courts.

As a result of the *Macy* decision, individuals with gender identity employment complaints now have a strong basis to seek assistance from the 53 regional EEOC offices as well as the EEO offices of federal agencies that are now bound by this administrative ruling. As such, the ruling takes the Obama Administration’s policy statement on gender identity discrimination a step further, and raises interesting questions about the pending Employment Non-Discrimination Act bill in Congress.

The ruling also raises interesting strategy decisions about pending federal legislation to ban discrimination based on sexual orientation and gender identity or expression, the Employment Non-Discrimination Act (ENDA). A version of ENDA that covered only sexual orientation discrimination passed the then-Democratic-controlled House of Representatives in 2007, after its lead sponsor, Rep. Barney Frank, removed gender identity from the bill on the ground that there was inadequate support in the House for a more comprehensive bill. After the Democrats recaptured the White House and achieved majorities in both houses of Congress in 2008, a comprehensive ENDA was re-introduced, but did not advance in either chamber before the Republicans re-captured the House in the 2010 election. Unless the Democrats take back control of the House and retain control in the Senate this November, the bill will not move in the next Congress. The EEOC’s action means that protection against gender identity discrimination is no longer held hostage by these political circumstances, but also raises the natural question whether ENDA needs to mention gender identity, when a bill limited to sexual orientation might be easier to pass. Inclusion of gender identity in the bill puts the protection on a more solid footing than an EEOC decision does, and goes further to lock in the positive developing trend in the case law. Perhaps the growing acceptance by lower federal courts that Title VII’s sex discrimination ban includes gender identity discrimination will help to advance broader acceptance by legislators, making its inclusion in ENDA less controversial as it would be seen as merely restating the law rather than extending current case law. ■

## The EEOC’s ruling marks a major advance for transgender rights, not least because federal courts are supposed to generally defer to the EEOC’s interpretations of Title VII.

rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion]. . . because of . . . sex” in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.”

The EEOC noted that transgender complainants might articulate a variety of theories in support of their discrimination claims. Gender stereotyping might be the basis of a complaint, but also a transgender applicant might have something more akin to a traditional sex discrimination claim by showing that the employer sought to fill a position with a man and the applicant, whose applications was proceeding favorable so long as the employer considered her to be a man, was suddenly denied when the employer was informed that the applicant was a woman. This would be a clearcut

Buick GMC Truck, supporting the plaintiff’s claim in that case that under recent federal court decisions, a gender identity claim could be brought under Title VII.

The EEOC’s ruling marks a major advance for transgender rights, not least because federal courts are supposed to generally defer to the EEOC’s interpretations of Title VII. Given the recent trends in the federal courts on the issue of gender identity discrimination as sex discrimination, it seems likely that the EEOC’s decision will be well-received in subsequent court rulings. So far, the defendant in one 6th Circuit Title VII gender identity discrimination case petitioned the Supreme Court for review, and that petition was denied. This is not a merits ruling on the issue by the Supreme Court, but as that petition for review was filed at a time when similar rulings had been made by the 9th and 1st Circuits in cases involving other

# Prop 8: Reading Tea Leaves From Diaz En Banc Denial?

While waiting for the two dozen active judges of the U.S. Court of Appeals for the 9th Circuit to decide whether to grant en banc review in *Perry v. Brown*, 671 F.3d 1052 (February 7, 2012), a decision that affirmed on the merits the district court's ruling that California Proposition 8 violates the 14th Amendment by rescinding a previously recognized state constitutional right for same-sex couples to marry without any rational basis, consider the 9th Circuit's action on April 3, 2012, denying a petition for en banc review that has been on file since September 29, 2011, in *Diaz v Brewer*, 656 F.3d 1008 (9th Cir., Sept. 6, 2011), petition for en banc review denied, 2012 WL 1109335 (April 3, 2012), in which a three-judge panel of the 9th Circuit had rejected the State of Arizona's appeal from an award of preliminary relief against the operation of a recent enactment that rescinded partner health benefits for the unmarried same-sex and different-sex partners of Arizona state employees.

The first thing to note, for those who are wondering how long it takes for the Circuit to rule on an en banc petition, is that in *Diaz* it took the Circuit more than 6 months to rule on the petition! Of course, it is likely that a substantial part of that time was due to the decision by 9th Circuit Judge Diarmuid O'Scannlain to write a dissent (joined by 9th Circuit Judge Carlos Bea). If a judge who wanted to grant en banc review decides to write a dissent from the decision by a majority of his colleagues not to grant such review, the announcement of the vote is, naturally, held up until the dissent can be written and circulated, so that the dissenting judge has a fair shot at trying to persuade enough of his colleagues to change their votes. In this case, Judge O'Scannlain was unsuccessful in persuading his colleagues.

So, the second thing to note is that the legal issues in *Perry v. Brown* and *Diaz v. Arizona* are distinct, but related, and the decision by a majority of the active 9th Circuit judges to deny en banc review in *Diaz* might foretell something about how they will vote on the *Perry* en banc petition.

In *Diaz*, the 3-judge panel, consisting

of 9th Circuit Senior Judge Mary Schroeder, 9th Circuit Judge Sidney R. Thomas, and U.S. District Judge Mark W. Bennett (N.D. Iowa, sitting by designation), affirmed a decision by District Judge John W. Sedwick to block the provision changing the benefits rule from going into effect, on the ground that plaintiffs were likely to prevail on their claim that the change violated their Equal Protection rights under the 14th Amendment and a failure to preserve the status quo would deprive them of health insurance coverage while the case was pending.

In some ways, an analogy can be drawn between the issue of *Diaz* and the issue in *Perry*. In *Diaz*, plaintiffs (same-sex couples) briefly enjoyed domestic partnership benefits coverage granted administratively by the state government to its employees, which was then rescinded by the state legislature. In *Perry*, plaintiffs (same-sex couples) briefly enjoyed the right to marry under California law, by virtue of a ruling by the state's Supreme Court, which was then rescinded by the initiative enactment of Proposition 8 before the plaintiffs had an opportunity to actually marry. In both cases, one would think, the reasons (or lack of reasons) for withdrawing a previously granted right or benefit is at issue.

And, of course, underlying both cases is the question whether the promise of Equal Protection of the laws made by the 14th Amendment pertains in any way to a decision by a state whether to allow same-sex couples to marry or to enjoy benefits frequently associated with marriage, such as spousal health insurance coverage under employee benefit plans.

On the other hand, as Judge O'Scannlain clearly points out in his dissent, the two cases are very distinguishable substantively and procedurally. In an aside towards the end of his dissent, O'Scannlain refers to the 3-judge panel decision in *Perry* as "breathhtaking," in the course of arguing that the panel decision in *Diaz* is "even more breathtaking" by ruling, in effect, that "opposite-sex-only marriage rules serve no rational purpose." Thus, he argues, the panel in *Diaz* "decided an issue that bears directly - perhaps dispositively - on the broad question expressly left open in *Per-*

*ry*," where the three-judge panel had specifically disclaimed deciding the ultimate question whether same-sex couples have a federal constitutional right to marry.

O'Scannlain's main point in dissent, however, is that the panel, in his view, improperly contradicted Supreme Court precedent by holding Arizona's rescission of benefits likely to be unconstitutional on a "disparate impact" theory. That is, Arizona rescinded benefits from all unmarried partners, not just same-sex partners, but the district court and the panel accepted the plaintiffs' argument that this action potentially violates the Equal Protection Clause because it has a disparate adverse impact on same-sex couples, who are precluded from entering into a legal marriage recognized by Arizona due to an anti-same-sex marriage constitutional amendment adopted by the voters a few years ago. (Most opposite-sex couples for whom the benefits are important can marry to obtain them, of course.) Judge Sedwick's preliminary injunction only bars the state from rescinding benefits for same-sex couples, acknowledging the alternate route for coverage open to different-sex couples.

Judge O'Scannlain notes that the state's official justification for its measure was entirely financial. The partner benefits were extended at a time when the state's finances were healthier, and the decision to cut out all partner benefits was part of a budget reconciliation measure undertaken to deal with a state fiscal crisis that required significantly reducing expenditures; this was one of several measures undertaken to cut costs. Thus, O'Scannlain argues, in the absence of any evidence that the measure was passed specifically to target same-sex couples out of some sort of animus or moral disapproval by the legislature, he thought the panel opinion "conflicts with long-settled principles of equal protection law," as the Supreme Court has rejected the disparate impact theory in the context of a 14th Amendment equal protection claim unless the plaintiff can show that the legislature had a discriminatory motivation for its action.

Furthermore - and here signaling his likely views on *Perry* - "It hobbles the ef-



forts of States and their citizens to protect traditional marriage by condemning, as a matter of federal constitutional law, such efforts as motivated by unbridled, irrational hatred. It undermines the decision of Arizona's legislature to respond rationally to a historic budget crisis. Although the panel's decision was reached in the context of an interlocutory appeal of a preliminary injunction, its corrosive logic reaches further, all but proclaiming that limiting benefits only to married couples is unconstitutional." O'Scannlain concludes that such a "departure" should not be undertaken by a three-judge panel, but rather by an expanded panel of the circuit. (En banc panels in the 9th Circuit consist of the Chief Judge plus ten active circuit judges drawn at random.) He politely makes no mention of the fact that the three-judge panel in *Diaz* included only one active member of the Circuit, Judge Thomas; Judge Schroeder is a senior judge who is not eligible to vote on the en banc petition and Judge Ben-

nett is a visiting district court judge from outside the boundaries of the 9th Circuit. O'Scannlain might argue as well that a panel thus constituted should be even more hesitant to depart from existing precedent, calling for en banc review by a large group of active 9th Circuit judges.

Of course, it could be that the majority of the circuit judges rejected en banc review because they felt it was premature, as the district court and panel decisions were not ruling on the ultimate merits of the case, but merely on whether the plaintiffs had shown a "likelihood" of success on the merits sufficient to justify pre-trial injunctive relief to preserve the "status quo"—continued enjoyment of the partner benefits—until the case can be decided on the merits. And, it seems likely, in a trial on the merits, the plaintiffs will have some opportunity to show that although all unmarried couples were affected by the challenged measure, there is a basis in the legislative record to argue that rescinding benefits specifically from same-

sex couples was a motivating factor in its enactment, thus overcoming at least one of Judge O'Scannlain's objections to the ruling - the lack of such evidence.

What might this April 3 announcement in the *Diaz* case portend for *Perry*, the Proposition 8 case? Could it mean that most of the active 9th Circuit judges would rather not have to rule on the issue of legal rights and status of same-sex couples? Could it mean that most of the 9th Circuit judges are happy to let stand a panel decision casting doubt on the constitutionality of excluding same-sex couples from the same rights that state governments extend to different-sex couples through marriage? Or is that painting with too broad a brush, since there are indeed doctrinal and procedural differences between the two cases - not least that the decision in *Perry* was a panel ruling on the merits after a district court ruling on the merits following a trial, so the question of "premature" en banc review would not arise. ■

## MS App. Ct. Ruling Highlights Need for LGBT Family Planning

The ten-member Mississippi Court of Appeals ruled on April 17, 2012, that Tate County Chancery Judge Percy L. Lynchard, Jr., erred in awarding compensation to a woman for part of the value of the house she had occupied with her former same-sex partner. Voting 8-2 on the ultimate merits of the case in *Cates v. Swain*, 2012 WL 1292639, the court found that the absence of any express contractual agreement between the women concerning ownership of the property left the court powerless to order compensation, despite evidence of the plaintiff's past contribution of assets that assisted in purchasing it.

The case shows the continuing need for LGBT "family planning" when same-sex couples cohabit, unless they are married or otherwise bound in a legally-recognized relationship that would govern joint property rights. Mississippi not only forbids same-sex marriage by statute and constitutional amendment, it also has legislatively abolished "common law marriage," as a result of which its courts have consistently rejected any theory of implied contractual obligations between cohabitants, either same-sex or different sex.

In this case, Mona Cates, a commercial airline pilot, and Elizabeth Swain, who was, until retiring in 2005, a meteorologist and oceanographer for the U.S. Navy, met in 2000 through a website for people seeking same-sex partners, according to the majority opinion by Judge James D. Maxwell, II. Although Swain stated in her profile that she was single, she was actually legally married to a man, from whom she had separated. Swain did not finally divorce her husband until after all the facts relevant to this case transpired.

At the end of 2000, Swain transferred to Pensacola, Florida, where she bought a house in her own name, although she was required by Florida law to list her husband on the mortgage as co-obligor. Cates contributed some money toward the down-payment and lived there with Swain between flight assignments. Swain made the mortgage payments. Cates opened a joint checking account with Swain, into which only Cates made deposits. Cates paid Swain \$11,000 in order to trade up Swain's Toyota to a Mercedes, and they purchased other vehicles jointly. After the 9/11 terror attacks, Cates, as noted above a commercial pilot, set up an E-trade investment account in both their

names as a joint tenancy with right of survivorship, to ensure that if anything happened to her Swain would have access to the balance in the account.

In 2003, Swain transferred to Seattle, Washington, selling the Florida home and recovering \$32,000 in equity. Cates purchased a home in Washington, with Swain signing over \$34,000 towards the purchase. The home was purchased solely in Cates' name, since Swain, still married, did not want to give her husband any rights to it. (At trial, Cates testified that the \$34,000 was repayment to her of money she had loaned Swain, but Chancellor Lynchard found this to be unsupported by the record.) Swain lived in the Washington home without paying rent or mortgage payments, but did make various improvements to the house.

When Swain retired from the Navy, they decided to move to Cates' native state of Mississippi. Cates sold the Washington house at a profit, and purchased a new home in Tate County using the proceeds. Once again, the house was purchased solely in Cates' name, although Swain paid for closing costs and for carpeting the house. Their relationship deteriorated after mov-

ing to Mississippi, and Swain moved out in March 2006, immediately attempting to liquidate the E-trade account in order to withdraw the money, but Cates was able to block this and direct that the funds be deposited to her own bank account. At trial, Swain testified that she did this "because I ended up with absolutely nothing financially from what I had invested, and so honestly, I was trying to get something back."

