U.S. SUPREME COURT HOLDS FIRST AMENDMENT SHIELDS WESTBORO BAPTIST MILITARY FUNERAL PROTESTERS FROM TORT LIABILITY

A majority of the Supreme Court of the United States has held that members of the Westboro Baptist Church, who regularly protest military funerals holding signs bearing slogans expressing their disapproval of America's tolerance of homosexuality, such as "God Hates Fags," "Fag Troops," "Thank God for Dead Soldiers," and "America is Doomed," was shielded by the First Amendment from tort liability for causing extreme emotional distress to the father of an Iraq war veteran when they protested nearby his son's funeral, in *Snyder v. Phelps*, 131 S.Ct. 1207 (March 2, 2011).

Chief Justice John Roberts, speaking for the Court, summarized the facts of the case: Fred Phelps, founder of the Westboro Baptist Church, ("Westboro") and 6 other Westboro parishioners (all relatives of Phelps), became aware of the death of Snyder's son, Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. Westboro notified the local law enforcement authorities of their intention to picket the funeral, and complied with police instructions in standing non-violently at a distance of 1,000 feet from the church before and during the funeral while holding signs and singing hymns. Snyder and the funeral procession passed within 200 to 300 feet of the protestors, but Snyder saw only the top of the signs and only later learned of the messages printed on the signs while watching the news.

Snyder filed suit in federal court against Phelps, his family, and Westboro church under diversity jurisdiction, alleging defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy, state law tort claims. The district court granted Westboro summary judgment and dismissed Snyder's claims for defamation and publicity given to private life, and held a trial on the remaining claims. A jury found for Snyder on the remaining claims and held Westboro liable for $2.0 million in compensatory damages and $8.0 million in punitive damages; the trial court later remitted the punitive damages award to $2.1 million. Westboro appealed to the 4th Circuit Court of Appeals, which held that Westboro was entirely shielded from liability by the First Amendment. Snyder petitioned the U.S. Supreme Court, which granted certiorari and agreed to hear the case.

Justice Roberts stated that "whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern," stating that speech deals with matters of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community… or is a subject of legitimate news interest." Justice Roberts opined that the content of Westboro's signs "plainly relates to broad issues of interest to society at large, rather than matters of purely private concern" because while the messages "may fall short of refined social or political commentary, the issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import."

Justice Roberts rejected Snyder's argument that the church members mounted a personal attack on Snyder and his family, stating that there was no pre-existing relationship between Westboro and Snyder that "might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter." Roberts held that Westboro's message "cannot be restricted simply because it is upsetting or arouses contempt" and concluded that the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

Justice Roberts also rejected Snyder's argument that he was "a member of a captive audience at his son's funeral," stating that "Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral… We decline to expand the captive audience doctrine to the circumstances presented here." In his concluding statement, Justice Roberts stated "our holding today is narrow… Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even a hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."

In a short concurrence, Justice Stephen Breyer agreed with the Court and joined its opinion, but wrote separately to state that he believed that the First Amendment analysis cannot stop after determining that the picketing "addressed matters of public concern," suggesting that the Court's opinion does not leave a State "powerless to protect the individual against invasions of, e.g., personal privacy, even in the most horrendous of such circumstances…, [that the] Court has reviewed the underlying facts in

LESBIAN/GAY LAW NOTES **April 2011**

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detail, as will sometimes prove necessary where First Amendment values and State protected… interests seriously conflict, [and has found that since the] picketing was lawful and in compliance with all police directions,… could not be seen or heard from the funeral,… [and because Snyder] saw no more than the tops of the picketers' signs" the First Amendment protects Westboro.

Justice Samuel Alito dissented, stating that "our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case." Justice Alito disagreed with the majority's holding, stating that the First Amendment ensures that persons have "almost limitless opportunities to express their view," but that "it does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate." Justice Alito suggested that Westboro could have picketed at the United States Capital, the White House, the Supreme Court, the Pentagon, or the over 5,600 military recruiting stations, 4,000,000 miles of public roads, 20,000 public parks, or 19,000 Catholic churches in the United States rather than picket Snyder's son's funeral. Justice Alito noted that church members have protested at nearly 600 military funerals and also picketed the funerals of police officers, firefighters, the victims of natural disasters, accidents, and shocking crimes.

Justice Alito stated that the majority mischaracterized the picketing in this case, and he pointed to Westboro signs stating such things as "God Hates You," "You're Going to Hell," and others which "would have likely been interpreted as referring to God's judgment of the deceased," as well as anti-homosexual signs that a reasonable bystander might believe suggest that the deceased was gay.

Justice Alito stated that he failed to see "why actionable speech should be immunized simply because it is interspersed with speech that is protected," that "one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention," and that "there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability."

Finally, Justice Alito noted that the Court's brief discussion that the wounds inflicted by picketing at funerals will be prevented or at least mitigated by future anti-funeral-picketing laws "is no substitute for the protection provided by the established [intentional infliction of emotional distress] tort," concluding that "[a]t funerals, the emotional well-being of bereaved relatives is particularly vulnerable…. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent." *Bryan C. Johnson*

LESBIAN/GAY LEGAL NEWS AND NOTES

7th Circuit Reaffirms Constitutional Right of High School Students to Wear Anti-Gay T-Shirts at School

On March 1, 2011, the U.S. Court of Appeals for the 7th Circuit affirmed a district court grant of summary judgment against a school district, which awarded $25 in damages to each student plaintiff and permanent enjoined the school from banning students from displaying the message "Be Happy, Not Gay" on their t-shirts. *Zamecnik v. Indian Prairie School District #204*, 2011 WL 692059.

The plaintiffs, Heidi Zamecnik and Alexander Nuxoll, have long since graduated from the school in question. The underlying incident arose when the plaintiffs decided to participate in a so-called "Day of Truth" one day after the "Day of Silence" promoted by the Gay-Lesbian-Straight Education Network (GLSEN) to signify solidarity with gay students silenced by the closet. During this Day of Truth, Zemecnik sought to demonstrate her disapproval of homosexuality by wearing a t-shirt that read "My Day of Silence, Straight Alliance" on the front, and "Be Happy, Not Gay" on the back. A school official objected to the t-shirt, blacked out the phrase "Not Gay," and banned the slogan as a violation of a school rule forbidding derogatory comments "that refer to race, ethnicity, gender, sexual orientation or disability." In seeking an injunction against the ban, the students argued that the ban violated their First Amendment rights, and contended that the statements did not otherwise fall under the "fighting words" doctrine (see *Chaplinsky v. New Hampshire*, 315 US 568 [1942]).

Earlier in the litigation, the 7th Circuit had affirmed the District Court's preliminary injunction blocking the school district from banning the slogan, in *Nuxoll v. Indian Prairie School Dist. #204*, 523 F3d 668 (2008). Writing on behalf of himself and Judges Kanne and Rovner, Judge Richard Posner again essentially affirmed all of the touchstones in the court's earlier decision. Judge Posner reiterated that "Be Happy, Not Gay" is not an instance of fighting words and that "[p]eople in our society do not have a legal right to prevent criticism of their beliefs or even their way of life," citing *R.A.V. v. City of St. Paul*, 505 US 377, 394 (1992]. Ultimately, the only way that the defendants could have permissibly banned the plaintiff's expression in this case was if they could demonstrate that there was a "well-founded fear of disruption or interference with the rights of others" he asserted, citing *Sypniewsky v. Warren Hills Regional Bd. Of Education*, 307 F3d 243, 264-65 (3d Cir 2002).

On this appeal, the defendants argued that the District Court's grant of summary judgment was premature. However, the 7th Circuit rejected this argument because the defendants had failed to demonstrate a factual issue as to whether it had a reasonable belief that it faced a threat of substantial disruption. The evidence the school district presented fell into three categories: 1) past incidents of harassment of homosexual students; 2) past incidents of harassment of Zamecnik; and 3) the report of an expert which concluded that the slogan "Be Happy, Not Gay" was "particularly insidious."