When Cates refused to make any payment to Swain for her share of the investment in the Mississippi house, Swain filed suit in the Chancery Court, asserting various equitable theories, including that they were joint venturers in the purchase of the homes, that they had an agreement that Swain would invest the proceeds of the sale of her Florida house in their joint real estate holdings, that the court should declare a trust, either "constructive" or "resulting," of Swain's interest in the Mississippi property, or that Swain should be awarded compensation in order to avoid "unjust enrichment" of Cates.

The Chancellor accepted only one of these arguments: that Cates would be unjustly enriched if Swain were not compensated for at least a portion of the value of the Mississippi home, since the proceeds from sale of the Florida home had been given by Swain towards the purchase of the Washington home, the sale of which then provided most of the money that Cates used to buy the Mississippi home. The Chancellor awarded \$44,995 to Swain, to be paid in cash by Cates, and Cates appealed.

Eight of the ten members of the court agreed that the Chancellor correctly rejected the joint venture, implied contract and vari-

## The case shows the continuing need for LGBT "family planning" when same-sex couples cohabit, unless they are married or otherwise bound in a legally-recognized relationship that would govern joint property rights.

ous trust arguments, but ruled that the unjust enrichment theory could not be used in this case because it is a form of contractual relief (sometimes called "quasi-contract") forbidden in a case involving unmarried cohabitants. Only six members of the court signed the majority opinion by Judge Maxwell, however, with a concurring opinion representing the views of two judges who agreed with the result but regretted the "inequity" of the decision. Chief Judge L. Joseph Lee dissented, joined by another member of the court, arguing that it was within the Chancellor's discretion "to apply the rules of equity and award Swain a share of the property accumulated by the joint efforts of the parties during their relationship."

Looming over the case, of course, was that Swain was still married to a man throughout her entire relationship with Cates, which means that even if Mississippi

allowed same-sex marriage or had some sort of legal status for same-sex couples, Swain and Cates would be ineligible for it. Judge Maxwell pointed out that despite the strong policy in Mississippi against same-sex marriage, the courts would enforce an express contract between cohabitants concerning their respective property rights, and had actually done so in a prior case involving a same-sex couple. So ultimately the problem here was that Cates and Swain failed to make any express contracts concerning the ownership of their houses, and the court's majority was content to rule that Swain's compensation for her "investment" was that she had lived in the Washington and Mississippi houses that were purchased by Cates.

John Thomas Lamar, Jr., and David Mark Slocum, Jr., represent Swain. Jonathan S. Masters and Robert M. Stephenson represent Cates. ■

## Lesbian Aide Can Pursue Claims Against NYC Dept. of Ed. & Principal

A divided panel of New York's Appellate Division, First Department, voted 3-2 to allow a lesbian who was employed as a school aide at P.S. 181 in Brooklyn to pursue her retaliation and sexual orientation discrimination claims against the New York City Department of Education (DOE) and school principal Lowell Coleman. The trial judge, New York County Supreme Court Justice Cynthia S. Kern, had granted summary judgment to the defendants on the retaliation claim but had denied summary judgment on the discrimination claim. The plaintiff

seeks \$2 million in damages for defamation, retaliation and discrimination. *Sandiford v. City of New York Department of Education*, 2012 Westlaw 1392947 (April 24, 2012).

According to the opinion for the majority of the Appellate Division panel, the plaintiff, Ayodele Sandiford, has been a school aide since May 2001. During the 2004/2005 school year, she was assigned to P.S. 181 (grades K-8), where Lowell Coleman is the Principal. Sandiford claims that Coleman made frequent derogatory remarks about gays and lesbians

in her presence, and in the presence of students and teachers.

According to Sandiford, Coleman said that "two men should not be behind closed doors," and "whatever two men is [sic] doing behind closed door[s], God would judge them for Himself." She also alleged that Coleman had said that "his church can change people like us for the better," and that "while acting out an obscene walk, 'this is how faggots walk.'" Coleman also reportedly "admonished students for using the word 'lesbian.'" Sandiford also alleged that she had complained about cer-

tain staff members “who had teased her, taunted her with notes in her locker and made lewd comments to her.”

In March 2005, Sandiford was suspended without pay pending an investigation by the Department of Education’s Office of Special Investigation (OSI). Coleman had submitted a complaint from an 18-year-old college student, who claimed that Sandiford, a co-worker in the after-school program, had tried to date her, even though Sandiford had been informed that the student was not a lesbian. According to the allegations against Sandiford, she had phoned a 16-year-old high school student who worked in the after-school program, and asked the student to “hook her up” with the college student. When the 16-year-old student allegedly told Sandiford to “leave it alone” because the college student was not a lesbian, Sandiford ended the call and then called the college student, who rebuffed her.

After being placed on suspension, Sandiford met with her union representative

plaining to DOE about his treatment of her. Coleman told her that the OSI report had substantiated the allegations against her and recommended her termination, and that he had decided to terminate her. Sandiford claims that during that meeting, Coleman told her that she “caused this upon yourself” for complaining about him. At that meeting, Sandiford denied having done anything inappropriate with the high school student or the college student co-worker.

Sandiford appealed her termination to the Chancellor’s office, which issued a grievance decision on December 15, 2006, finding that the incident happened as described in the OSI report, but concluding, “although inappropriate, the grievant’s conduct in this matter did not warrant discharge.” DOE reinstated Sandiford with back-pay less two weeks, and put a warning letter in her file. Sandiford did not appeal the Chancellor’s decision that she had engaged in inappropriate conduct, instead filing this lawsuit. In addition to her claim

panel seemed to be very impressed by the evidence of Coleman’s anti-gay statements, finding that Sandiford’s deposition testimony about these statements “was sufficient to raise a question of fact as to plaintiff’s claim alleging unlawful discriminatory practices under the New York City Human Rights Law..., the uniquely broad and remedial provisions of which are liberally construed to provide expansive protections not afforded by their state and federal counterparts.”

The court continued, “This Court has made clear that where a plaintiff ‘responds with some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied. Moreover, in light of plaintiff’s testimony regarding Coleman’s comments and conduct, the record did not conclusively estab-

## The majority of the Appellate Division panel seemed to be very impressed by the evidence of Coleman’s anti-gay statements.

and an OSI investigator, and complained about Coleman’s treatment of her. She also lodged a complaint with the Chancellor’s office in April 2005. These complaints apparently drew no response. The OSI investigation, which involved interviewing both students and Sandiford (in the presence of her union representative), substantiated the allegations against her, concluding that she “had used her position as an employee of the NYC Department of Education in an attempt to engage in a personal relationship. [She] utilized a sixteen year old Department of Education student to assist her in doing so. [She] engaged a sixteen year old Department of Education Student in inappropriate conversation.” The OSI report recommended terminating her and putting her on a list that would preclude her from being hired in the future by DOE.

In late June 2005, Sandiford met with Coleman, who allegedly “berated, belittled and reprimanded” her for com-

plainting that she had been defamed and discriminated against in violation of the City and State human rights laws, she also asserted a state constitutional claim.

The appeal before the Appellate Division concerned Justice Kern’s ruling granting summary judgment to the defendants on the retaliation claim and denying summary judgment on the discrimination claims. The defendants argued on appeal that the Chancellor’s ruling on the grievance, which she did not directly appeal, was a final judgment that Sandiford engaged in inappropriate conduct. Consequently, she should be barred from relitigating that issue in the context of a discrimination claim, which would mean that they would prevail in defense of their initial decision to terminate her. In her own appeal, Sandiford argued that there remained contested issues of fact concerning the motivation for her termination, precluding a grant of summary judgment.

The majority of the Appellate Division

panel seemed to be very impressed by the evidence of Coleman’s anti-gay statements, finding that Sandiford’s deposition testimony about these statements “was sufficient to raise a question of fact as to plaintiff’s claim alleging unlawful discriminatory practices under the New York City Human Rights Law..., the uniquely broad and remedial provisions of which are liberally construed to provide expansive protections not afforded by their state and federal counterparts.”

On the retaliation claim, the court asserted that “summary judgment is precluded by triable issues of fact as to whether, within the context of this matter and the workplace realities as demonstrated by the record, plaintiff’s termination from employment would be reasonably likely to deter other persons in defendants’ employment from engaging in protected activity.” The court also said that Sandiford had made a “prima facie showing that her termination was the direct result of retaliatory animus,” and thus there remained a jury question whether defendants’ explanation -- essentially, implementation of OSI’s recommendation -- was “pretextual.”



Justice James Catterson wrote a lengthy, detailed dissenting opinion, joined by Justice Dave Saxe. Catterson argued that Justice Kern's decision to grant summary judgment on the retaliation claim should have been affirmed, and that her denial of summary judgment on the discrimination claims should have been reversed.

Catterson pointed out that by not appealing the Chancellor's grievance decision, Sandiford had conceded that the charges against her were true. "In focusing on the principal's alleged derogatory remarks, the majority gives no weight to the fact that the misconduct charges against the plaintiff were investigated and substantiated..., and that the DOE then recommended that the principal terminate plaintiff. Regardless of any remarks made by the principal, it was the plaintiff's burden to 'respond with some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete,' and the plaintiff entirely failed to do so."

Catterson emphasized the nature of the charges against Sandiford. "As a threshold matter," he wrote, "the plaintiff's claims should be viewed in the context of overriding public policy that seeks to protect children from predatory teachers regardless of whether the teacher is heterosexual or homosexual." He cited a long string of rulings upholding discipline, including terminations, of DOE employees who had made sexual comments, either in person or through emails, to students, and noted in particular a recent ruling by the state's highest court, upholding a 90-day suspension of a teacher who engaged in "inappropriate communication" with a 15-year-old student in her class. "The court acknowl-

edged that the state has a broad public policy of protecting children," he observed.

In light of that, and the OSI report substantiating the allegations against Sandiford, which were upheld by the Chancellor and not appealed further, Catterson argued that Sandiford had failed to allege a valid claim of discrimination or retaliation. Catterson invoked a legal doctrine called "collateral estoppel," under which a matter that has been determined in a prior legal proceeding cannot be relitigated in a new legal proceeding.

The majority had claimed that Sandiford never had an opportunity in the grievance process for a full airing of her discrimination claim, so she should not be barred from raising it in this case. The termination grievance focused entirely on her conduct, as it was about the decision to discipline her based on the telephone incidents with the students. Catterson argued that there was no indication that Sandiford was denied an opportunity to defend herself in that proceeding. "As such," he wrote, "the plaintiff cannot argue that the principal's reason for terminating her, her inappropriate conduct with a 16-year-old student, is false. Therefore, under a pretext analysis, her discrimination claim must fail."

To Catterson, the majority's focus on Coleman's anti-gay comments was misplaced, because "the record reflects that the principal followed DOE policy in reporting the allegations. More significantly, at the time the principal made his decision to terminate the plaintiff, he was in receipt of a DOE report that substantiated her misconduct and recommended her termination. In my view, it is clear that this documentation induced the principal to terminate the plaintiff, and he would have done so no

matter what her sexual orientation."

In other words, the issue isn't whether Coleman was loudly anti-gay; the issue is whether his actions against Sandiford were justified.

Catterson also invoked a frequently-made argument in cases where biased comments by a decision-maker are discounted by the court because they were not made close in time to the challenged decision. Here, the comments attributed to Coleman were not closely associated in time with his decision to report the allegations, suspend Sandiford, and ultimately terminate her so, Catterson argued, they should be discounted.

Catterson also differed with the majority on their revival of the retaliation claim, noting that Coleman had denied making the comments attributed to him in Sandiford's account of the termination interview, and that, in any event, it was clear that the reason for terminating her, the OSI report and recommendation, was not pretextual. He also noted that Coleman suspended her before she complained to her union and DOE about his anti-gay comments, so the suspension could not have been in retaliation for her complaints. "As with her termination claim," wrote Catterson, "she does not raise a triable issue of fact that the reasons for her termination were false and/or that the principal would not have made the same decision regardless of her complaints."

Given the sharply divided decision by the Appellate Division, the defendants, represented by the Corporation Counsel's office, are likely to seek review in the Court of Appeals. Colleen M. Meenan represents Sandiford, and Mordecai Newman from the Corporation Counsel's Office represents the defendants. ■

## MN U.S. Dist. Ct. Rules Against Union in Transgender Marriage Dispute

**O**n April 2, 2012, the U.S. District Court in Minnesota determined that the Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund (the Fund) wrongly terminated Christine Alisen Radtke's enrollment in its health insurance benefit program. Radtke had been covered under the plan as the wife of an eligible Plan member, but when the Fund's Board of Trustees learned that she had been born male, they cut off all benefits

and subsequently demanded restitution for the coverage already paid out. In a scathing opinion by Judge Michael J. Davis, the Fund's decision to deny coverage was roundly rejected as "a flagrant violation of its duty under any standard of review." *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 2012 WL 1094452 (D.Minn.).

Plaintiff Radtke was born an anatomical male, but was diagnosed

with gender dysphoria in her twenties. In the 1980s she changed her name to Christine Alisen Jensen and went through a gender transition program, and in 2003 underwent sex-reassignment surgery. Two years later, Radtke successfully requested that her Wisconsin birth certificate be amended to reflect her changed name and to designate her sex as female. The certificate was issued July 14, 2005, and the plaintiff married Calvin Radtke in a civil ceremony on

August 10, 2005. From that date, her name was changed to Christine Alisen Radtke.

Using the couples' marriage certificate as documentation, Calvin Radtke added Christine to his medical coverage provided by the Fund. At the time, the Fund explicitly allowed a participant's "legal spouse pursuant to Minnesota Statute 517" to enroll in its coverage plans, and Mrs. Radtke was covered as of August 10, 2005.

When one of plaintiff's gel breast implants burst, she filed a pre-authorization form for the cost of the repair procedure with the Fund, and on it Radtke's doctor identified her as a transgender individual. Reimbursement for the surgery was declined based on an exclusion of any expenses related to sex-transformation surgery, and after confusion arose as to whether Calvin and Christine could be legally married, the benefits assistant and Board of Trustees of the Fund referred the matter to their counsel, Peter Rosene, in order to determine if the couple's marriage was valid.

Rosene instructed the Fund to terminate Radtke's benefits shortly after the April 2010 Trustee meeting. The termination letter sent to Mrs. Radtke stated that, in their judgment, the marriage between Christine and Calvin was not recognized under Minnesota law, despite all the evidence to the contrary. Additionally, for good measure, the letter noted that Minnesota expressly bars same-sex marriage.

Radtke appealed the termination, provided evidence that she was legally recognized as female prior to her marriage, and submitted proof that the Internal Revenue Service, the Social Security Administration, and the Minnesota Department of Public Safety each considered her to be female and recognized Calvin Radtke as her legal spouse. The Fund upheld the termination, however, responding that they reviewed what they believed was "intended" by the Minnesota marriage statute: that "man" and "woman" as referenced in the statute be determined by the sex recorded at birth regardless of later events.

The Fund subsequently amended its plan to explicitly only recognize the sex of an individual at the time of their birth for purposes of deciding whether the individual is a plan member's legal spouse. Prior to this change, however, Radtke filed a claim for denial of ERISA benefits. The Fund counterclaimed for restitution of over \$80,000 in medical expenses already paid out for Mrs. Radtke's treatments over the years of coverage, but the Court dismissed this counterclaim. Both Radtke and the Fund moved for summary judgment on the remaining ERISA benefit claim.

Because the denial of benefits stemmed from an interpretation of Minnesota's law, not the Plan's terms, the Fund's decision was reviewed by the Court *de novo*. The Court first dispenses of the Fund's continued emphasis on the ban on same-sex marriage in the state, as

the Radtkes are not arguing that they are a legally wed same-sex couple. Rather Judge Davis frames the issue as whether or not, according to the state of Minnesota, Christine Radtke is female. If she is considered female, he reasons, her marriage is legal and the Plan's explicit terms at the time of her enrollment allowed her to be covered.

In its termination letter, the Fund stated that, in its interpretation, the Minnesota marriage law intended for "man" and "woman" to be determined only at the time of birth. This does not make sense, Judge Davis counters, as Minnesota allows transgender individuals to update their birth certificate after a sex-reassignment procedure. If Minnesota were so concerned with the sex of an individual only at their birth, it seems unlikely they would allow a transgender individual to change their certificate and "fool" unsuspecting officials who don't do additional research into thinking that they were always that sex.

Further, the court finds it "logical" to simply look to the designation on the individual's current birth certificate to determine their sex, as well as any other official documents. Here, Radtke's Wisconsin birth certificate (expressly recognized by Minnesota) lists her as female, and she possesses a number of other official documents proving that the state considers her to be a woman, e.g., on her driver's license. It would be unreasonable to follow the Fund's logic that the state considers Radtke female for some purposes but not for purposes of marriage.

The court also rejects the Fund's interpretation that the state requirement that the couple be of different sexes to be legally married is a capacity requirement that should be determined at the time of birth. No other capacity requirement – being 18 years of age, not being married to anyone else – is determined other than at the time of the marriage.

Attempting to shore up their shaky arguments, the Fund cites a number of non-Minnesota cases finding that transgender marriages are invalid, but the court points out that in each of the cases, the marriage was void not

**The issue is whether or not, according to the law of the state of MN, Christine Radtke is female. If she is considered female, her marriage is legal & the Plan's explicit terms at the time of her enrollment allowed her to be covered.**

because of the fact that the plaintiff was transgender, but for procedural or other reasons (such as in *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987)), which hinged on the fact that Ohio did not allow individuals to change the sex on their birth certificate, but found that the plaintiff's marriage would be legal if Ohio did allow such a change).

In his conclusion, Judge Davis calls the Fund's interpretation of Minnesota's law "unreasonable and wrong." It is clear, he points out, that the state recognizes Radtke as female, and accordingly, it is equally as clear that her marriage is recognized. As the Fund's plan, both at the time she enrolled and at the time they purported to cancel her enrollment, was unambiguously written to allow any Plan member's legal spouse, as determined by the state of Minnesota, to be covered as an eligible dependent, the Fund clearly erred in terminating Radtke's benefits.

Accordingly, the court orders the Fund to reinstate Radtke's benefits, backdated to the time her coverage was terminated. The matter is not settled, however, as the court specifically sidesteps the issue of how Radtke will be treated under the Fund's newly adopted rules that a person's sex, for purposes of whether they are a valid spouse and eligible dependant, will be determined as of the time of their birth. Though the Fund argues that the court's ruling should be prevented by the Fund's affirmative language that now bars Radtke from receiving benefits, the court points out that it can only consider the basis on which the Fund made the decision leading to the complaint. As the Fund never cut off Radtke's benefits based on the new language, but rather relied on their misguided interpretation of Minnesota law in tandem with their old regulations, the court is unable to address the issue. Considering the Fund's insistence on cutting Radtke's benefits off, however, one can't help but feel the parties will likely be right back in the same position again soon. —*Stephen E. Woods*

*Stephen Woods is a Licensing Associate at Condé Nast Publications.*

# Lambda Legal Files Federal Suit for Same-Sex Marriage in Nevada

Opening a new front in the ongoing campaign for same-sex marriage, Lambda Legal filed suit in the U.S. District Court in Nevada on April 10, asserting the claim that the state has violated the Equal Protection Clause of the 14th Amendment by maintaining and enforcing a state constitutional amendment and a state statute that both provide that only different-sex couples can marry or have their marriages recognized as such in Nevada. *Sevcik v. Sandoval*, Case 2:12-cv-00578 (D. Nev.).

The plaintiffs are eight same-sex couples residing in Nevada, some of whom have registered for domestic partnership under a Nevada statute that provides almost all of the rights and benefits of marriage for registered domestic partners, who can be either same-sex or different-sex couples. Some of the plaintiff couples have also married in other jurisdictions, but their marriages have only limited recognition as domestic partnerships in Nevada, if they pay the registration fee and file the necessary forms. Some of the couples are raising children.

The complaint builds on prior marriage cases, making factual assertions that closely follow along the analytical lines of recent successful same-sex marriage suits, most especially *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)(petition for en banc review pending), in which the district court ruled that California's denial of the right to marry to same-sex couples by adoption of Proposition 8, a state constitutional amendment, violated the Due Process and Equal Protection clauses of the 14th Amendment. (In affirming the district court's holding that Proposition 8 was unconstitutional, the court of appeals panel ruled on the narrower ground that California voters had no rational basis to rescind marriage rights that had previously

bee recognized by the California Supreme Court.) Despite the similarity of factual allegations, however, the *Sevcik* complaint asserts only a federal Equal Protection claim, arguing the irrationality of the state having extended almost all the rights of marriage to same-sex couples through its domestic partnership law but then having denied the status of marriage itself.

Although the 9th Circuit panel in *Perry* disclaimed deciding the underlying question of whether denying the right to marry to same-sex couples is a direct violation of the Equal Protection clause, the logic of the panel decision would suggest an openness to the equality argument, especially in a state where the legislature has already made the policy judgment that same-sex couples are entitled to a legal status akin to marriage. Failing to take the next step to marriage, after having conferred its legal incidents, is itself an expressive act by the legislature signifying a normative judgment about same-sex couples, posing a parallel to the California case, where Proposition 8 had left intact the state's domestic partnership law.

Lambda Legal's Legal Director, Jon W. Davidson, and staff attorneys Tara L. Borelli, Peter C. Renn, and Shelbi Day, are counsel on the case together with cooperating attorneys Carla Christofferson, Dawn Sestito, Melanie Cristol and Rah Azizi from the Los Angeles office of O'Melveny & Myers LLP and local counsel Kelly H. Dover and Marek B. Bute of the Las Vegas firm of Snell & Wilmer LLP. Named defendants, sued in their official capacity, are Governor Brian Sandoval, a Republican, and county clerks from the three counties in which plaintiff couples sought and were denied marriage licenses on account of the same-sex marriage ban under state law. ■

# AK DMV Ordered to Adopt Regulation on Driver License Gender Changes

In a decision dated March 12, 2012, the Superior Court of Alaska at Anchorage held that the state's Division of Motor Vehicles ("DMV") infringed on the privacy rights, as guaranteed by the state constitution, of a transgender woman by not having a valid procedure by which she could change the sex designation on her driver's license from male to female. *K.L. v State of Alaska*, Case No. 3AN-11-05431 CI. In his opinion, Judge Michael Spaan ordered the DMV to adopt a new procedure by which a person may alter the sex designation on their license and gave the department 180 days to comply with the order.

The plaintiff, identified by the court as K.L., is a male-to-female transsexual who presents herself as a woman, and many of her identifying documents, including her United States passport and pilot's license, identify her as female. In May 2010, K.L. submitted a Certificate of Name Change to the DMV to reflect her female identity and on the application she listed her gender as female. Less than a month later, she received a new license identifying her as female.

It soon became apparent, however, that the driver's license had been issued in error. At that time, the DMV's Standing Operating Procedure D-24 required a person seeking to have the sex designation changed on their driver's license to submit a medical certification of a sex change. In contrast, a person could change any other identification on their license, including eye color or height, without submitting any supporting documentation. As there was no evidence that K.L. had submitted the required medical certification, the DMV sent her an Order of Cancellation Notice. The department included in the notice a statement that K.L.'s new license would not be cancelled if she submitted proof of surgical alteration.

In response to the notice, K.L. requested an administrative hearing to determine whether the DMV erred in canceling her new license and to evaluate the department's policy in light of the state's Administrative Procedure Act. K.L.'s petition to the Administrative Hearing Officer (AHO) also included the question of whether the DMV's requirement of a medical certification of a sex change violated her state constitutional rights to informational privacy, autonomy, medical decision-making, due process, and equal protection.

The AHO found that the DMV did not err in canceling K.L.'s new license, because the DMV changed her sex designation in error. Importantly, the AHO found the error due, not to K.L.'s failure to submit a medical certification of a sex change, but rather to the fact that the DMV's policy was not validly promulgated as a regulation, and therefore the department has no authority to change the sex designation on anyone's driver's license. The AHO determined that as "D-24 is a regulation that was not promulgated in accordance with the Administrative Procedure Act," the portion of the regulation concerning altering the sex designation on a driver's license is invalid. With no valid procedure, the Alaska DMV had no authority to change K.L.'s sex designation and her new license should not have been issued. The AHO declined to address any of K.L.'s constitutional claims.

In her claim in Superior Court, K.L. did not challenge the AHO's determination that D-24 is invalid, but asserted that the AHO erred in holding that the DMV issued her new driver's license in error and that the DMV's refusal to allow a transgender individual to change the sex designation on their license absent a medical certification is a violation of fundamental liberty and privacy rights and equal protection.

While the court affirms the AHO's decision that the DMV issued K.L.'s new license in error as the DMV's policy is invalid, Judge Spaan states that the DMV's current lack of any procedure to allow transgender individuals to change the sex designation on their driver's license violates their privacy rights under the Alaska Constitution. The court

does not address the constitutionality of requiring a medical certification to change a person's sex designation as that policy is invalid, but focuses on the fact that now there is no means in Alaska by which a transgender person can alter the sex designation on their driver's license.

The right to privacy is explicitly protected in the Alaska Constitution, and one of the recognized interests in protecting that right is a person's "interest in protecting sensitive personal information from public disclosure." Although this is the first time that an Alaska court has considered whether a person's status as transgender implicates a privacy interest, the court agrees with K.L. "that one's transgendered status is private, sensitive personal information." In drawing this conclusion, the court relies on the Second Circuit's decision in *Powell v Schriver* wherein that court "recognized that '[t]he [excruciatingly] private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.'" (172 F.3d 107, 111 (April 2, 1999)).

While the DMV's lack of procedure to allow a change of the sex designation on a license does not *directly* infringe on K.L.'s interest to keep information regarding her transsexualism private, as the department is not publicizing that she applied to have it changed, it does indirectly force her to share such personal information. If K.L.'s driver's license identifies her as male and she is required to present the license to someone for purposes of identification, "the discrepancy between the license and [her] physical appearance [could] lead to the forced disclosure of [her] transgendered status."

**The DMV's current lack of any procedure to allow transgender individuals to change the sex designation on their driver's license violates their privacy rights under the Alaska Constitution.**



The court then turned to a determination of whether the state's infringement of K.L.'s privacy right "bears a close and substantial relationship to the furtherance of a legitimate state interest." The court declined to determine if the privacy right implicated here is a fundamental right, and therefore applied a less stringent standard of review than heightened scrutiny. Importantly, Judge Spaan does not state that K.L. does not have a fundamental right to keep her transsexualism private, but rather that it is unnecessary to determine if the right is fundamental as the court found that there is some form of privacy right at stake here.

Further, the state's lack of any procedure to allow K.L. to alter her license fails the lower level of scrutiny. The DMV asserted that the state has a legitimate interest in preventing fraud and having accurate identification documentation. Although the state allows people to change the height, eye color or weight designations on their licenses, the DMV insisted that not allowing people to change their sex designation "furthers the legitimate state goal of issuing accurate and fixed forms of identification that cannot be readily changed or manipulated." However, it is not made clear if the state articulated how *not* allowing people to change their sex designation ensures that all Alaska driver's licenses will be accurate forms of identification. The court is unconvinced by the argument and points out that having a license that does not match a person's physical appearance is a fairly inaccurate form of identification. Additionally, the state put forward no argument for how being able to alter someone's sex on a license will increase fraud and even "admits that it has seen no evidence of fraud resulting from the sex designation of one's license."