Judge Posner characterized the incidents of harassment of gay students as "negligible", noting that only a handful of incidents had occurred in a school with thousands of students. As for any harassment against Zamecnik, such evidence was barred by the trial court by the doctrine of "heckler's veto," which essentially disallows reliance upon disapproval of a message as grounds for the ban of said message. The 7th Circuit also observed that a substantial disruption didn't result from the incident, noting that the worst thing that happened was that a

water bottle was thrown and struck one of Zamecnik's friends during the 2007 Day of Silence.

The last piece of evidence was an expert's report by Stephen T. Russell. The 7th Circuit essentially disregarded this report because the main thrust of it, that the term "Be Happy, Not Gay" is "particularly insidious," was not based upon Russell's personal knowledge of the subject school district, was lacking any evidence that the term has any actual effect on gay students, and did not describe the methodology used to base a prediction of harm to gay students on particular "negative comments." Since the report was based on mere conclusions without any indication of the facts or data relied upon or proof that the report is the product of reliable principles and methods, it was "useless to the court."

As for damages, the 7th Circuit noted that the $25 award was justified. Zamecnik's shirt was defaced and Nuxoll's desire to wear the shirt was on multiple occasions was "thwarted by fear of punishment." *Eric J. Wursthorn*

Federal Court Invites DOMA Challenge While Dismissing Spousal Benefits Case

U.S. District Judge Jeffrey S. White (N.D.Cal.) invited Lambda Legal to file an amended complaint in *Golinski v. U.S. Office of Personnel Management*, No. C 10-00257 JSW (March 16), challenging the constitutionality of Section 3 of the Defense of Marriage Act, the provision upon which the defendant is relying in its refusal to comply with an order by 9th Circuit Judge Alex Kozinski that Karen Golinski, a lawyer employed by the 9th Circuit, be allowed to enroll her wife in the health benefits program provided for Circuit employees.

Noting the recent announcement that President Obama and Attorney General Holder have agreed that Section 3 (which provides that the federal government will not recognize marriages of same-sex couples for any purpose) is unconstitutional, Judge White wrote, "The Court would, if it could, address the constitutionality of both the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages or address the conflict regarding the Executive's decision not to defend the constitutionality of a law it has determined appropriate to enforce. However, the Court is not able to reach these constitutional issues due to the unique procedural posture of this matter."

This case is an offshoot from the brief period during 2008 when same-sex marriages could be contracted in California. Karen Golinski married her long-time same-sex partner, Amy Cunninghis, and then applied to have Ms. Cunninghis covered by Golinski's employer's health insurance plan. Her employer, the 9th Circuit, adopted an Employment Dispute Resolution Plan (EDRP), and a non-discrimination policy that includes sex and sexual orientation. When the Administrative Office of the Courts rejected Golinski's application, she appealed within the Circuit's EDRP, represented by Lambda Legal. Her appeal landed before Chief Judge Alex Kozinski, sitting in his capacity as an administrator rather than an Article III judge.

In that capacity, Judge Kozinski ruled in *In re Golinski*, 587 F.3d 956 (9th Cir. 2009), that it was possible to construe the applicable insurance provisions in light of the Circuit's non-discrimination policy to allow Golinski's wife to enroll, and he issued an order to the Administrative Office to that effect. But the Office of Personnel Management (OPM), an Executive Branch agency that contracts with Blue Cross to provide the benefits, instructed the Administrative Office and Blue Cross to reject the application, taking the position that Section 3 of DOMA applies and so Golinski's wife cannot be treated as her spouse under any federal program.

The DOJ announcement issued on February 23 made the point that although DOJ considers Section 3 unconstitutional, nonetheless all federal agencies are still bound to enforce it unless Congress repeals it or it is finally declared unconstitutional by the courts. Although at least one federal trial judge, Joseph Tauro of the U.S. District Court in Massachusetts, has declared it unconstitutional in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010) and *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 699 F.Supp.2d 234 (D.Mass. 2010), those cases are on appeal to the 1st Circuit. (Attorney General Holder has notified the Circuit's clerk that the Justice Department will not be arguing on appeal that Section 3 is constitutional, but that Congress may seek to intervene to make that argument.) Another 9th Circuit judge, Stephen Reinhardt, also sitting as a grievance administrator on a parallel benefits claim brought by another gay lawyer employed by the federal courts in the 9th Circuit, ruled in *In re Levenson*, 587 F.3d 925 (9th Cir. 2009), unlike Judge Kozinski, that Section 3 was unconstitutional, but also indicated that the applicant would have to vindicate his claim in federal court.

Judge White, denying Golinski's motion for preliminary injunction and granting a motion to dismiss by the government, pointed out that Judge Kozinski had not ruled on the constitutionality of Section 3, and concluded (after ten months of pondering on the pending motions) that Judge Kozinski, when sitting as an administrator within the 9th Circuit, did not have the authority to order OPM to disregard its obligation to enforce DOMA.

Technically, Golinski was seeking a *writ of manadamus*, a device by which the court would order a government official to take or refrain from taking an action. White noted that the standards for issuing such a writ are extremely high, requiring that it be very clear that the plaintiff is entitled to what she is seeking and that the government actor's resistance is clearly improper. A federal court will not issue the writ to compel an official to perform a discretionary act. In this case, until DOMA is actually declared unconstitutional in a controlling appellate ruling, White found, it was not within Judge Kozinski's power to order OPM to disregard it or fail to enforce it.

Since Golinski sought a writ to enforce Kozinski's order, rather than a determination by Judge White as to the constitutionality of Section 3, that issue was not properly before him, he concluded.

White did not hide his own views about Section 3, however. "The Court has a responsibility to be clear and resolute in its condemnation of a discriminatory rule of law," he wrote, "while maintaining its circumscribed, and therefore legitimate, authority. Both parties agree that Section 3 of DOMA as applied to legally married same-sex couples fails to meet the heightened standard of scrutiny required to adjudicate laws targeting minority groups with a history of discrimination and is therefore unconstitutional. However, the constitutionality of the application of Section 3 of DOMA to the decision by the OPM to

restrict the provision of health insurance benefits to Plaintiff's wife is not directly challenged in this case."

White concluded that if Golinski would file an amended complaint raising the constitutional issue, he could get to the merits. Acting as an Article III judge, he would then have the authority to make a determination of Golinski's claim as to her wife's benefit entitlement and to award appropriate relief. "Because the Court cannot find as a matter of law that amendment would be futile," he wrote, "the Court grants Plaintiff leave to amend to attempt to plead a claim that the Court may legitimately address." White gave Lambda Legal until April 15 to get the amended complaint on file, and indicated that the government would then have 20 days to respond. The ball is back in Golinski's court, as White concluded that if an amendment is not filed by then, this case is over.

In light of White's comments, it appears that Golinski's amended complaint would receive prompt consideration and most likely a favorable disposition.

Lambda Legal's Jennifer C. Pizer and Morrison & Foerster's Rita Lin, James McGuire, Gregory Dresser and Aaron Jones represent Golinski. A.S.L.

Minnesota Same-Sex Marriage Suit Dismissed

State trial judges do not have the authority to overrule decisions by the highest court in their state, so perhaps it is not too surprising that Hennepin County District Judge Mary DuFresne has dismissed a lawsuit brought on behalf of three Minnesota same-sex couples seeking the right to marry. The March 7 ruling in *Benson v. Alverson*, Case File No. 27 CV 10-11697 (Minn. 4th Jud. Dist.), relies on the first appellate ruling on same-sex marriage in the United States, the Minnesota Supreme Court's 1971 decision in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185. On the other hand, Judge DuFresne's reliance on *Baker* seems strange in this context, since the plaintiffs in the new case relied solely on the state constitution, whereas the *Baker* case was litigated on federal constitutional grounds. But the court insisted that *Baker* set the parameters for analysis under the state constitution on this subject.

In *Baker*, the Minnesota Supreme Court rejected the argument that denying same-sex couples the right to marry violates the 14th Amendment of the U.S. Constitution, dismissing arguments based on due process (fundamental right to marry) and equal protection, and, in a footnote without any substantive discussion, the 1st Amendment freedom of association and the 8th Amendment ban on cruel and unusual punishment.