While the court issued an order requiring the DMV to institute a procedure by which people can change the sex designation on their driver's licenses within 180 days of the order, it does not hold that K.L.'s new license is valid. Judge Spaan states that for the time being the cancellation of K.L.'s new license is stayed, but when the new regulation goes into effect, she will need to apply for a new one and must be able to comply with the new regulation in order to be issued a driver's license designating her as female. If the DMV decides she is not entitled to a new license, she can initiate a new proceeding in court.

The ACLU LGBT Rights Project and the law firm of Perkins Coie represent K.L. as co-counsel. —*Kelly Garner*

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*Kelly Garner is a May 2012 graduate of New York Law School.*

## IA U.S. Dist. Ct. Refuses to Overturn Convictions for Criminal Transmission of HIV

The U.S. District Court for the Southern District of Iowa has denied habeas corpus relief to a man seeking to overturn on constitutional grounds his four convictions under Iowa Code Section 709C.1(a) for criminal transmission of HIV in *Musser v. Mapes*, 2012 WL 11995661 (S.D. Iowa).

Iowa Code Section 709C.1(a) makes it a crime for an HIV+ person to "engage in intimate contact with another person," and defines "intimate contact" as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of [HIV]." It is an affirmative defense to the crime that the victim knew of the HIV status, knew how HIV is transmitted, and consented to the intimate contact. During 2002 and 2003, Musser had unprotected sexual intercourse with four different women without informing them of his HIV status. During those years, Musser knew his HIV positive status and was receiving medical treatment.

Musser was charged with and found guilty in Iowa state court of four counts of criminal HIV transmission, and sentenced to 25 years for each. Three sentences were ordered imposed concurrently and the fourth consecutively for a total of fifty years imprisonment. The record of Musser's convictions indicated that he denied having any sexually transmitted disease when specifically asked by the victims; however the record also indicated that three victims were ultimately not infected with HIV and was silent regarding the fourth victim.

Musser unsuccessfully appealed his case to the Supreme Court of Iowa, which in a 2006 decision rejected all of his Federal Constitutional and State law issues. Musser brought the instant timely habeas corpus petition, arguing his convictions violate the Eight Amendment proscription against cruel and unusual punishment (disproportionate sentence), the Fourteenth Amendment (claiming the statute was void for vagueness), the First Amendment (unconstitutionally compelling his speech while chilling his freedom of association), his Substantive Due Process Clause right to privacy, and his Sixth Amendment right to effective assistance of counsel.

District Court Chief Judge James E. Gritzner first set forth the standard for habeas corpus challenges to State convictions: "Habeas relief is granted sparingly, reserved for 'extreme malfunctions in the state criminal justice systems' and 'not as a means of error correction.'"

Dealing with Musser's Eight Amendment Claim, Judge Gritzner held that while "Federal jurisprudence in this area has not been exceedingly clear," the Eight Amendment proscription against cruel and unusual punishment is run afoul only when a sentence is "grossly disproportionate" to the offense. Gritzner adopted the Iowa Supreme Court's analysis, which rejected Musser's arguments and compared the criminal transmission of HIV to the similarly-punished crime in Iowa of first-degree robbery, which also does not require an express intent to inflict harm but, as with HIV transmission, carries a risk of inflicting serious injury or death on the victim. Finding the State's interest in protecting persons against the spread of AIDS and the potential harm inflicted upon victims infected with HIV to be very great, Judge Gritzner held that a 25-year sentence for each offense was not grossly disproportionate to the offense.

As to Musser's Fourteenth Amendment claims that Iowa's HIV transmission statute was vague and overbroad, Judge Gritzner agreed with the Iowa Supreme Court in finding that the phrase "intimate contact" gave Musser "fair notice that his act of unprotected sexual intercourse exposed a person to bodily fluid that could transmit HIV." He further rejected Musser's arguments that the law reached as far as "kissing, wearing a condom during intercourse, inadvertent bleeding or sweating during basketball," stating that these "close cases... can be imagined under virtually any statute" and that the requirement that every element of the offense be proven beyond a reasonable doubt would keep such conduct from resulting in convictions. He further agreed that Iowa's interpretation of the law "requires the actor to know he or she has HIV and to engage in intimate contact with another person that puts the other unwittingly at risk of contracting the virus" and that the statute was accordingly not vague or overbroad.

Musser claimed that the Iowa Supreme Court failed to show that the law was the least restrictive means of promoting the government's interest in preventing the spread of HIV because it impacted on his right to refrain from speaking and his freedom of association, and he claimed the court should have considered other means, such as compelling people to wear condoms or to put the burden on the other party to ask if his or her partner has HIV. Gritzner held that "such requirements actually sweep more broadly than the government's [current] requirement [that an HIV positive person inform sexual partners of their status]," and noted that there was evidence in Musser's trials "to the effect that the victims did ask Musser his HIV status and he did not reveal it." He held that upon review of the law and facts of Musser's case, the Iowa Supreme Court's decision was not an unreasonable application of federal law.

Chief Judge Gritzner rejected Musser's arguments that the Iowa Supreme Court misinterpreted *Lawrence v. Texas*, 539 U.S. 558 (2003), stating that the Iowa Court "readily distinguished *Lawrence*, which involved 'two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle,'" stating that "the Iowa law reaches the private acts of consenting adults... but is aimed at protecting non-consenting persons." Judge Gritzner further noted that the Court in *Lawrence* "found it relevant that [the facts of *Lawrence*] did not involve persons who might be injured," while the potential injury for HIV infection "could be fatal."

Musser's claims that he was ineffectively assisted by former counsel, who failed to raise Confrontation Clause issues regarding the admissibility of the medical reports submitted in court to prove Musser was HIV+, were also rejected by Judge Gritzner, who agreed with the Iowa Supreme Court's holding that the laboratory reports in Musser's case were not testimonial and that therefore former counsel did not err in not raising Confrontation Clause issues.

Finally, after having ruled that Musser had "not made a substantial showing of the denial of a constitutional right," Judge Gritzner denied Musser's request that he issue a certificate of appealability, noting that Musser may request issuance of such a certificate from a judge on the 8th Circuit Court of Appeals. —*Bryan C. Johnson*

## MS App. Ct. Rejects Needle-Stick Emotional Distress Claim of Maintenance Employee

In a 7-2 ruling issued on April 24, the Court of Appeals of Mississippi held that a woman who suffered a needle-stick injury that did not result in the transmission of disease could not maintain an action for emotional distress for "her six-month 'window of anxiety' while she awaited test results." Finding that only the medical responses she incurred for testing were recoverable against the employee uniform company that had negligently left used hypodermic needles in a pocket of the plaintiff's uniform, the court affirmed the grant of summary judgment on the emotional distress claim in *Lee v. G & K Services Co.*, 2012 WL 1405858, while reversing the grant of summary judgment on the medical expense claim.

Kathy Lee, who works at Copiah-Lincoln Community College, wears a uniform rented for her by the College and supplied by defendant G & K Services. On March 5, 2008, a G & K representative delivered uniforms to the school, including two jackets for Lee, a maintenance employee. Lee alleges that she placed her hand in the left pocket of one of the jackets and pricked her finger on a used hypodermic needle. Upon further inspection, she found three used needles and syringes in the jacket's pocket. She took the needles to a doctor and underwent testing for

various infections, including HIV and HBV, from March through September 2008. All tests were negative, and she was told at that point that she was not infected as a result of the needle stick injury. A test of the needles, which had been used to administer insulin to a diabetic, showed traces of dried blood but no sign of infectious disease agents.

She filed suit against G & K alleging negligence and *res ipsa loquitur* as theories of recovery, seeking \$700 in medical expenses and \$10,000 per month for the six months of emotional distress due to her fear that she may have contracted a disease from the needlestick injury. An expert testified that failing to find evidence of infectious diseases by testing the needle was not conclusive; only testing the victim of the needle stick over a six month period could determine whether she was exposed and infected. The only other way to establish exposure would be to show that the blood on the needle came from an infected person, which was not the case here.

In granting summary judgment to the defendant, Lincoln County Circuit Court Judge Michael M. Taylor found that Mississippi precedent limited recovery in such cases. The court relied on *Leaf River Forest Products, Inc. v. Ferguson*, 662 So.2d 648 (Miss. 1995) and *South*

**Plaintiff sought \$700 in medical expenses & \$10,000 per month for the six months of emotional distress due to her fear that she may have contracted a disease from the needle-stick injury.**

*Central Regional Medical Center v. Pickering*, 749 So.2d 95 (Miss. 1999), which held “exposure must be proved either by the presence of a substance on the offending instrument, proof that at some time there was such a substance – for instance, that the instrument had previously been used on a person with a disease – or, third, obviously disease in the plaintiff that can be tied back to the instrument.” Finding none of those elements here, the court held that “plaintiff is not entitled to recover on a fear of illness claim.”

A majority of the Court of Appeals, sitting en banc, agreed in an opinion by Judge James D. Maxwell, II. “‘Injury’ is not synonymous with ‘harm,’” wrote Maxwell in explaining that Lee’s claim lacked an essential element for a tort suit. “Lee’s alleged injury is not that she was exposed to a disease but that she *feared* she was exposed to a disease – and that her fear was a reasonable, foreseeable result of the needle stick. . . . We are certainly sensitive to Lee’s allegations that she was harmed – that she feared the needle stick exposed her to diseases like AIDS and hepatitis. But we are bound by the supreme court’s delineation between an actionable versus an unactionable claim for emotional distress based on fear of disease. The supreme court has held ‘emotional distress based on the fear of a future illness must await a manifestation of that illness or be supported by substantial exposure to the danger.’ Because Lee did not present substantial evidence of exposure to a disease, we find the circuit court properly dismissed her window-of-anxiety claim.”

Lee relied on *Pickering*, where “a hospital nurse attempted to draw blood from [the plaintiff] with a lancet that had already been used on another patient. Realizing her mistake, the nurse immediately threw the used lancet away.” As the “best evidence” had been destroyed by the defendant, even though it had notice that “a material, factual issue existed regarding that evidence,” the supreme court ruled that “a rebuttable presumption of actual exposure arose” and that plaintiff could sue for emotional distress under the

circumstances. That was clearly distinguishable from this case, according to the Judge Maxwell. “Lee urges that, as a matter of public policy, we declare that fear of disease during the window of anxiety is recoverable in all needle-stick cases because of the inability to prove actual exposure through testing the needle,” wrote Maxwell. However, he pointed out, as an intermediate court, the court of appeals is bound by supreme court precedent. Lee will have to appeal to the supreme court to vindicate this claim.

However, the trial court erred in not taking account of the needle-stick as being a physical injury. Maxwell wrote, “We find, however, Lee can potentially recover for her medical expenses. After the needle stick, Lee sought medical treatment. And Lee’s medical expert agreed that Lee’s physician followed medically accepted protocol by testing her for disease contraction for six months following the needle stick. Thus, we reverse the grant of summary judgment solely as to the denial of her claim for medical expenses. On remand, should Lee prevail on the issue of duty, breach, and causation, she is entitled to recover her proven medical expenses related to her treatment.” Since the claim for medical expenses is only about \$700,

one doubts the efficacy of having a trial to prove negligence in order to be awarded that sum.

In a partial dissent, Judge Virginia C. Carlton, joined by Judge Ermea J. Russell, while agreeing that Lee could sue for her medical expenses, also believed that the defendant should not have been granted summary judgment. “A dispute of material fact exists in this case regarding Lee’s claims for emotional-distress damages,” she wrote, “and I respectfully submit that this determination of damages falls within the province of the jury. . . . The jury should determine the reasonableness of Lee’s damages, including her emotional-distress damages, since Lee claims that these damages were proximately caused by the needle puncture, an injury.” She argued that this case differed from the Mississippi Supreme Court rulings upon which the majority relied, one of which did not involve an actual puncture wound, and she argued that Lee’s allegations clearly met the prima facie case requirements specified by the Supreme Court in *Pickering*. She noted cases from other jurisdictions authorizing damage awards for emotional distress arising from needle stick injuries, and argued that summary judgment was an inappropriate method of disposing of Lee’s claim. ■

## Austrian Ct. Refuses to Apply Criminal Law to HIV+ Man for Consensual Safe Sex

Rechtskomitee Lambda, a gay rights organization in Austria, reported that the Regional Court for Criminal Affairs in Graz had rejected the prosecution of an HIV+ gay man on the complaint of his former same-sex partner, who accused the man of infecting him with HIV. According to the report by RKLambda, “The accuser, who has a massive criminal record of violence, drug and property offences, reported the defendant to police years after the sexual contact and only after the man refused to fulfill his considerable financial demands. In addition, the accuser admitted during his interrogation that he had unprotected sex

with others, and he had searched for casual sex on the internet displaying is his profile “Safer Sex: Never.” The man also admitted having used heroin and thus having also exposed himself to the possibility of non-sexual transmission. There was also a case against the accuser for aggravated blackmail, but this was dropped after both men were interrogated due to “conflicting depositions.” The court determined that it is not a crime for an HIV+ person to engage in sex observing the state’s safer sex guidelines, contrary to the prosecutor’s argument. The Appeals Court upheld dismissal of the prosecution. OLG Graz 16.02.2012, 8 Bs 40/12m. ■

# KY App. Ct. Rejects Pre-Existing Condition Analysis in HIV Disability Pension Case

The Court of Appeals of Kentucky rejected the Kentucky Retirement Systems' determination that a man who first tested HIV+ after he had been employed for nine years was necessarily disqualified for a disability retirement pension based on a pre-existing condition because he conceded having engaged in homosexual sex prior to becoming an employee. *Kentucky Retirement Systems v. Parker*, 2012 WL 1447929 (April 27, 2012) (not officially published).

John Parker began working as a janitor for the Laurel County Fiscal Court on April 2, 1996, when he was 39 years old. His last day of employment was December 23, 2005, after which he applied for disability retirement benefits. He claimed to be unable to perform his job duties due to "disabling conditions of HIV/PCP Pneumonia and Emphysema/COPD." He later amended his application to include additional disabling conditions of depression and pancreatitis. He alleged that his health problems caused chronic fatigue, making him unable to walk for more than a few minutes at a time and susceptible to germs. He provided documentation for his health care from the 1980s through 2008 in the course of proceedings over his contested application. The medical review panel recommended denying his claim on the ground that his conditions were either pre-existing his employment or not permanently incapacitating.

Parker had been hospitalized in November 2005 and diagnosed at that time with PCP-Pneumonia, COPD and HIV infection. He never returned to work from the hospital, and was readmitted in January 2006 upon reoccurrence of the pneumonia. He continued to suffer from various conditions attributed either to his HIV condition or the results of being a life-long smoker. A hearing officer reasoned that since medical journals indicated that "it might take ten years for AIDS to develop after HIV is contracted," and Parker had admitted that "he had homosexual encounters prior to his employment in 1996," he

must have already been infected with HIV before he began working for the Court. Thus, reasoning the hearing officer, his HIV infection was a pre-existing condition and could not be the basis of a disability retirement benefit, which was supposed to be based on health conditions that arose during the employment.

The Court of Appeals, affirming the Franklin County Circuit Court, disagreed with the hearing officer's analysis. "We believe Parker satisfied the preponderance standard by submitting medical records, prior to his employment, which contain no indication he suffered from HIV, COPD, pancreatitis, or depression," wrote Judge Dixon for the court. "It appears Parker was diagnosed with depression in 2000, he was diagnosed with pancreatitis in February 2005, and he was diagnosed with HIV and COPD in November 2005." Judge Dixon cited a prior ruling interpreting the meaning of the pre-existing condition provision: "We believe it the intent of our legislative authority to preclude from benefits those individuals who suffer from symptomatic diseases which are objectively discoverable by a reasonable person. We do not believe it the intent of the legislature in drafting KRS 61.600 to deny benefits to those individuals who suffer from unknown, dormant, asymptomatic diseases at the time of their employment, ailments which lie deep within our genetic makeup, some of which may not yet be known to exist. Rather, we be-

lieve the legislature intended to deny benefits to individuals whose diseases are symptomatic and thus were known or reasonably discoverable. Why else would the legislature have referred to 'objective medical evidence' in KRS 61.600(3)?"

The Retirement Systems board argued that Parker had failed to meet his burden of proof because he "failed to get reasonable medical testing and treatment" prior to his employment. The court differed: "Essentially, the Systems would impose the unreasonable burden of requiring an otherwise healthy person to go on a fishing expedition for unknown illnesses in order to prevent that person's future reliance on an *absence* of medical evidence as proof of the non-existence of a condition." The court deemed this argument "without merit" and said that the evidence "compels a finding in favor of Parker on this issue." On remand, the Retirement Systems was to give Parker "full consideration for disability benefits, as he has satisfied the pre-existing conditions provision." The court said that the hearing officer "clearly erred" in reaching the pre-existing condition conclusion as to Parker's HIV based on his "pre-employment homosexual relations," or the smoking-related diseases based on his pre-employment smoking. The court specifically criticized the hearing officer for relying on medical journal articles, stating that "they do not constitute objective medical evidence within the meaning of the statute." ■

**We do not believe it the intent of the to deny benefits to those individuals who suffer from unknown, dormant, asymptomatic diseases at the time of their employment.**



## MO Ct. of App. Rejects Ineffective Assistance of Counsel Claim in HIV+ Man's Appeal of Life Sentence

An HIV+ man did not receive ineffective assistance from his appellate counsel on direct appeal of his conviction of the class B felony of recklessly exposing another to HIV infection without that person's knowledge or consent in violation of section 191.677.1(2) of the Missouri Statutes, ruling the Missouri Court of Appeals, Western District, on April 17, 2012, in *Sykes v. State*, 2012 WL 1288487.

Sean Lee Sykes had been convicted and done prison time for two prior incidents of violating the statute. In this case, the evidence at trial showed that he had commenced a romantic relationship with D.M. without telling her that he was HIV+, and that he actually denied being HIV+ on several occasions after several other people told D.M. that Sykes was infected. Sykes finally admitted to D.M. that he had HIV after her sister had confirmed this fact to her.

However, according to the court's opinion by Presiding Judge James Edward Welsh, D.M. continued the sexual relationship, assuming that by then she was already infected (which, it turned out, she was). When Sykes told his probation officer that he was planning to marry D.M., the probation officer demanded to meet with her to get a written acknowledgement that she knew Sykes was HIV+. She told the probation officer as well as her case manager at the county health department that she had known Sykes was HIV+ from the beginning of their relationship, lying to protect him from prosecution. However, after the relationship broke up and she learned, allegedly for the first time, about his past convictions, she decided to contact law enforcement and change her story.

Sykes' subsequent conviction and life sentence as a recidivist were upheld on direct appeal. Then he filed

a new proceeding seeking post-conviction relief, arguing that he had received ineffective assistance of counsel on the direct appeal of his conviction because his appellate counsel did not raise the issue of prejudicial introduction of evidence at trial concerning his prior convictions. The Court of Appeals, rejecting this argument, agreed with Judge Daniel Fred Kellogg of the Buchanan County Circuit Court that the appellate counsel's testimony showed that her decision not to raise the issue was a strategic decision that was evidently well-grounded, as the court found that such an argument on appeal was without merit, the testimony about Sykes' past convictions ultimately being a relevant part of the evidence concerning his knowing exposure of D.M. to the risk of HIV infection. Thus, raising the argument on direct appeal would have been fruitless. ■



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# CIVIL LITIGATION NOTES

**THIRD CIRCUIT** – In *Free Speech Coalition, Inc. v. Attorney General of the United States*, 2012 WL 1255056 (3rd Cir., April 16, 2012), a three-judge panel partially reversed a dismissal order by District Judge Michael M. Baylson (see 729 F.Supp.2d 691, E.D. Pa.), and revived a 1st and 4th Amendment challenge to 18 U.S.C. sections 2257 & 2257A and regulations issued under these statutes. The challenged statutes impose various documentation requirements on producers of sexually-oriented materials, under the rationale of advancing the government’s goal of protecting minors from exploitation by their use in pornographic productions. Among the requirements is that the producers must keep on file, subject to inspection without notice by federal officials, documentation of the identity and age of all performers. Contrary to the district court, the court of appeals found that the plaintiffs, “a collection of individuals and entities involved with various aspects of the adult media industry,” might be able to show that the law unduly burdens free speech rights and violates the privacy of performers and producers through its documentation and inspection requirements. A concurring judge went further, concluding that the 4th Amendment doctrine of administrative searches does not apply in this case, because it is not targeted at a “pervasively regulated industry,” and that at this stage the government had failed to show that the challenged statutes would substantially advance an important governmental interest, finding the record “sparse” on that point. (Indeed, given the burden on the government to show that the normal requirements for a search for evidence of criminal activity – i.e., employment of children in pornographic material – does not apply, it is hard to know how a motion to dismiss could be granted in such a case.) In the past, the Supreme Court has struck down several attempts by Congress to crack down on on-line pornography – which is, in practical terms, now the main target of this law, even though the statute predates the internet! The 3rd Circuit’s revival of this challenge suggests that the law remains vulnerable to a serious constitutional challenge. Circuit

Judges Scirica, Rendell and Smith sat on the panel, with Smith writing for the panel and Rendell concurring. The ACLU of Pennsylvania joined with counsel for the various plaintiff individuals and groups in arguing for reversal of the dismissal order.

**NINTH CIRCUIT** – The 9th Circuit Court of Appeals has denied en banc review in *Diaz v Brewer*, 656 F.3d 1008 (9th Cir. 2011), petition for en banc review denied, April 3, 2012, in which a panel of the circuit had refused to overturn a preliminary injunction requiring the state of Arizona to continue providing health care benefits for same-sex partners of state employees pending a trial on the merits of plaintiffs’ equal protection claim. Partner benefits had been extended administratively by Governor Janet Napolitano, a Democrat, but subsequently rescinded as part of a budget deal between the legislature and Governor Janet Brewer, a Republican. The plaintiffs, represented by Lambda Legal, argued that providing benefits to different-sex spouses of state employees but denying them to same-sex partners raised equal protection questions, and won preliminary relief from District Judge John W. Sedwick in July 2010, upon his finding that the plaintiffs, who would suffer irreparable injury were their partners to lose their health care coverage, were likely to prevail on their constitutional claim.

**ELEVENTH CIRCUIT** – In *Lyashchynska v. Attorney General*, 2012 WL 1107991 (April 4, 2012), the 11th Circuit Court of Appeals affirmed a ruling by the Board of Immigration Appeals denying asylum to a lesbian from Ukraine, who claimed that she had been subjected in Ukraine to several attacks by civilians on account of her sexual orientation, and that the police had refused to take her report on one of the incidents because of her sexual orientation. Counsel for the government had introduced evidence that hospital records submitted in support of her claims were questionable, and a follow-up investigation by the State Department produced no record of her alleged hospital treatments following the assaults. Although the Immigration Judge found credible the testi-

mony by the petitioner’s girlfriend in the U.S. that they were in a lesbian relationship, the IJ concluded that the claims of persecution in Ukraine lacked credibility, and was affirmed in this by the BIA. The 11th Circuit panel noted that the IJ had granted a continuance in the hearing to give the petitioner an opportunity to try to obtain credible evidence from Ukraine; at a subsequent hearing, she submitted a polygraph test result, which was not accepted due to petitioner’s failure to provide sufficient information about the examiner and the circumstances under which the test was taken to be able to evaluate its credibility, and she submitted “originals” of the documents she had previously submitted, whose genuineness had been challenged by the government. She also argued that the IJ failed to consider the State Department’s country report on Ukraine, indicating massive government corruption. The IJ and BIA did consider this, but noted that there was no indication from the country report that the hospital would be complicit with the police in suppressing treatment records. “Based on the totality of the circumstances,” wrote the court, “both the IJ and the BIA weighed the evidence of authenticity and determined that the State Department’s Report was more credible than Petitioner’s testimony and the claims of her family. Their determinations were not based on any single source or inconsistency, but on substantial record evidence. We find no reason to disturb their rulings.” The court also rejected a claim that petitioner’s right to “confidentiality” had been violated when State Department investigators contacted the hospital in Ternopil to seek corroboration of plaintiff’s allegations. The court found that it would be impossible for the State Department to investigate her claims without disclosing her name to the hospital. “Petitioner would have this Court equate disclosure to a hospital administrator with disclosure to a government official and presume a violation. Such an argument is a non-starter. . .”

**NORTHERN DIST. OF CA** – Ruling in the context of an internal administrative court procedure, Chief U.S. District

# CIVIL LITIGATION NOTES

Judge James Ware issued an order on April 3, 2012, requiring that Christopher Nathan, a law clerk for U.S. Magistrate Maria Elena James, be reimbursed for the cost of health insurance coverage for his spouse, Thomas Alexander, to whom he was married in a ceremony conducted by Magistrate James on 2008 during the period when same-sex marriages were available in California. As a practical matter, enforcement of Judge Ware's order depends on the outcome of litigation pending in other cases concerning the constitutionality of Section 3 of the Defense of Marriage Act, the federal statute mandating that same-sex marriages not be recognized or acknowledged for any purpose of federal law. Several district court judges around the county have ruled that Section 3 is unconstitutional, and appeals are pending before the 1st and 9th Circuits. The Justice Department is seeking expedited, en banc review in the *Golinski* case in the 9th Circuit, which could be dispositive of Nathan's claim. *San Francisco Chronicle*, April 5, 2012.

**CALIFORNIA** – The California 2nd District Court of Appeal ruled on April 17, 2012, that an arbitration provision used by Neiman Marcus in its dealings with employees was “illusory” under Texas law and thus unenforceable because the employer reserved the right to change it unilaterally with 30 days’ notice, such change applying to any claim that had not already been filed with the American Arbitration Association. *Peleg v. Neiman Marcus Group, Inc.*, 2012 WL 1297337. Amir Peleg, described in the opinion by Justice Mallano as a “gay Jewish male of Israeli national origin,” worked at the Beverly Hills Neiman Marcus store from December 28, 2005, until February 21, 2008, in the fragrances department. He claims his work was exemplary, but nonetheless that he was discharged because of his national origin, religion and sexual orientation, in violation of California’s Fair Employment and Housing Act. He also alleged harassment and retaliation in the claim he filed with the state Commission. Having exhausted administrative remedies, he filed suit, alleging in addition violation of an

implied-in-fact contract requiring good cause for termination and a violation of public policy, asserting retaliation for his complaints about compensation issues. He also said Neiman Marcus falsely accused him of theft. The employer responded with a motion to compel arbitration pursuant to its “Mandatory Arbitration Procedure” that Peleg had acknowledged in writing have received. The Procedure stated that its construction and application was governed by Texas law, and, as noted above, that the employer could unilaterally change it. Peleg opposed arbitration, but it was ordered by the trial judge and ultimately the arbitrator dismissed the case based on the failure of Peleg to present his case after the arbitrator had denied request for continuances, sanctioning Peleg for NM’s expenses in the amount of \$40,350.22. Peleg sought to have the award vacated, but the trial court confirmed it, and Peleg appealed. While upholding the choice-of-law provision, the court of appeal concluded that under Texas law the arbitration procedure was not an enforceable contract. Wrote Mallano, “we determine that an arbitration contract containing a modification provision is illusory if an amendment, modification, or revocation – a contract change – applies to claims that have accrued or are known to the employer. If a modification provision is restricted – by express language or by terms implied under the covenant of good faith and fair dealing – so that it exempts *all* claims, accrued or known, from a contract change, the arbitration contract is not illusory. Were it otherwise, the employer could amend the contract in anticipation of a specific claim, altering the arbitration process to the employee’s detriment and making it more likely the employer would prevail. The arbitrator could also terminate the arbitration contract altogether, opting for a judicial forum if that seemed beneficial to the company.”