In those days, disappointed plaintiffs whose federal constitutional claims were rejected by a state's highest court were entitled to appeal their case to the U.S. Supreme Court. (These days, the U.S. Supreme Court has "docket control" regarding such cases and is not required to decide them unless it agrees to grant a petition for review.) The Supreme Court responded to the appeal by Richard John "Jack" Baker and James McConnell by dismissing the appeal "for want of substantial federal question." That is, in 1971 the Supreme Court did not think that the question of same-sex marriage presented any sort of substantial federal issue that would require it to call for full briefing, hold oral arguments, and write an opinion.

Ever since then, one of the arguments made by state defendants in federal same-sex marriage cases has been that there is no valid federal constitutional claim because of *Baker v. Nelson*, which is, at least theoretically, a U.S. Supreme Court ruling on the merits, even though the Court did not say anything beyond the curt language dismissing the appeal as quoted above. Plaintiffs have argued (successfully last summer in *Perry v. Schwarzenegger*, the Prop 8 case decided in the Northern District of California and now pending before the 9th Circuit), that *Baker* is no longer a controlling federal constitutional precedent because intervening U.S. Supreme Court decisions in cases such as *Romer v. Evans* and *Lawrence v. Texas* have totally changed the legal landscape for due process and equal protection claims by gay litigants.

Most recently, for example, Attorney General Eric Holder has apparently abandoned the precedent of *Baker* in his determination that Section 3 of the Defense of Marriage Act, which withholds federal recognition for same-sex marriages lawfully contracted in those states that allow them, violates the equal protection requirement of the 5th Amendment.

Attorney Peter Nickitas, who represents the plaintiffs in the Minnesota case (Duane Gajewski and Douglas Benson, Tom Trisko and John Rittman, and Jessica Dykhuis and Lindzi Campbell), tried to persuade Judge DuFresne that she could ignore *Baker,* as this is a state constitutional case, raising no federal claim, but she was not convinced. She wrote that "unless and until" the Minnesota Supreme Court overrules *Baker*, "Same-sex marriage will not exist in this state." After citing *Baker*, she wrote, "This, of course, is binding precedent on this Court, and this Court is not free to ignore it."

The court approached the state/federal issues by acknowledging that state constitutions may be construed to provide broader protection of rights than the federal constitution, and observed that the Minnesota Supreme Court could decide to overrule *Baker*, but she insisted that until such overruling it was a binding precedent on the trial court. She also insisted that plaintiffs had not shown that she had authority to provide broader constitutional protection than the *Baker* plaintiffs had received, and pointedly noted that the *Baker* court had not been sympathetic to the plaintiffs in that case. She asserted that although the "times have changed…. The law has not." Of course, if one is referring to federal constitutional law, she is plain wrong about that, since federal constitutional law on the rights of gay people has changed considerably from 1971 to the present. Indeed, a series of federal trial court decisions over the past year or so have marked a revolutionary change, as Attorney General Holder's analysis in his letter to Speaker Boehner about DOMA well illustrates.

Perhaps in the very broadest sense, one might argue that a trial judge in Minnesota may not rule in favor of a right for same-sex couples to marry when the state's highest court previously ruled against such a right, albeit forty years ago. But this seems like a rather odd result. The complaint filed by the plaintiffs raised *only* state constitutional claims, *not* federal constitutional claims, whereas the complaint filed in the *Baker* case argued, in the alternative, that the state marriage law as then written could be construed to allow same-sex marriage, or that the plaintiffs in that case had a federal constitutional right to marry. Thus, unless there have been other rulings on these issues by the Minnesota Supreme Court since then, it is hard to understand why Judge DuFresne would conclude that *Baker*

precludes a state constitutional challenge to the Minnesota statute forbidding same-sex marriages.

In the complaint, plaintiffs raised claims under the following Minnesota constitutional provisions: Article I, Section 7 (due process); Article IV, Section 17 (state DOMA enacted in violation of "single subject" rule in constitution); Article I, Section 2 (equal protection); Article I, Section 16 (freedom of conscience/religious freedom); Article I, Sections 1, 2 & 16 (freedom of association). Judge DuFresne was equally dismissive of their association and religious freedom claims. She observed that there is no express protection for freedom of association in the Minnesota constitution, and insisted that denying civil marriage to same-sex couples was not an abridgement of religious freedom. She observed that religious institutions were free to conduct religious marriage ceremonies for same-sex couples, who could attach spiritual significance to such ceremonies, but the state's concern was entirely with the civil side of marriage.

The trial court is merely the first stop in a same-sex marriage case in any event, so the plaintiffs were always going to have to take their case to the state Supreme Court to achieve a final victory. In that sense, a loss in the trial court is no big deal, but Judge DuFresne seems to be out of step with the trend over the past few months towards support for same-sex marriage rights, and her reliance on *Baker* as a state constitutional precedent is odd.

Plaintiff Doug Benson, who is executive director of Marry Me Minnesota, a nonprofit group that was formed to bring this case, told the newspaper that an appeal will be filed promptly. The plaintiffs have called on Minnesota Governor Mark Dayton and Attorney General Lori Swanson to disavow defense of the state's marriage law, citing the recent action by U.S. Attorney General Holder, but no response to that call has yet been reported. A.S.L.

French Lesbian Flight Attendant Benefits from U.S. Law in Discrimination Suit Against United

In *Rabe v. United Air Lines, Inc.*, 2011 WL 677946 (7th Cir. Feb 28, 2011), the plaintiff flight attendant sued United Air Lines for discrimination based on sexual orientation, among other things, leading to her termination. United argued that because Rabe was a foreign national working for United abroad, American courts lacked subject matter jurisdiction over her discrimination claims. Judge Hamilton, writing for the Seventh Circuit Court of Appeals, rejected this argument and reversed the district court's ruling that it lacked subject matter jurisdiction because Rabe was a foreign national working abroad.

In its decision, the Seventh Circuit held that because the choice-of-law provision in Rabe's contract with United designated United States and Illinois state law as the law to be used in deciding disputes, that law could be applied through a breach of contract or promissory estoppel theory, even though the relevant statutes by their own terms arguably did not apply. Thus, the case was remanded for further proceedings on the merits and re-characterized as claims for breach of contract and/or promissory estoppel with the substantive principles of the statutes absorbed as part of the contract.

Laurence Rabe, a French citizen and a lesbian, worked as a United flight attendant from 1993 until 2008 from the Paris and Hong Kong hubs. Rabe asserts that ninety percent of her flights were to or from U.S. destinations until her voluntary furlough in 2002. After being recalled in 2005, she only worked flights to or from Asian destinations. Rabe had an individual employment contract with United. The contract's choice-of-law clause specified that "the terms and conditions" of employment would "be governed exclusively by applicable United States law," including the Railway Labor Act and the Association of Flight Attendant's collective bargaining agreement. The contract also had a choice-of-forum clause, which provided that only courts of the United States and Illinois could hear disputes related to the contract.

Rabe's lawsuit alleged that United discriminated against her on the basis of her national origin, age, and sexual orientation in violation of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Illinois Human Rights Act. United fired Rabe at the end of an investigation for alleged misuse of travel vouchers, which she claims was a pretext for the supervisor to fire her because she is a lesbian, among other things. United moved to dismiss the suit for lack of subject matter jurisdiction, arguing that these discrimination laws did not apply to a foreign worker working abroad.

The district court held with United, reasoning that it lacked subject matter jurisdiction because U.S. employment discrimination laws do not apply to Rabe as she did not spend sufficient time working in the U.S to meet the Title VII and ADEA domestic-work requirement. But the Seventh Circuit rejected this line of argument. As to subject matter jurisdiction, the court held that "an employee's status as a foreign worker may prevent her success on the merits in a Title VII or ADEA case, but it is not a barrier to the court's power to adjudicate her case." ThecCourt drew a comparison to a Supreme Court ruling that held that the closely related question whether an employer has enough employees to be subject to Title VII is a matter for the merits rather than a requirement for subject matter jurisdiction.