**COLORADO** – The Colorado Court of Appeals, Division 4, ruled April 26 on an appeal by anti-gay/anti-choice demonstrators whose protest activities conducted outside St. John’s Church in the Wilderness had been made the subjective of re-

straint through injunction by the Denver District Court. *Saint John’s Church in the Wilderness v. Scott*, 2012 WL 1435945. The Court of Appeals rejected the appellants’ argument that the Supreme Court’s decisions in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (the funeral picketing case) and *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011) (the violent videos case), had changed 1st Amendment law so as to require a new analysis of appellants’ 1st Amendment claims. The court found the picketing in this case distinguishable from *Phelps* in that it was taking place directly at the church and had been shown to be actually disruptive of services, and distinguishable from *Brown* in that the exhibition of posters showing mutilated fetuses could be narrowly restricted to meet the state’s compelling interest in preventing psychological harm to children who would have to see these disturbing images when attending church services. However, the court did find that some of the specific restrictions were unnecessarily duplicative, and thus narrowed the relief provided to the church.

**GEORGIA** – U.S. District Judge Richard W. Story rejected a claim by Reuben Lack, an openly gay high school student, that he had been wrongly removed from his position as student body president because of his sexual orientation. *Lack v. Kersey*, Civil Action No. 1:12-CV-930-RWS (N.D.Ga., Atlanta Div.). On March 30, Judge Story issued an order denying Lack’s motion for a temporary restraining order restoring him to his position, finding that Lack was unlikely to prevail on the merits, in light of the allegations in his complaint and the school district’s contentions in opposition to the motion. “The Court ultimately finds that his frequent failure to complete or attend any ‘spirit tasks’ and continual undermining of the faculty advisers is sufficient to preclude a finding of a substantial likelihood of success on his First Amendment retaliation claim,” wrote Judge Story. The *Atlanta Journal-Constitution* reported on April 23 that following a bench trial Judge Story had rendered judgment on the merits against Lack, having found that

# CIVIL & CRIMINAL LITIGATION NOTES

the school officials had numerous non-discriminatory reasons for removing him. Judge Story told Lack, "It is time to close this chapter in your life and move on."

**MICHIGAN** – The *Detroit Free Press* reported on April 18 that U.S. District Judge Arthur Tarnow had dismissed a claims asserted by Andrew Shirvell against Christ Armstrong, the first openly-gay student body president at the University of Michigan. Shirvell, a former assistant attorney general and an alumnus of the University, had been outraged at Armstrong's election, and undertook a campaign against him on-line and in person. The resultant controversy led to Shirvell's discharge by the attorney general. Armstrong filed suit against Shirvell, alleging defamation and infliction of emotional distress. Shirvell countered with claims that Armstrong had bullied him and defamed him in turn. While dismissing Shirvell's claims, Judge Tarnow refused to dismiss Armstrong's claims, which will go to trial. Shirvell claims that his actions were protected by the 1st Amendment and that Armstrong was a public figure for purposes of defamation law. Attorney General Mike Cox had rejected Shirvell's argument that his speech was protected by the 1st Amendment when he discharged him. Shirvell also filed claims against Armstrong's attorney; Judge Tarnow threw out the claim that the attorney, Deborah Gordon, had procured Shirvell's discharge.

**OHIO** – In a new chapter in the t-shirt wars, Lambda Legal's lawsuit on behalf of Maverick Couch, a high school junior in Wayne, Ohio, challenges the high school principal's refusal to allow the openly-gay Couch to wear a t-shirt with a "rainbow ichthus" ("sign of the fish") and the slogan "Jesus is Not a Homophobe." Couch wore the t-shirt to school on the National Day of Silence in April 2011; Principal Randy Gebhardt called him into his office and told him he would be disciplined if he did not turn the t-shirt inside out. Couch complied, but at the beginning of the current academic year applied for permission to wear the t-shirt, and was told he would be suspended if he did so. According to Prin-

icipal Gebhardt, the t-shirt is objectionable because its message is "sexual in nature and therefore indecent and inappropriate in a school setting." We would be interested in some professional psychological insight into Mr. Gebhardt's thought processes. In any event, Lambda filed suit on Couch's behalf in the U.S. District Court for the Southern District of Ohio, asserting a First Amendment claim, and seeking a temporary restraining order to allow Couch to wear the t-shirt for the 2012 National Day of Silence. Rather than contest the TRO, the School District agreed in a status conference on April 4 with District Judge Barrett to allow Couch to wear the t-shirt on April 20. However, Lambda will proceed with the suit unless the District drops its opposition to allowing Couch to wear the t-shirt on any other day. *Couch v. Wayne Local School District* (U.S. Dist. Ct., S.D. Ohio). The case is being handled by Lambda Senior Staff Attorney Christopher Clark (Midwest Regional Office) and cooperating attorney Lisa T. Meeks of Newman & Meeks, Cincinnati. ■

**KANSAS** – The Supreme Court of Kansas ruled in *State v. Coman*, 2012 WL 106615 (March 30, 2012), that a man who pled guilty to a charge of bestiality should not be required to register under the Kansas Offender Registration Act. Reversing a 2-1 decision by the Court of Appeals, the Supreme Court found that an ambiguity created by the Registration Act should be resolved in favor of the defendant under the rule of lenity in construing ambiguous criminal statutes. Joshua Coman pled guilty to misdemeanor criminal sodomy after his former girlfriend discovered him in a sexually-compromising position with her pet Rottweiler in the garage of her house. Coman told her that he "loved the dog and wanted to see it one more time." She called the police, who apprehended him with a package of personal lubricant in his pocket. He confessed that he had used the lubricant to "penetrate the dog's vagina with his finger." The sentencing judge determined that Coman's crime was "sexually motivated," and imposed the sex offender registration requirement. Coman appealed this aspect of his sentence, later adding a claim that the law on bestial-

ity was unconstitutional under *Lawrence v. Texas*. The Supreme Court found the constitutionality claim was raised too late and had been waived by Coman's guilty plea, but even were it timely and properly before the court, they did not see *Lawrence* as applying to bestiality, given the crime's inherently non-consensual nature. (The law presumes that animals, no matter how intelligent or willing they may appear, do not actually consent to having sex with people.) The Registration Act lists sex crimes that are presumptively subject to registration, ending with a catch-all provision for any sexually-motivated offenses. The list pointedly *omits* the bestiality subdivision of the sodomy law, suggesting that the legislature did not intend the registration requirement to apply to convictions of bestiality. However, the catch-all provision literally applies to the offense, by mandating registration for crimes that are "sexually motivated." Resolving this ambiguity in an opinion by Justice Lee A. Johnson, the court concluded that the catch-all provision was intended to sweep in non-sex crimes that were committed with a sexual motivation, and that Coman should not have been sentenced to register as a sex offender as that was contrary to the legislature's apparent intention in omitting this sex offense from the specific list. The court noted that the dissenter in the court of appeals quoted the maxim "expression unius est exclusion alterius," and agreed it should be applied in this case. The court's opinion would make an interesting addition to the curriculum for a course in statutory interpretation.

**KENTUCKY** – The *Huffington Post* reported on April 12 that a federal grand jury in Kentucky had issued the "first-ever indictment to charge a violation of the sexual orientation section of the federal hate crimes law." The grand jury sitting in London, Kentucky, returned an indictment against David Jason Jenkins and Anthony Ray Jenkins for kidnapping and assaulting an openly gay man, Kevin Pennington. According to the news report, the indictment also included conspiracy charges extending to other named individuals. The indictment claims that the defendants used deception to get Pennington to get into a truck with them, after they drove him to a state park and as-



# CRIMINAL LITIGATION NOTES & LEGISLATIVE NOTES

saulted him there. The report, relying upon a news article in the *Lexington Herald-Leader* based on a “court document,” says that the wife of one of the men and their sister “cheered on the attack, yelling gay slurs such as ‘Kill that faggot.’” Pennington eventually escaped from his tormenters and hid in the part until they stopped searching for him. \*\*\* In a follow-up to this story, the *Messenger*, a newspaper in Madisonville, Kentucky, reported April 17 that the wife and sister of the indicted men, Alexis Jenkins and Mable Ashley Jenkins, pled guilty to helping assault Pennington and aiding others in causing bodily injury to the victim because of his sexual orientation. These were said to be the first convictions under the sexual orientation provisions of the federal hate-crimes law. They will be sentenced in August.

**MASSACHUSETTS** – Should a 12-1/2 year old boy be required to register as a sex offender because when he was ten years old he talked a seven year old boy into allowing him to suck the boy’s penis briefly? Sound like an exam question in criminal law? This issue confronted the Appeals Court of Massachusetts in *Doe v. Sex Offender Registry Board*, 2012 WL 1432528 (April 27, 2012). Judge McHugh’s decision for the unanimous panel concluded, “On this record, there is no question that the plaintiff is a troubled youngster deeply in need of the services he is receiving and from which one hopes that he will benefit. But the classification decision rested on unreliable hearsay and the application without explanation of predictive criteria that do not on their face take account of sexual activity between prepubescent children.” The court remanded the case “for entry of a judgment vacating the [Sex Offender Registry Board]’s classification order.”

**NEW JERSEY** – The New Jersey Appellate Division upheld a final restraining order issued by the Warren County Family Court against a cross-dressing man who had made threats against his wife in the context of arguments between them about his cross-dressing. *B.B. v. M.B.*, 2012 WL 1108507 (April 4, 2012). The court rejected the argument that the trial court had improperly admitted “prejudicial” evidence about the defendant’s cross-dressing activities, pointing

out that arguments with his wife about his cross-dressing had given rise to his threats against her. “The testimony that Martin had threatened to kill Brenda on a prior occasion, only a few weeks before the charged incident, was clearly relevant and admissible even if it contained salacious details of the parties’ relationship or embarrassing revelations as to Martin’s proclivities,” wrote the court in its *per curiam* opinion. “Moreover, the trial court placed the evidence in proper perspective, noting that while ‘it’s certain not a crime to cross-dress,’ the defendant’s credibility was ‘drastically questioned’ when his testimony about cross-dressing was contradicted by his own writings.” More to the point, defendant, when ordered to surrender every item in his substantial arsenal of weapons, had concealed one of his weapons from the police officer who arrived at the family home to execute the court’s restraining order, thus undermining the credibility of the police officer’s statement that he had been “cooperative.” ■

**FEDERAL** – S.1910, the Domestic Partnership Benefits and Obligations Act, introduced by Senators Joe Lieberman (Independent – Connecticut) and Susan Collins (Republican – Maine) has gained co-sponsorship from twenty members of the Senate. This is largely symbolic for now, since there is no chance that the House would pass the companion bill, HR 3485, which was introduced by Rep. Tammy Baldwin (Democrat – Wisconsin). The bill had been scheduled for a committee mark-up session late in March, but that was postponed. The bill would make same-sex domestic partners of federal employees living together in a committed relationship eligible for health benefits, family and medical leave, and federal retirement benefits. *Federal Times*, April 3. \*\*\* President Barack Obama’s endorsement of the Safe Schools Improvement Act and the Student Non-Discrimination Act, bills pending in Congress, was announced on April 20. The Student Non-Discrimination Act, introduced by Senator Franken and Representative Polis, would add sexual orientation and gender identity as forbidden grounds of discrimination under federal statutes banning discrimination in educational institutions that receive federal

funds. The Safe Schools Improvement Act, introduced by Senator Casey and Representative Sanchez, would amend the Safe and Drug-Free Schools and Communities Act to add bullying- and harassment-prevention programs, specifically referencing sexual orientation and gender identity. *Poliglot*, April 20. \*\*\* As a result of the implementation of the Don’t Ask, Don’t Tell Repeal Act, veterans who were discharged under prior anti-gay personnel policies are entitled to have their discharge papers changed. More than 14,000 service members dismissed under the policy could apply for such changes, to avoid having the stigma associated with involuntary discharge on their official documents. U.S. Senators Mark Udall, Kirsten Gillibrand and Joseph Lieberman contacted the Defense Department on April 25, urging that the process for obtaining such papers be streamlined, responding to complaints by some veterans that they have found the process to be “full of red tape, protracted and overly burdensome,” according to a press release issued by Senator Udall’s office. \*\*\* On April 26 the Senate voted 68-31 to pass reauthorization of the Violence Against Women Act, with several controversial amendments that may make ultimate enactment difficult. Among those likely to encounter opposition from the House Republican majority is the addition of sexual orientation and gender identity to the provisions dealing with domestic violence. There were 61 co-sponsors in the Senate, assuring that a vote on the merits of the bill could be held in a chamber where Republicans hold enough seats to prevent the 60 votes needed to close debate and bring a measure to a vote. *SFGate.com*, April 27.

**COLORADO** – The Colorado Senate voted 23-12 to approve Senate Bill 2, a measure that would provide civil unions for same-sex couples. The entire Democratic caucus voted for the measure. All twelve men in the Republican caucus opposed it. The three women in the Republican caucus supported it. A nearly-identical bill was approved in the Senate last year, but died in the Republican-controlled House. This year, the Republicans hold a 33-32 majority in the House and the fate of the bill is uncertain. Several opponents of the measure cited the

# LEGISLATIVE NOTES / LAW & SOCIETY NOTES

Bible and invoked religious arguments in support of their opposition to extending any legal recognition to same-sex couples, claiming that even though the measure was distinctly *not* a marriage bill, creating civil unions would be essentially allowing same-sex marriage. *Denver Post*, April 27.

**LOUISIANA** – Senate Bill 217, which was intended to forbid state agencies from adding to the statutory list of forbidden grounds of discrimination when entering into contracts or drawing up bid specifications for public works, was deferred from consideration by a 24-9 vote. The main purpose behind the bill was to prevent state agencies from mandating non-discrimination on the basis of sexual orientation or gender identity, characteristics not explicitly covered by the state's anti-discrimination law. The bill ran into flack over arguments that it would allow public schools and charter schools to reject students based on sexual orientation or gender identity. The bill's lead sponsor, Senator A.G. Crowe (Republican – Slidell), agreed that he would amend the bill to clarify that it would not have this effect, and then reintroduce it in the senate. *New Orleans Times Picayune*, April 18.

**PENNSYLVANIA** – Equality Pennsylvania reported continued progress in getting local governments to ban anti-LGBT discrimination. Pm April 12, the Commissioners in Abington Township (in Montgomery County) voted to become the 28th municipality in the state to ban discrimination in housing, employment and public accommodations on the basis of sexual orientation or gender identity. Equality Pennsylvania also reported that the East Pennboro Area School Board (in Cumberland County) had reversed an earlier decision and voted to allow formation of a Gay Straight Alliance at East Pennboro Area High School, after some lobbying by Equality Pennsylvania representatives.

**WISCONSIN** – The Eau Claire City Council voted 10-1 to extend benefits to registered domestic partners of city employees. Most of the debate on April 24 concerned the possible costs of the program. Based on experience in other jurisdictions, the councilors concluded that the cost would

be minimal. Indeed, the city's insurance carrier, Group Health Cooperative of Eau Claire, estimated that the additional costs would be so slight that it was not planning to increase the city's premiums for the group plan. The benefits plan for employees in Eau Claire is a contributory plan, under which employees pay a share of the cost through payroll withholding; coverage of partners will require the same additional payment that coverage of legal spouses now requires. *The Leader-Telegram*, April 25. ■

**FEDERAL – DEPARTMENT OF HOMELAND SECURITY** – An internal "interim memorandum" (denominated as Policy Memorandum PM-602-0061 (April 10, 2012)), circulating within U.S. Citizenship & Immigration Services, an agency within the U.S. Department of Homeland Security, specifies that proof of surgical alteration should no always be required as a prerequisite to recognition of an individual's gender identity for purposes of determining the validity of a marriage for federal immigration law purposes. In 2009, the USCIS had issued a guidance document to field officers that required, in cases where spousal status was being claimed between two persons of the same "birth sex," that evidence be received "that one of the individuals had in fact undergone sex reassignment surgery to show a change of gender." After observing that some jurisdictions do not require such evidence, the memorandum states, USCIS "is superseding previous guidance relating to transgender individuals to reflect the broader range of clinical treatments that can result in a legal change of gender under the law of the relevant jurisdiction." The interim memo states that it will supersede the guidance on this point in the existing publications. In effect, USCIS is now taking the position that if a change of sex is recognized by the jurisdiction that performed a marriage, USCIS will recognize that marriage for immigration law purposes, even if the marriage jurisdiction did not require proof of sex reassignment surgery. The interim memorandum was posted on April 13, allowing two weeks for comments, but was stated to be "in effect until further notice."

**FEDERAL** – Advocates for a federal executive order banning anti-LGBT discrimination by federal contractors were disappointed when White House Press Secretary Jay Carney stated that the President would not be signing such an order. There had been reports that a draft order had been endorsed by the Labor Department and "cleared" by the Department of Justice, and The Williams Institute (UCLA Law School) had issued a study documenting the problem of anti-LGBT workplace discrimination by federal contractors. Some commentators suggested that the President decided the timing was not right in a presidential election year. Protests about the President's failure to act led to editorializing in support of an executive order by leading media outlets, including the New York Times and the Washington Post. The question whether the President has the authority to impose such an obligation on private sector companies as a unilateral executive action was not really addressed in the public discussion, although some past presidential actions affecting the private sector in the absence of legislative authorization have encountered problems in the courts. (Notably, the Supreme Court invalidated a Clinton Executive Order that sought to ban federal contracts for companies that hired strike replacement employees, on the ground that federal law did not prohibit hiring strike replacements and, in fact, that the Supreme Court had interpreted the National Labor Relations Act to allow employers to continue operating during a strike by replacing striking workers.) The White House did not raise this issue in Mr. Carney's statements, instead reiterating the President's support for passing the Employment Non-Discrimination Act.

**SPITZER RECANTS** - Dr. Robert Spitzer, a prominent psychiatrist whose 2001 published study claiming that some people can change their sexual orientation through "reparative therapy" has been cited by anti-gay litigants in numerous contexts over the past decade, has publicly recanted in an interview with *American Prospect* magazine, in which he said he owed an apology to the gay community and to gay individuals who had sought reparative therapy based on his study. "In retrospect, I have to admit I think the cri-

# LAW & SOCIETY NOTES / INTERNATIONAL NOTES

tiques are largely correct,” he told the magazine in the article published on April 11. “The findings can be considered evidence for what those who have undergone ex-gay therapy say about it, but nothing more.” Spitzer bowed to the criticism that he had uncritically accepted the statements of such individuals that the therapy had changed their sexual orientation. Such statements have been repeatedly undercut by reports of prominent ex-gays “relapsing” into homosexuality.

**BOY SCOUTS HOLD FIRM** – Despite continuing controversy about its policy banning openly gay people from leadership positions, the Boy Scouts of America is holding firm in the face of a national outcry about the removal of a lesbian woman as a Cub Scout den mother in Ohio. Local Scout officials were happy to have Jennifer Tyrrell’s services as den leader for the group in which her 7-year-old son was participating, even though they knew she was a lesbian, but the national organization allows no exceptions and ordered that she be removed, despite the lack of complaints or objections from the parents of any of the boys. The Scout’s position is that its focus is on “character development and leadership training,” and that Scouting is not the appropriate forum for children to encounter the issue of sexual orientation. In the Supreme Court case of *Boy Scouts of America v. Dale* (2000), the court voted 5-4 that the BSA’s expressive associational rights under the 1st Amendment privileged it to refuse to comply with a state law banning sexual orientation discrimination, holding that as an expressive association the BSA had a right to exclude somebody (in that case, an openly gay college student who was removed as an assistant scout master after a local newspaper identified him as president of his college’s gay student organization) whose inclusion would, in the view of the BSA, communicate a message of approval of homosexuality with which they disagreed. Ms. Tyrrell said that she didn’t encounter problems as a den leader until she was asked to take on treasurer duties for the local Council and raised questions about some accounting discrepancies. Suddenly she became unacceptable because she was gay. She started an online petition on Change.com, which

quickly achieved more than 180,000 signatures. *Columbus Dispatch*, April 27.

**ALASKA** – Voters in Anchorage rejected Proposition 5 at the polls on April 3 by a substantial margin. Proposition 5 was intended to enact a ban on discrimination based on “sexual orientation or transgender identity” in the city. Proponents took this route because Mayor Dan Sullivan had vetoed legislation to accomplish this purpose and there was not enough support in the city council to override the veto. The results of the vote were a bit surprising, since polls had shown the a slight majority of voters in favor of the measure, but it appeared that the anti-Prop 5 forces, although substantially outspent on advertising, were better organized at getting their supporters to the polls. The main opposition to Prop 5 was led by religious leaders, although there was also a coalition of moderate and progressive religious leaders who supported its passage, as did both U.S. Senators from Alaska. *New York Times*, April 4. Reported irregularities during the voting led to calls for investigations and setting aside the result of the balloting. Taking into account absentee ballots and questioned ballots, the final count was not achieved until April 20, when it was announced that Proposition 5 failed, receiving only 43 percent of the vote. *Anchorage Daily News*, April 21. There is no state-wide ban on sexual orientation discrimination in Alaska, and the state enacted a constitutional amendment against same-sex marriage during the 1990s in response to a lawsuit that had achieved success at the trial court level.

**CALIFORNIA** – The Los Angeles Police Department has announced that its response to continuing problems of violence against transgender arrestees will be the opening of a designated jail for transgender inmates. The facility will be a 24-bed transgender module established within the LAPD women’s jail in downtown Los Angeles. Captain David Lindsay, the jail division commander, claimed that this was the first such dedicated transgender unit in the nation, the purpose of which was to create “an environment that’s safe and secure, as there’s been a history of violence against transgender people.” The city jail’s function is to hold people from arrest until they are arraigned, when they are transferred

to the Los Angeles County Jail, run by the County Sheriff’s Department. Police Chief Charlie Beck also announced at a community meeting that police officers would be trained to refer to transgender individuals properly by the name and gender they prefer, and to treat them with respect. The community meeting itself was described as an unusually non-acrimonious exchange between law enforcement and members of the transgender community in L.A. *Los Angeles Times*, April 15. ■

**EUROPEAN COURT OF HUMAN RIGHTS** – Our report about the European Court’s decision in *Gas & Dubois v. France*, decided on March 15, 2012, was based on an English press report that, we are informed, contained misinformation about the opinion, in an apparent attempt by the *Daily Mail* to add fuel to the raging debate in the U.K. over the Cameron government’s proposal to open up marriage to same-sex couples. Contrary to the report on which we relied, the European Court did *not* speculate that if a county allowed same-sex marriages, religious institutions would be required to perform such marriages in order to be in compliance with the anti-discrimination mandate of the Convention. This was apparently entirely an editorial interjection by the *Daily Mail*, which has a political agenda, into what appeared on its face to be a news report. Indeed, the court’s opinion, published only in French, did not mention religious ceremonies. Its reference to marriage was in the context of restating the continuing position of the European Court that the Convention does *not* at this time require member states to make same-sex marriage available, which is consistent with other recent rulings, although the court has recognized a right of unmarried couples to some level of recognition, such as the Austrian civil union law that was cited as fulfilling the requirements of the Convention in a prior decision by the court on a case from that country. In *Gas & Dubois*, the Court found that it does not violate the Convention for France to deny a second-parent adoption to the same-sex partner of a child’s mother, reflecting the reality that most of the countries that adhere to the Convention do not all second-parent adoptions. (Most of the core of original signatories to the Convention do allow such adoptions, including the



# INTERNATIONAL NOTES

U.K.) Our report last month drew comment from several readers in Europe, who we thank for clarifying the situation for us.

## **G8 FOREIGN MINISTERS STATEMENT**

– Following a meeting of G8 Foreign Ministers in Washington, the following statement was issued: “The ministers reaffirmed that human rights and fundamental freedoms are the birthright of all individuals, male and female, including lesbian, gay, bisexual or transgender individuals. These individuals often face death, violence, harassment and discrimination because of their sexual orientation in many countries around the world.” The Russian Federation insisted that a footnote be appended to this statement, as follows: “The Russian Federation dissociates itself from this language given the absence of any explicit definition or provision relating to such a group or such persons as separate rights holders under international human rights law.” In other words, the Russian government, in light of highly adverse public opinion against gay people as reflected in opinion polls, does not want to be associated with any statement urging respect for the human rights of gay people. This position is consistent with recent municipal enactments banning “propaganda of homosexuality,” under which some demonstrators have been prosecuted for holding up pro-gay signs in public places. Similar legislation has been proposed several times in the national legislature, the Duma, but has so far been rejected on the grounds that homosexual conduct is not criminal under the current Penal Code. *Wall Street Journal*, April 13.

**EUROPE** – The European Parliament urged potential member states – now including Turkey, Serbia, Montenegro and Kosovo – to provide greater protection for GLBT citizens in order to make progress towards being accepted into membership in the European Union. *Pink News*, April 2.

**AUSTRIA** – After a gay rights organization brought to the attention of the City of Vienna that its method of recording partnership status on the passports of registered partners would have the effect of “outing” gay Austrians when they had to show their passports for identification purposes or when

traveling (which would include traveling to countries that have severe anti-gay policies), the city agreed to alter its practice, promising to adopt a neutral wording for registration that would not distinguish between married couples and registered partners.

**CANADA** – Justice Loryl D. Russell of the Supreme Court of British Columbia ruled in *J.C.M. v. A.N.A.*, 2012 BCSC 584 (April 23, 2012), that anonymously-donated sperm purchased by a lesbian couple was jointly owned “property” subject to division between them upon termination of their relationship. In so holding, Justice Russell found it necessary to undertake common law development, inasmuch as the traditional common law did not treat as property the human body, its constituent parts, or any emanations therefrom. Reviewing authorities from Canada and the U.S., the judge concluded that in the context of this case, treating the sperm – which is being stored under refrigeration in “straws” for future use – as property is the most sensible legal approach. During their relationship, each of the women conceived one child from the large supply of donated sperm, purchased from a sperm bank in the United States which certified that all the sperm came from the same donor. After having conceived these children, the women had thirteen straws of sperm remaining in storage. After their relationship ended, each of the women retained custody of the child that she had conceived, with the other having visitation rights. One of the women then began a relationship with another woman, who wished to conceive a child who would be related to her partner’s child, but the sperm bank no longer had contact with the donor. Thus, she wanted to use the stored sperm, but the former partner would not consent. Justice Russell ordered that seven straws go to the claimant, J.C.M., and six to the respondent, who had indicated her desire that the remaining sperm be destroyed. Justice Russell rejected respondent’s arguments that treatment of the sperm as property would violate British Columbia law or policy, or would constitute “forced procreation,” since the respondent would have no relationship to the resulting child or children, making this case distinguishable from cases involving disputes over the disposition

of frozen embryos stored as part of attempts at in vitro conception. The court also rejected the argument that it should weigh the “best interest” of the existing children or the prospective child as part of its decision. The court indicated that had the women made a contract concerning ownership and disposition of the donated sperm, it would have been enforceable. In the absence of such a contract, the court deemed the sperm to be property of the former spousal relationship, whose disposition would resemble that of any spousal property distribution.