As to the dismissal, the court indicated that the primary question argued before the district court was on the merits, i.e., did Rabe spend sufficient time in the U.S. to qualify as a person working in the U.S. under Title VII and the ADEA? As such, United's motion should have been treated as a motion to dismiss for failure to state a claim. In that respect, the court did not disagree with the district court's conclusion that the time spent was insufficient. However, the court concluded that the district court should have denied United's motion to dismiss Rabe's complaint on the basis of the attached employment contract.

As to the contract's choice- of-law clause, United argued that even though the district court was free to apply Title VII, the ADEA, and the IHRA, those statutes are not applicable to a non-citizen who worked outside the U.S. The court of appeals reasoned that, under United's theory, Rabe would not be protected by the employment discrimination laws of any country. The court concluded that the most reasonable interpretation of Rabe's employment contract was that United agreed to the application of U.S. law notwithstanding provisions that might exclude her.

Appellant Laurence H. Rabe appeared *pro se*. Gary S. Kaplan of Seyfarth Shaw LLP represented United Air Lines, Inc. *Bill Stewart (NCLR Law Clerk) & Daniel Redman*

Unregistered Domestic Partner Can Seek Compensation for Negligent Killing of Partner by Police

A federal district court has ruled that a person who can prove a marriage-like relationship to another person is entitled to sue police officers, under federal civil rights laws, for killing a domestic partner, even if unmarried and not registered as a domestic partner. This federal right supersedes a state statute that requires domestic partner registration as a prerequisite to a state wrongful death action. *Estate of Mendoza-Saravia v. Fresno County Sheriff's Dep't*, 2011 WL 720061 (E.D. Cal. Feb. 22, 2011).

Fresno County Police shot a "bean bag round," intended to be nonlethal, but they wound up killing Angel Mendoza-Saravia. Blanca Estela Castro, Angel's unmarried domestic partner, sued for damages. Under California law, a wrongful death action is not available unless one is either a spouse or a registered domestic partner. Cal. Code of Civil Procedure § 377.60(a) and (f)(1). Blanca was neither, even though she lived with Angel and, 3 months after his death, gave birth to their child, Angie. Since a wrongful death action was barred, she sued instead for deprivation of her "federal liberty interest in and right of familial association." Fresno County moved, under FRCP 12(f), to dismiss the action based on Blanca's having no "essential or important relationship" to the decedent.

The district court noted that the U.S. Supreme Court has recognized that certain kinds of personal bonds and intimate conduct are protected by the substantive due process component of the due process clause. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Lawrence v. Texas*, 539 U.S. 558 (2003).

The right of intimate association exists in unmarried relationships as well as married ones, such that the Seventh Circuit reversed a decision by a district court holding that unmarried domestic partners have no standing to challenge a police search that intruded on their privacy. *Christensen v. County of Boone, Illinois*, 483 F.3d 454 (7th Cir.2007). "[T] the choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our Constitutional scheme . . . ." *Roberts,*, 468 U.S. 609 (1984).

The district court noted that such relationships are of great importance, and that Fresno County cannot merely cite the fact that Angel and Blanca were unmarried and unregistered, and expect the action to be thrown out under FRCP 12(f). The County would have to challenge the duration and quality of the relationship as an "insufficient intimate association," and such a challenge cannot be ruled upon as a matter of law, said the court

In this instance, Blanca proved to the court that her relationship with Angel was an intimate one. The court listed relevant factors in determining intimate relationships, such as: deep attachment and commitment; sharing each others' thoughts, lives and experiences; existence of relatively few such relationships in one's lifetime; long duration; involvement in procreation; cohabitation; and raising of children.

The district court cited an unpublished Ninth Circuit case that recognized that "a state violates the 14th Amendment when it seeks to interfere with the social relationship of two or more people." *Bevelhymer v. Clark County*, 53 F.3d 337 (9th Cir.1995) (unpublished). The 14th Amendment guarantees the right to intimate association, and this right supersedes the denial of the right to bring a wrongful death action under California law, the court held.

Under the federal civil rights statutes, 42 U.S.C. § 1983, compensation is available for deprivation of federal rights. The court therefore held that Blanca has a constitutionally protected interest in Angel's companionship which must be recognized; thus, Blanca has standing to assert a civil rights claim for deprivation of intimate familial association. *Alan J. Jacobs*

4th Circuit Finds Employer May Be Liable for Customer's Homophobic Sexual Harassment of Employee

In a case of first impression in the Fourth Circuit, the court of appeals held that an employer is liable under Title VII of the Civil Rights Act of 1964 for sexual harassment conducted by a non-employee against an employee. *EEOC v. Cromer Food Services, Inc.*, 2011 WL 733814 (4th Cir., March 3, 2011). In the opinion written by Circuit Judge Gregory, the court reversed and remanded the District Court of South Carolina's decision granting summary judgment to the employer, Cromer Food Services (CFS). The circuit court found that the employee, Homer Ray Howard, did establish that a reasonable person could conclude that CFS had "actual or constructive notice of the harassment and failed to take any corrective action" to stop the harassment.

In July 2006, Howard began working for CFS, a company that stocks vending machines. At the time, the company's largest client was Greenville Hospital (Greenville). Howard was assigned to work at Greenville and was given the second shift, from 3 p.m. to 11 p.m., in order to accommodate his childcare duties as he is responsible for taking his child to hospital appointments during the day.

Howard began to experience sexual harassment at Greenville in December 2006, after a note was left by one of Howard's co-workers in the Greenville cafeteria stating that Howard was gay. Two members of Greenville's housekeeping staff, John Mills and Andre McDowell, then began calling him 'Homo Howard.' The two men waited for Howard by the vending machines at the start of his shift and followed him throughout the hospital as he worked, making sexual gestures and graphically describing oral sex. Both Mills and McDowell deny harassing Howard.

Right after the first instance of harassment, Howard reported the behavior to both his supervisor, Gregg Adams, and his direct supervisor, Brian Tyner. Adams responded to the complaint by telling Howard that the men were "only joking" and that Howard should "let it go." Adams did not ask Howard for any further detail about the harassment and took no action to stop the harassment. Tyner had a similar reaction. He reiterated Adams' sentiment that the Greenville employees were only joking with Howard and that Howard should not "take things too seriously because 'faggots are ignorant, retarded people, and Homer, I know you're not retarded.'" Tyner also ignored Howard's request to switch his route so that he would no longer have to work at Greenville. When Tyner and Adams failed to take any action to stop the harassment or give Howard another shift or route, Howard reported the problem to another supervisor, Gary Roper. Roper expressed regret at the way Adams handled the problem, but stated that as Howard's supervisor "had

already dealt with" the problem, he could not take any action.

The harassment continued into January. At this point, Howard reported the harassment to the son of the chairman of the Board of Directors, Chet Cromer, who is also himself a manager at CFS. Chet reported the problem to his father, C.T. Cromer, and arranged a meeting between his father and Howard. However, during the meeting, C.T. did not allow Howard to say anything, but rather spent the meeting "rambl[ing]" about how Howard's complaint would ruin the company. Despite his apparent concern, at least for the company's reputation, C.T. took no action to stop the harassment, and when Howard approached him again later in the month telling him that the harassment was increasing, C.T. stated that CFS is not responsible for the actions of non-employees.

Frustrated with CFS's inaction, Howard reported the harassment to Greenville's Human Resources Department, but nothing came of the report. He also reported the problem to McDowell's and Mills' supervisor, Ronnie Galloway. After he spoke with Galloway, the harassment did stop for two days, but then resumed just as before. Throughout this period, Howard asserts that he continued to report the harassment to Adams, although Adams contends that Howard only made one complaint in February of 2007 concerning only one instance of harassment.

After Adams' continual refusal, according to Howard, to take any action to stop the harassment, Howard reported the situation to the Equal Employment Opportunity Commission (EEOC). In response to the report filed by the EEOC, Howard was offered an early shift that would not require him to work at Greenville. However, the early shift was from 4 a.m. to 3 p.m., which conflicted with Howard's childcare responsibilities. The EEOC also contended that the new shift would have decreased Howard's pay while increasing the number of hours he worked in a week. Howard declined the offered shift and was terminated from his position because the alternate shift was a "take it or leave it" option and no other solutions were offered by CFS.

In the suit filed by the EEOC against CFS, the District Court granted CFS's motion for summary judgment based on the determination that CFS never received the requisite details to address Homer's claim of sexual harassment. This conclusion appears to be based largely on one of Howard's responses during his deposition testimony. When asked whether he gave Adams, or any other CFS employee, details of the harassment, Howard answered "no." The District Court interpreted this response as meaning that CFS never received full knowledge of the extent of the harassment, and therefore could not be found liable for the harassment. In addition, CFS asserted that Howard did not follow the company's anti-harassment policy which requires an employee to report any harassment directly to the president of CFS, and therefore CFS was never properly informed of the harassment.

To establish a sexual harassment claim, an employee "must establish four elements: (1) the harassment was unwelcome; (2) was based on sex; (3) was sufficiently severe or pervasive to alter conditions of employment and create an abusive atmosphere; and (4) was imputable to the employer." As the issue here is whether CFS is liable for the actions of non-employees, Circuit Judge Gregory focuses the opinion only on the fourth element. To answer this question, the Circuit Court applied the negligence standard employed by other circuits in similar cases. Under this standard, if an employer possesses "actual or constructive knowledge" of harassment by a non-employee towards an employee and takes no action to stop the harassment, then the employer can be held liable for the actions of the non-employees.

On the issue of whether or not CFS had knowledge of the problem, CFS argued that Howard never provided the company with details of the harassment, such as the names of the alleged harassers. Without such information, CFS asserted, the company did not have "actual or constructive knowledge" of the situation. The Circuit Court rejected CFS's contention that Howard failed to give the company any details of the harassment. Although Howard never gave CFS the names of his harassers, he did attempt on numerous occasions to report the problem to CFS and was dismissed every time. While CFS argued that Howard only reported the harassment a few times and never offered the names of the alleged harassers even when given the opportunity, Judge Gregory states that the facts must be read in a light most favorable to the non-movant, which here is the EEOC and in turn Howard. Following this reading of the facts, the court held Howard's testimony to be credible. Howard's testimony indicates that he was never afforded any opportunity to give CFS the names of his harassers or even more details of the harassment. Every time he tried to report the problem, he was ignored or told to stop taking jokes so seriously, and no one at CFS ever asked for more information. The court also asserts that, even if CFS had asked Howard to give names and he had refused, as his employer, CFS had a duty to conduct a follow-up investigation. In fact, in the past when other CFS employees complained of problems with Greenville employees, CFS conducted investigations and addressed the concerns. These previous actions indicate that CFS was fully aware of its responsibilities to conduct inquiries into possible harassment of an employee by a non-employee.

As to CFS's contention that Howard did not follow the procedures for reporting sexual harassment outlined in the company's anti-harassment policy, the court refused to adopt the Eleventh Circuit's finding that failure by an employee to follow an employer's anti-harassment policy indicated that the employer was not on notice and therefore could not be held liable for the harassment. *Madray v. Public Supermarkets, Inc.*, 208 P.3d 1290 (11th Cir. 2000). In contrast, the Fourth Circuit previously rejected the argument that an employer can avoid liability for non-employee action by asserting a lack of notice in *Ocheltree v. Scollon Products, Inc.*, 335 F.3d 325 (2003). The court held in Ocheltree that an employer can gain knowledge of harassment through imputation "if a 'reasonable [person], intent on complying with Title VII, would have known about the harassment.'" Here, Howard's repeated reports to various CFS supervisors should have indicated to any reasonable person that some form of harassment was occurring. Additionally, the court found CFS's anti-harassment policy to be unreasonable, as it requires an employee not only to know who the president of the company is, but also to approach that person, which could be intimidating to many employees. Importantly, the court notes that the policy also requires an employee who gains knowledge of harassment of another employee by a non-employee to report the harassment to the president, which Adams failed to do.

The court also found that CFS failed to take appropriate steps to stop the harassment. CFS made neither an attempt to address the harassment itself nor to find a reasonable means of removing Howard from the situation. The court found that offering Howard a shift that Howard informed CFS he could not take due to prior childcare obligations was not a reasonable solution to the problem. Perhaps more importantly, though, the court states that, in general, the proposed remedy offered by CFS was simply unacceptable when one takes into consideration the months of harassment Howard endured and the complete disregard with which he was treated with by his superiors.

Circuit Judge Gregory concludes his opinion by finding that Howard did establish a claim of unlawful retaliation based on his termination from CFS following his refusal of the offered early shift. To establish a successful claim of retaliation, an employee must prove that he engaged in a protected action and that the employer acted adversely against him because of that protected action. The court did not rule on Howard's unlawful retaliation claim, but found that based upon the facts Howard presented, a reasonable jury could find CFS's action to be in retaliation for Howard reporting the harassment to the EEOC. Not only did the offered shift conflict with prior Howard's familial responsibilities, but the EEOC also argued that Howard's salary would decrease if he accepted the new shift. It was unclear, however, if Howard's salary would have actually decreased if he had taken the new shift as both the EEOC and CFS calculated his prior salary differently based on a question of whether or not his annual bonus was figured in correctly. However, in viewing these facts in "the light most favorable to Howard," the court concluded that a reasonable jury could find that CFS acted adversely towards Howard. *Kelly Garner*

How Will the Obama Administration's New Position on DOMA Affect Immigration Matters?

When the Justice Department announced on February 23 that the Obama Administration had concluded that Section 3 of the Defense of Marriage Act violates the federal equal protection rights of gay people and that the Administration would not defend its constitutionality in court cases, it also stated that pursuant to the President's order and the Department's duty to "faithfully execute the laws" the Administration would continue to enforce Section 3 until it was repealed or definitively declared unconstitutional. That leaves interesting questions about how such enforcement will proceed, particularly in the context of concrete situations in which individuals are being denied equitable treatment under federal law due to the failure to recognize their marriages.

Immigration Equality, which litigates on behalf of same-sex couples seeking recognition of their marriages under U.S. immigration law, announced on March 3 that it would file a lawsuit on behalf of a group of same-sex couples challenging the refusal of immigration authorities to accord recognition to their marriages for immigration purposes. Even before such a case can be filed, however, the Administration's position on constitutionality is practically implicated in pending proceedings. *MetroWeekly* reported on March 9 that attorney Lavi Soloway was able to secure the release by Immigration and Customs Enforcement (ICE) officials of a man from El Salvador who is married to his U.S. citizen same-sex partner, who had responded to an order to report for deportation. Soloway had filed a Motion for Emergency Stay of Removal as well as a Motion to Reopen Proceedings, accompanied by documentation of the marriage, seeking an order that the marriage be recognized in light of the unconstitutionality of DOMA Section 3. ICE responded by releasing the man under an Order of Supervision, which allows him to remain in the U.S. while the case is pending, subject to reporting in personally to ICE officials monthly and notifying ICE of any travel outside the states of Maryland, Virginia or the District of Columbia for more than 48 hours. Also, *Gay City News* reported on March 22 that an Immigration Judge in Manhattan had adjourned deportation proceedings for an Argentine lesbian spouse of an American who had married last year in Connecticut. Soloway and his partner Noemi Masliah represent the lesbian couple in the New York case.

Although it is not within the power of the Article I Immigration Judges or the Board of Immigration Appeals unilaterally to recognize same-sex marriages in light of DOMA Section 3, when their rulings are appealed to the Circuit Courts of Appeal such constitutional claims can be raised. Presumably the Justice Department will now concede in those cases that Section 3 is unconstitutional; if the courts agree, they should apply the normal rule that prevailed before DOMA was enacted and order that ICE recognized same-sex marriages that were lawfully contracted. Of course, DOJ is supposed to notify Congress when it will concede the unconstitutionality of a statute in a pending court case, so Congress may find itself embroiled in numerous immigration cases around the country attempting to defend DOMA in this context.