**CANADA** – Ontario’s Human Rights Tribunal has ruled that the province is violating constitutional equality requirements by requiring transgender individuals who apply for new birth certificates to undergo gender reassignment surgery. The Tribunal ordered the province to drop the surgery requirement and adopt new criteria for changing gender indications on birth certificates within six months of the Tribunal’s order. *Hamilton Spectator*, April 21. \*\*\* The *Winnipeg Sun* reported on April 12 that a jury convicted Michael Pearce of manslaughter in the death of his same-sex partner, Stuart Mark. Pearce subsequently confessed to police that he beat Mark to death with a golf club after Mark disclosed that he was HIV+. Pearce’s defense attorney claims that the confession was coerced, and that Pearce was in a vulnerable state when he spoke with the police, having taken a massive dose of Tylenol and attempted suicide the previous day, but the jury evidently believed otherwise. Sentencing will take place on July 3. There is no minimum sentence for manslaughter, but the judge could sentence Pearce to as much as a life prison sentence. The newspaper reported that Pearce is out on bail.

**CHILE** – The brutal torture and murder of a young gay rights activist sparked political action in Chile, where the House of Deputies voted 58-56 to approve an anti-discrimination law on April 4. The measure had passed the Senate in November 2011, but slight differences in the bills will require further negotiations prior to passage of an identical bill in both houses. The bill describes as illegal discrimina-



# INTERNATIONAL NOTES & LGBT PROFESSIONAL NOTES

tion “any distinction, exclusion or restriction that lacks reasonable justification, committed by agents of the state or individuals, and that causes the deprivation, disturbance or threatens the legitimate exercise of fundamental rights.” Four suspects were arrested in the murder of Daniel Zamudio, 24, who died on March 27 after three weeks in the hospital. Some of the suspects already had criminal records involving attacks on gay people, and prosecutors sought murder charges in the case. *Associated Press*, April 4.

**HUNGARY** – On April 13 a Budapest Court overturned the refusal of law enforcement authorities to permit a planned gay-pride parade to take place in Budapest on July 7. The police had argued that the event would impede the free flow of traffic along alternate routes to the planned march, which in the past has started at the City Park, proceeded along Andrassy Street, and ended at Alkotmany Street leading to the Parliament building. The court ruled that the march could be held on the specified route and the police had no legal foundation on which to ban it, according to an April 16 report by the *All Hungary Media Group*. Human Rights Watch had issued a statement condemning the refusal by the police to allow the parade, focusing international attention on the free speech issue.

**INDIA** – A gay male couple, Chunmun Kumar and Simran, were married in Ballia on March 29, but then fled their home, fearing imprisonment as a result of registration of their marriage under the Hindu Marriage Act, which does not provide for same-sex unions, according to an April 10 report in the *Indian Express*. \*\*\* The Punjab and Haryana High Court on April 25 ordered police protection for Swaran Kaur and Hasharan Kaur, a lesbian couple who faced death threats from members of their family. The couple applied to the court after police officials rejected their request for protection. *Times of India*, April 26.

**ISRAEL** – The Schechter Rabbinical Seminary, affiliated with Israel’s movement for Conservative Judaism (Masorti),

has announced that it will allow gay and lesbian Jews to enroll in its rabbinical studies program beginning with the Fall 2012 semester and will provide ordination. This announcement brings the Israeli branch of the movement in line with the American branch, which began accepting openly gay rabbinical students in 2006 and ordained its first openly gay graduate last year. *Boston Globe*, April 21.

**RUSSIA** – Two gay rights supporters were arrested on April 7 for violating the new St. Petersburg law criminalizing “gay propaganda.” At a court hearing, one of the men was found guilty of disobeying police orders for refusing to stop displaying a pro-gay sign in public, but the court did not cite the homosexual propaganda law, which would have imposed a greater penalty. The other arrested man’s hearing was put off because the police officer summoned to testify in his case failed to appear. *Advocate.com*, April 24. \*\*\* Novosibirsk’s regional legislature voted to approve a law criminalizing “homosexual propaganda” on April 26. Earlier in April, the Moscow City Duma approved a law banning all forms of sexual propaganda to minors. Proponents of such laws are pushing for federal legislation, which would have the effect of outlawing gay rights demonstrations throughout the country. These moves are being taken in the face of an existing ruling from the European Court of Human Rights in favor of gay rights demonstrators who were contesting the refusal of Moscow city officials to issue a permit for a gay pride demonstration. *Moscow Times*, April 26.

**SAUDI ARABIA** – *Israel National News* (April 18) reported that Saudi Arabia’s Commission for the Promotion of Virtue and Prevention of Vice would be overseeing a new government order requiring public schools and universities to ban the entry of gays and lesbians (referred to in the news report as “tom boys”) and to “intensify their efforts to fight this phenomenon, which has been promoted by some websites.” ■

**THE NATIONAL LGBT BAR ASSOCIATION** will honor the Legal Depart-

ment of GlaxoSmithKline at a reception in Philadelphia on May 10. The Association has been holding such receptions on a regular basis in major cities to recognize “out and proud” in-house counsel at major corporations for their work promoting LGBT-inclusive workplace policies in the American business community.

**MASSACHUSETTS LGBTQ BAR ASSOCIATION** – The Association’s annual dinner on May 4 bestows the following recognition: The Gwen Bloomingdale Pioneer Spirit Award, presented to the Honorable Dermot Meagher (retired); The MBA Community Service Award, presented to the Massachusetts Chapter of the National Organization for Women; The Legislator of Distinction Award, presented to Massachusetts State Senators Sonia Chang-Diaz and Benjamin Downing for their leadership in winning passage of the Transgender Equal Rights Bill; the Kevin Larkin Memorial Award for Public Service, presented to Maura Healey, Chief, Civil Rights Division, Massachusetts Attorney General’s Office. Ms. Healey is the Keynote Speaker for the event

**IMMIGRATION EQUALITY** announced that they are interviewing to fill a staff attorney position in their Washington, D.C., office. Applicants should have a JD, be admitted to practice in at least one state, preferably should have some immigration law experience, especially with non-immigrant visas and/or employment-related visas; excellent research, writing and speaking skills, fluency in more than one language, demonstrated commitment to LGBT issues, HIV issue, and/or immigration issues. The job will require regular travel and some evening and weekend work (not a 9-to-5 situation), and requires skills in multitasking and prioritizing assignments. Applicants should submit a detailed cover letter and resume via email to [legal@immigrationequality.org](mailto:legal@immigrationequality.org) with Washington Staff Attorney on the subject line. Those invited to interview will be requested to submit a writing sample and three references. ■

# PUBLICATIONS NOTED

## LGBT & RELATED ISSUES

1. Anker, Deborah, and Sabi Ardalan, *Symposium: Uncovering Asylum: A Conversation on Refugee Law, Sexuality Orientation, and Moving Towards a Just Jurisprudence*, 44 N.Y.U. J. Int'l L. & Pol. 529 (Winter 2012).
2. Appleton, Susan Frelich, *Illegitimacy and Sex, Old and New*, 20 Amer. U. J. Gender, Social Pol'y & L. 347 (2012) (Symposium: The New Illegitimacy: Revisiting why Parentage Should not Depend on Marriage).
3. Baker, Katharine K., *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. Ill. L. Rev. 319 (contrary to what the title suggests, this article does not argue for a more flexible legal definition of family, instead suggesting that a more flexible definition will lead to too much indeterminacy so the law should stick to the "normal" definition).
4. Barlow, Keith W., "Can They Do That?": *Why Religious Parents and Communities May Fear the Future Regarding State Interests and Custodial Law*, 2012 Brigham Young Univ. L. Rev. 281.
5. Bartlett, Katharine T., *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 Cal. L. Rev. 381 (April 2012).
6. Behre, Ashley L., *Coming Out to Fight for Our Country: Achieving Equality for Gay Service Members in a Post-"Don't Ask, Don't Tell" Military*, 29 Hofstra Lab. & Emp. L. J. 189 (Fall 2011).
7. Bergstresser, John, *When Evidentiary Rules Enforce Substantive Policies: Same-Sex Marital Privilege Under Federal Rule of Evidence 501 in Diversity Cases*, 46 New Eng. L. Rev. 303 (Winter 2012).
8. Cahill, Courtney Megan, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 Ariz. L. Rev. 43 (Spring 2012).
9. Connolly, Lisa C., *Anti-Gay Bullying in Schools – Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. Rev. 248 (April 2012).
10. Dwyer, James G., *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 Ariz. L. Rev. 79 (Spring 2012).
11. Englander, Daniel, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda's "Anti Homosexuality Bill, 2009"*, 25 Emory Int'l L. Rev. 1263 (2011).
12. Eskridge, William Nichol, *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 Stanford L. Rev. Online 93-98 (2012).
13. Ghai, Ritu, *Deciphering Motive: Establishing Sexual Orientation as the "One*

### Editor's Notes

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

*Central Reason*" for Persecution Asylum Claims, 43.2 Columbia Hum. Rts. L. Rev. 521 (Winter 2012).

14. Groshoff, David, *The Wrong Track, Baby – How Damage to Gay Youth Was Borne This Way: Via Ideologically Bound Law Reviews Publishing "Honey Changey Stuff"*, 18 Cardozo J. L. & Gender 275 (2012).
15. Hagedorn, Audrey K., "Don't Ask, Don't Tell," *the Supreme Court, and Lawrence the "Laggard"*, 87 Indiana L.J. 795 (Spring 2012).
16. Harris, Leslie Joan, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender Soc. Pol'y & L. 467 (2012) (Symposium: The New Illegitimacy: Revisiting why Parentage Should not Depend on Marriage).
17. Joshi, Yuvraj, *Respectable Queerness*, 43.2 Columbia Hum. Rts. L. Rev. 415 (Winter 2012).
18. Kaplan, Roberta A., and Julie E. Fink, *The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation*, 2012 Cardozo L. Rev. de novo 203 (2012).
19. Keller, Scott A., and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301 (April 2012).
20. Kendrick, Leslie, *Content Discrimination Revisited*, 98 Va. L. Rev. 231 (April 2012).
21. Knauer, Nancy J., "Gen Silent": *Advocating for LGBT Elders*, 19 The Elder L. J. 289 (2012).
22. London, Catherine, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 Cardozo J. L. & Gender 391 (2012).
23. Murray, Melissa, *What's So New About the New Illegitimacy?*, 20 Am. U. J. Gender Soc. Pol'y & L. 387 (2012) (Symposium: The New "Illegitimacy": Revisiting why Parentage Should not Depend on Marriage).
24. Raatjes, Laura Pavlik, *School Discipline of Cyber-Bullies: A Proposed Threshold That Respects Constitutional Rights*, 45 J. Marshall L. Rev. 85 (Fall 2011).
25. Schraub, David, *The Perils and Promise of the Holder Memo*, 2012 Cardozo L. Rev. de novo 187 (2012) ("The Holder Memo" is the February 2011 memo stating that the Department of Justice had concluded that Section 3 of the Defense of Marriage Act is unconstitutional, and DOJ would no longer defend it in the courts, although it would continue to be enforced until such time as it was repealed or definitively declared unconstitutional by the federal courts.)
26. Shepard, Rebecca, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders*, 28 Ga. St. Univ. L. Rev. 529 (Winter 2012).
27. Smolow, Josh, *Can Equitable Estoppel Be Used as an Effective Way for a Legal Parent to Obtain Child Support for the Children of a Separated Same-Sex Couple?*, 18 Cardozo J. L. & Gender 481 (2012).
28. Spindelmann, Marc, *Gay Men and Sex Equality*, 46 Tulsa L. Rev. 123 (Fall 2010) (just published, despite the cover date).
29. Stewart, Monte Neil, Jacob D. Briggs & Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 Brigham Young Univ. L. Rev. 193.
30. Strasser, Mark, *DOMA's Bankruptcy*, 79 Tenn. L. Rev. 1 (Fall 2011).
31. Tarasen, Nick, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. Chi. L. Rev. 1585 (Fall 2011).

# PUBLICATIONS NOTED

## LGBT & RELATED ISSUES

32. Ten Brink, Charles J., *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 Ga. St. U. L. Rev. 789 (Spring 2012).
33. Tribe, Laurence H., and Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471 (2012) (Essay).
34. Waldman, Ari Ezra, *Tormented: Antigay Bullying in Schools*, 84 Temp. L. Rev. 385 (Winter 2012).
35. West, Robin L., *A Marriage is a Marriage is a Marriage: The Limits of Perry v. Brown*, 125 Harv. L. Rev. Forum 47 (2012).
36. Williams, R., *Same-Sex Marriage and Equality*, 14 Ethical Theory & Moral Practice 589 (Nov. 2011).
37. Wolff, Tobias Barrington, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201 (2012).
38. Yamamoto, Mia, Jonipher Kwong and Karin Wang, *Queer and Asian: A Public Forum*, 16 Asian Pacific Amer. L.J. 32 (Fall 2010-Spring 2011). ■

### Specially Noted

New York University Press has published *The Right to Be Parents: LGBT Families and the Transformation of Parenthood*, by Carlos A. Ball. Ball, a Professor of Law and the Judge Frederick Lacey Scholar at Rutgers University School of Law in Newark, N.J., is the author of two prior significant books in the area of gay studies: *From the Closet to the Courtroom* and *The Morality of Gay Rights*. The book provides a detailed overview of the history of litigation over the parental rights of LGBT parents, and should prove an important resource for lawyers, students and lay people. Of particular interest for *Law Notes* readers may be Prof. Ball's account of the controversy that arose around our reporting in *Law Notes* about the trial court decision in *Steel v. Young* and the subsequent series of letters to the editor that we published about this case involving a suit by a gay male sperm donor seeking to establish parental status and visitation rights with the child of a lesbian couple for whom he had been the known donor. (See pages 123-129.)