Meanwhile, there was a brief period when it appeared that the Administration might be willing more generally to avoid deporting same-sex spouses while pending DOMA litigation is resolved. At least, such was hinted at a meeting between immigration lawyers and administration officials late in March. However, after a few days of suspense, Citizenship and Immigration Services announced that they were bound to enforce DOMA and to continue to refuse recognizing same-sex marriages for immigration purposes. Thus, applications for green cards based on same-sex marriages will continue to be denied for now. It was uncertain how all this may eventually play out, especially if Immigration Equality files its lawsuit and obtains preliminary injunctive relief.

Is it possible that Congress will take the pragmatic route and amend or repeal Section 3, or more narrowly amends relevant immigration law provisions? It seems unlikely, as long as the generally gay-unfriendly Republican Party controls the House of Representatives, but the hopes of thousands of bi-national couples hang on the outcome. A.S.L.

NY's High Court Upholds Jury Verdict in Gay Retaliation Case Against NYC Police Department

The New York Court of Appeals has unanimously affirmed jury verdicts for two New York City Police Department officers who claimed that they suffered retaliation for opposing discrimination against another officer who was perceived as being gay. The jury had awarded Lori Albunio $579,728.83 and Thomas Connors $588,113.45, plus attorneys fees. The case is *Albunio v. City of New York*, 2011 WL

11577062011 N.Y. Slip Op. 02480 (March 31, 2011).

Captain Albunio was commanding officer of the Youth Services section and Lt. Connors was operations coordinator of the section. Sergeant Robert Sorrenti had applied to transfer to the section, and Albunio recommended him after interviewing him for a specific vacancy. The recommendation went to James Hall, commanding officer of Community Affairs, who decided to interview Sorrenti himself before approving the transfer. The job would involve working with kids. Hall evidently perceived Sorrenti to be gay and would not approve the transfer. Based on the evidence presented to the jury, it could have concluded that Hall believed that gay people as a class should not be assigned to work with kids. Hall found somebody else to fill the vacant position in Youth Services, and told Albunio "that there was something not right about that guy" and that he "found out some fucked up shit about Sorrenti and ... wouldn't want him around children."

At a later point, Hall called Connors into his office and spoke angrily about Sorrenti, using "many expletives," speculating that there was something going on between Sorrenti and another male officer to whom Sorrenti had loaned some money, and said that he "wouldn't be able to sleep at night knowing that Sorrenti is going to be working around kids." Connors responded to these comments by saying that he thought Sorrenti "would be more than qualified to work around kids."

In the fall of 2002 Albunio heard rumors that she was being transferred out of Youth Services and asked for a meeting with Deputy Commissioner Frederick Patrick. Hall was present at the meeting. When Albunio asked why she was being relieved of her Youth Services command, she was told that she had used poor judgment in requesting personnel, giving Sorrenti as the primary example. Albunio responded that "Sorrenti was the better candidate" and that she would recommend him again. She was told to find a different assignment and ended up with something worse.

When Albunio told Connors, her subordinate, what had happened, he filed a complaint with the police department's EEO office, alleging that Hall had discriminated againt Sorrenti due to Sorrenti's perceived sexual orientation. (Ultimately, Sorrenti also filed a discrimination charge against NYPD and won a jury verdict of $491,706 plus legal fees that was upheld by the Appellate Division. Presumably the City didn't settle that case outright because the officers denied the discrimination allegations, but the jury believed the testimony of Albunio, Connors and Sorrenti.)

Connor's act of filing the complaint brought the matter back to Hall's attention, and soon Connors found himself in a boring desk job after he resigned from Youth Services, probably correctly perceiving that his position there was in danger with Albunio's removal. Albunio and Connors filed retaliation complaints, asserting they suffered adverse consequences for opposing discrimination against Sorrenti, and won jury verdicts with substantial damage and fee awards.

The Appellate Division affirmed the jury's verdict in their favor, with one judge dissenting as to Albunio. The dissenter accepted the City's argument that Albunio first opposed discrimination against Sorrenti after the decision was made to relieve her from Youth Services, but the majority accepted the argument that her assignment to a comparatively undesirable petition followed the meeting with Patrick and Hall.

Affirming the jury verdicts, the court of appeals stressed that it was commanded by New York City's Local Civil Rights Restoration Act of 2005 to give a very broad construction to the City's Human Rights Law in favor of discrimination plaintiffs, and thus the court could be liberal in interpreting the requirement that the plaintiffs have suffered retaliation for opposing discrimination. The court found Connors' case to be relatively easy, in any event, since he suffered adverse consequences after filing a discrimination complaint about the way Sorrenti was treated by Hall.

Albunio presented the harder case, as the Appellate Division dissent indicated. Writing for the Court of Appeals, Judge Robert Smith said that the record showed no "opposition" by Albunio to the discriminatory treatment suffered by Sorrenti prior to Albunio's meeting with Hall and Patrick concerning the rumors about her own transfer. Although Albunio had been displeased that Sorrenti didn't get the job, she didn't do anything affirmatively about it that would constitute "opposition" to discrimination.

In that meeting, however, when she was criticized about having recommended Sorrenti, she said he was the better candidate and she would recommend him again. "While she did not say in so many words that Sorrenti was a discrimination victim," wrote Judge Smith, "a jury could find that both Hall and Albunio knew that he was, and that Albunio made clear her disapproval of that discrimination by communicating to Hall, in substance, that she thought Hall's treatment of Sorrenti was wrong. Bearing in mind the broad reading that we must give to the New York City Human Rights Law, we find that Albunio could be found to have 'opposed' the discrimination against Sorrenti at the October 31 meeting."

Since nobody disputes that Albunio ended up with a worse assignment patrolling in the subway system after that meeting, the elements of a retaliation claim are complete.

Evidently, violating City law and subjecting the NYPD to embarrassment and more than $2 million in financial liability is no barrier to advancement for a politically-connected police officer, because Hall has since been promoted to Chief of Patrol, the second highest uniformed rank in the Department. A.S.L.

Armed Forces Appeal Court Vacates and Remands Article 125 Sodomy Conviction

The U.S. Court of Appeals for the Armed Forces vacated a guilty plea to a charge of sodomy under Article 125 of the Uniform Code of Military Justice (UCMJ), finding that the court martial trial judge did not engage in the required colloquy with the defendant necessary for an informed guilty plea. *United States v. Hartman*, 2011 WL 904218 (March 15, 2011). As a result of the guilty plea, Hartman was sentenced to a bad-conduct discharge following a reduction in pay grade and a month in the brig.

In 2004, this court issued its decision in *United States v. Marcum*, 60 M.J. 198, setting out its analysis of the effect of *Lawrence v. Texas*, 539 U.S. 558 (2003), on the continued enforcement of the military sodomy law. In *Lawrence*, the U.S. Supreme Court held that the liberty interest protected by the 14th Amendment Due Process Clause included the right of consenting adults of the same-sex to engage in private, non-commercial sexual activity. In *Marcum*, the Armed Forces Court of Appeals estab-

lished a tripartite analytical framework for analyzing sodomy charges against military personnel, acknowledging that the 5th Amendment Due Process Clause applies in the military and thus that some conduct covered by Article 125 might be constitutionally protected in light of *Lawrence*. Under the *Marcum* framework, the court first considers whether the nature of the conduct would "bring it within the liberty identified by the Supreme Court." If so, the next question would be whether the conduct encompassed "any behavior of factors identified by the Supreme Court as outside the analysis in *Lawrence*." And, finally, the court would have to consider whether there were "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." In subsequent cases, it has become clear that under the third prong of the analysis, crucial factors will be whether the defendant's sex partner was also a member of the military covered by Article 125 and, if so, of what rank and assignment relative to the defendant, as well as the location, whether the participants in the sexual activity were "on duty," and how "private" the activity was.

In this case, the defendant proposed to plead guilty. The military judge "asked Appellant to explain in his own words why he believed he was guilty of the offense. Appellant responded by describing the nature of the sexual conduct between himself and the other party to the sexual act. The inquiry did not reflect consideration of the *Marcum* framework." After questioning the Appellant, the military judge asked Appellant's counsel if he desired further inquiry. Counsel and judge then entered into a discussion of *Lawrence* and *Marcum*, as a result of which the military judge further questioned Appellant about "the location of the act of sodomy, the presence of any other person in the room, and the military relationship between Appellant and the other person involved in the sexual act." The judge did not first explain to Appellant the potential significance of these factors, and the Appellant responded that "the incident took place at the Transient Visitors Quarters on a U.S. Navy facility; that the other participant in the sexual activity was a member of the Navy assigned to the same ship as Appellant; and that a third shipmate 'was present and asleep in the room' at the time of the charged act of sodomy." The judge did not question Appellant about whether he understood the legal significance of these factors "to the distinction drawn in *Lawrence* and *Marcum* between constitutionally protected behavior and criminal conduct."

Under these circumstances, the court found that the Appellant was not in the position to make a provident decision to plead guilty. As Chief Judge Effron explained for the court: "The fundamental requirement of a plea inquiry… involves a dialogue in which the military judge poses questions about the nature of the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct. A discussion between trial counsel and the military judge about legal theory and practice, at which the accused is a mere bystander, provides no substitute for the requisite interchange between the military judge and the accused. In the absence of a dialogue employing lay terminology to establish an understanding by the accused as to the relationship between the supplemental questions and the issue of criminality, we cannot view Appellant's plea as provident." The court authorized a rehearing before a military judge.

The court does not mention the recent enactment of the "Don't Ask Don't Tell Repeal Act of 2010," which is currently in the stage of preparation for implementation of the repeal of the existing policy on military service by gay personnel, anticipating full implementation by the end of the summer. The Repeal Act did not directly affect Article 125, leaving open the question whether military tribunals may alter their enforcement of Article 125 in light of the new phenomenon of service by openly gay members. This decision by the Armed Forces Court of Appeals suggests that the court is adopting stringent procedural requirements for prosecutions of consensual sodomy that may portend giving even greater weight to the *Lawrence* decision. A.S.L.

Lambda Legal Suit Against Indian River Central School District Will Continue

U.S. District Judge Glenn T. Suddaby (N.D.N.Y.) has ruled that a lawsuit filed by Lambda Legal on behalf of two students (a brother and sister) against the Indian River Central School District (in Central N.Y.) and various district and school officials (including the school board) can proceed on state and federal statutory and constitutional claims, finding that the complaint adequately places in issue whether the school's failure to protect a gay student from bullying and harassment and failure to extend equal access to a proposed gay-straight alliance at the school violated the students' legal rights. The ruling in *Pratt v. Indian River Central School District*, No. 7:09-CV-0411 (GTS/GHL) (N.D.N.Y., March 29, 2011), denied the defendants' motions for summary judgment, and left standing the bulk of plaintiffs' legal claims for trial.

In some ways this is a depressingly familiar sort of case, as once again a group of school administrators and personnel have allegedly failed to rise to their responsibilities under the law to afford equal treatment on the basis of sexual orientation. Indeed, it is rather astonishing, in light of the litigation record on this issue compiled in federal courts around the nation over the past two decades, that school officials and employees anywhere in the country could have behaved the way the defendants in this case are charged with behaving during the relevant period of 2003-2004.

Judge Suddaby decided not to describe the factual allegations in detail in his opinion, noting that this was a pretrial ruling mainly directed to the parties, whose familiarity with the allegations could be presumed. But they are available in detail from the complaint, which can be accessed at Lambda Legal's website. The complaint alleges that Charlie Pratt, then a 15-year-old gay student at the high school, dropped out in 2004 after a campaign of harassment, assault, and threats against him. The complaint was also filed on behalf of his sister, also a student there, who joined Pratt in seeking the establishment of a GSA at the school.

It has long since been firmly established, in decisions by judges ranging across the political spectrum, that under the federal Equal Access Act, students who wish to form a gay-straight alliance at their school are entitled to do so if the school allows any other non-curricular clubs whatsoever, and to be afforded equal status, recognition, and benefits as a recognized student organization. And it has been firmly established as well since late in the last century that anti-gay discrimination by state actors

can be challenged under the Equal Protection Clause and is unconstitutional unless supported by a rational non-discrimination justification.

One wonders, reading Judge Suddaby's opinion, whether school officials sought legal advice at any time prior to being served with this lawsuit, since competent legal advice would have warned them about the potential liability they faced. In the first major case on harassment of gay students resulting in a trial verdict, *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), Lambda Legal obtained a settlement of close to $1 million for a gay man subjected to similar conduct after a jury voted to hold the school district liable, and there have been similar cases in the interim involving significant damage awards. Further, it is amazing to read in the court's opinion that the district argues that anti-gay discrimination may not be attacked as unconstitutional because the Supreme Court has not held that sexual orientation claims involve a "suspect class." Ever since the Supreme Court's 1996 decision in *Romer v. Evans*, 517 U.S. 620, it has been well established that anti-gay discrimination is actionable under the 14th Amendment. But then, perhaps the school district's legal advisors are not particularly well informed, or thought they could render advice without doing legal research. This would be consistent with Judge Suddaby's criticisms about the procedural flaws and oddities of the Defendants' motion, which "vacillates so freely between asserting a [dismissal] challenge and asserting a [summary judgment] challenge — often in the same sentence" that the motion "arguably violates" the Federal Rules of Civil Procedure, and thus shouldn't be considered at all. But the judge decided to overlook these problems and get to the merits of the motions.

As to procedural defenses, the judge rejected the defendants' claims that various state statutory claims had to be dismissed because certain notices hadn't been sent to the defendants before the lawsuit was filed, but accepted the argument that such notice must be given before asserting a state constitutional claim, so the claim of violation of a provision of the state constitution drops from the case. He also found that because plaintiffs' claims concerning defendant's denial of equal access for a GSA could be said to seek to vindicate a public interest, notice requirements under the Education Law for suing a school district were not applicable. The court rejected a statute of limitations argument, finding that lead plaintiff Charles Pratt was a minor when these events occurred, and the statute of limitations on his claims would not start to run until after his 18th birthday. As a result, his state law claims were not time-barred when the lawsuit was filed before his 21st birthday.

Disappointingly, the court found that controlling appellate division precedent compells dismissal of claims against the school district under the New York State Human Rights Law. The Appellate Division ruled in *East Meadow Union Free School District v. New York State Division of Human Rights*, 65 A.D.3d 1342 (2009), leave to appeal denied, 14 N.Y.3d 710 (2010), that a school district is not an "education corporation or association" within the definition of a public accommodation in the state Human Rights Law, and thus not governed by that law's ban on sexual orientation discrimination.

However, the court found that the New York State Civil Rights Law, which also mentions sexual orientation and specifically focuses on harassment by any "institution, or by the state or any agency or subdivision of the state," did apply, and that Pratt's factual allegations were sufficient to ground valid claims of sex and sexual orientation discrimination against the defendants under this statute.

Of greater potential significance for purposes of this lawsuit in federal court, Judge Suddaby refused to dismiss the federal statutory and constitutional claims.

Title IX of the Education Amendments Act of 1972 applies to sex discrimination in schools that receive federal funding, and courts have found that it applies to harassment of gay students due to gender nonconformity that results in a hostile educational environment. The court found that Pratt's allegations were sufficient to raise this theory of liability, contending that Pratt was harassed due to gender stereotyping, as reflected in the derogatory language directed against him, and that it was severe enough to create a hostile environment in violation of the statute.

On plaintiffs' equal protection claim, the court noted federal precedents finding that anti-gay discrimination may violate the Equal Protection Clause, and that plaintiffs had alleged facts "plausibly suggesting" that the District, the School Board, and various individual named defendants "discriminated against Plaintiff Pratt because of his sex and sexual orientation, and were deliberately indifferent to antigay harassment of him by other students and faculty." Indeed, plaintiffs alleged harassment so severe that Pratt had to drop out of school, and that various defendants were aware of the harassment but took no remedial action. This is enough to state a valid equal protection claim, in light of evidence that school officials took action to protect non-gay students who encountered harassment.

Plaintiffs alleged that First Amendment expressive association rights as well as the federal Equal Access Act were violated by the way the District responded to their request to start a GSA at the school. Here the school argued that since the lawsuit was filed they have allowed a GSA to meet at the school. However, plaintiffs counter, the GSA still has not been accorded equal treatment with other student groups, a point that defendants didn't bother to refute in their motion to dismiss. Judge Suddaby observed that compliance with the law after a lawsuit is filed would not relieve the defendant of liability for failing to comply with the law before the lawsuit was filed, and would not provide a basis to dismiss a lawsuit that was seeking damages.

The District also mounted the tired old argument, rejected numerous times in other cases, that because it was not required to allow student clubs to exist, it could not be charged with a violation of the First Amendment for rejecting the formation of a GSA. This misses the point of the First Amendment claim, which is that having decided to allow student clubs to form, the school district has created a limited public forum in which it is not free to selectively forbid particular clubs because of its disapproval of their subject matter unless there is some good non-discriminatory justification for doing so. Content-based regulation of speech and association is suspect under the First Amendment, so the court refused to dismiss this claim on a motion to dismiss.

Finally, the court agreed with the defendants that under established law a school district may not be sued for punitive damages, only for compensatory damages and injunctive relief, so the demand for punitive damages was dropped from the case.

The upshot of the court's rulings is that the district will have to stand trial for vio-

lations of the New York Civil Rights Law, the federal Equal Access law, Title IX, and the federal constitution. The school district's attorney, trying to put a good face on the decision in a statement to the Watertown Daily Times published March 31, pointed out that the ruling was not "entirely a victory" for the plaintiffs and "isn't something complete adverse for the school district." That's certainly true. But what is also certainly true is that the major legal claims of the case survived the motion, and that the ruling was mostly a victory for the plaintiffs, which means that it's certainly time for a settlement. One suspects that the experience of named defendants testifying at trial would not be enjoyable.... at least to them. Now that the motion to dismiss is past, discovery can begin and Lambda Legal's crack attorneys can make the district officials squirm in depositions, which one suspects they would like to avoid experiencing. A.S.L.

Federal Civil Litigation Notes

Military — On March 31, a three-member administrative separation board held a hearing on the proposed separation from the service of Navy Petty Officer 2nd Class Derek Morado under the "Don't Ask, Don't Tell" policy. Although Congress enacted and the president signed legislation prospectively repealing the policy in December, the repeal does not take effect until sixty days after a joint certification by the President, Secretary of Defense, and Chair of the Joint Chiefs of Staff that all steps have been taken to ensure that repeal of the policy does not adversely affect military readiness and effectiveness, a certification that is expected to be given before the end of 2011. Morado's discharge case dates from 2009, when he posted a photo of himself on his MySpace page kissing another man, was turned in by a senior member of his unit and then processed for discharge. As a practical matter, discharges have generally not been carried out under the policy since last fall, when Secretary Gates directed that any discharge under the policy had to be finally approved by the Secretary of the relevant service branch after going through several layers of high level approval. (The unspoken goal of this change was to delay finally discharging anybody pending repeal of the policy.) At the conclusion of the March 31 hearing, the panel voted 3-0 to recommend that Morado be retained in the Navy. Perhaps this portends the de facto end of the policy, especially as some Pentagon officials had met with LGBT rights advocates earlier in March to discuss progress towards the certification process and assured them that it was well under way and would result in certification, most likely in the fall.

California - Proposition 8 Case Developments - The California Supreme Court rejected motions to expedite its consideration of the question certified by the 9th Circuit Court of Appeals over the standing of Proponents of Proposition 8 to appeal the district court's decision declaring Proposition 8 unconstitutional. As of now, it appears that oral argument before the California Supreme Court will probably be scheduled for late in the summer or early in the fall, perhaps as early as September. In light of this delay in resolving the standing issue, injecting as much as a year into the pendency of the 9th Circuit appeal, counsel for the plaintiffs and the city of San Francisco, joined by counsel for Governor Jerry Brown, Attorney General Kamala D. Harris and public interest amici, filed papers urging the 9th Circuit to lift the stay on District Judge Vaughan Walker's ruling holding Proposition 8 unconstitutional, but the court rejected this suggestion in a cryptic announcement released on March 23. * * * Clerical revision: With changes resulting from the November 2010 elections, motions have been granted to substitute new office-holders for old in the caption of the pending appeal, so lead respondents are now Gov. Edmund G. Brown, Jr. and Attorney General Kamala D. Harris. With Judge Walker's retirement from the bench, the case has been reassigned to District Judge James Ware for any further action that might need to be taken at the district court level. The newly-elected Imperial County Clerk has also sought to intervene as a co-appellant with the Proponents of Proposition 8.

Connecticut — In *Maroney v. Waterbury Hospital*, 2011 WL 1085633 (D.Conn., March 17, 2011), U.S. District Judge Janet C. Hall granted defendant's motion to dismiss a gay employee's Title VII harassment and retaliation charge and a state wrongful discharge charge. Maroney had claimed that the hospital engaged in a campaign of harassment against him and his same-sex partner, ultimately resulting in the end of his employment. His complaint alleged violations of the Americans With Disabilities Act, the Connecticut Fair Employment Practices Act (which bans sexual orientation discrimination), the Family & Medical Leave Act, Section 504 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, and a common law wrongful discharge in violation of public policy claim. The hospital moved to dismiss two of the counts: Title VII and the common law claim. In granting the motion, Judge Hall pointed out that a gay employee bringing a sex discrimination claim under Title VII must allege facts that would support a conclusion that the employer's action was motivated by his sex, which he hadn't done. Sexual orientation discrimination claims as such are not actionable under this statute. Furthermore, Maroney could not take advantage of the Title VII sexual harassment cases that turn on gender nonconformity or sexual stereotyping, because he made no pertinent factual allegations to support those theories. Finally, Judge Hall found precedents required dismissing the common law wrongful discharge cause of action when the plaintiff had available statutory remedies on basically the same theory — in this case, the ADA, Rehab Act and Connecticut sexual orientation discrimination claims.

Massachusetts, New York, Connecticut, California — *DOMA Case Developments* — Rep. John Boehner, the Speaker of the House of Representatives, convened a Legal Advisory Committee made up of majority and minority leadership in the House to determine whether the House would attempt to defend the Defense of Marriage Act (DOMA) in pending litigation. Attorney General Eric Holder had informed Boehner that there are nine pending cases in several different jurisdictions where legal challenges are pending to DOMA, including an appeal pending before the 1st Circuit, in which DOJ planned to take the position going forward that Section 3 of DOMA is unconstitutional. On a party-line vote of 3-2, the Committee concluded that the House should intervene, and instructed the House's Counsel, Kerry Kircher, to undertake the defense of Section 3 in the pending cases. The Democratic members of the committee, Majority Leader Nancy Pelosi and her second-in-command, Steny Hoyer, argued that this expense is unnecessary, in that amicus parties could be counted on

to make the arguments that the House's counsel would make in defense of the law. Kircher informed the Committee that his small office would need to hire outside counsel to undertake litigation work, which will be expensive, but the majority of the Committee voted to go ahead. Does this qualify as an "earmark" for some big firm litigation department? * * * In addition to the nine cases now pending, Immigration Equality has announced that it will be putting together a class action challenge to the refusal of the Department of Homeland Security's Immigration Control and Enforcement agency to recognize lawfully contracted same-sex marriages involving foreign national's and U.S. citizens for immigration purposes. IE has not yet announced where it is planning to bring the lawsuit. * * * On March 15, U.S. Magistrate Judge James C. Francis, assigned to deal with pre-trial issues in *Windsor v. United States*, 10 civ. 8435 (JCF) (S.D.N.Y.), issued an order giving Congress until April 18, 2011, to file a motion to intervene, and set a conference date of May 9 at 9:30 am for the plaintiff, DOJ, and "any Congressional intervenor" to meet with Francis "to discuss how this case should proceed in light of the President's decision, as announced by the Attorney General on February 23, 2011, that Section 3 of the Defense of Marriage Act ('DOMA'), 1 U.S.C. § 7 as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment." The plaintiff was stuck paying $350,000 in estate taxes because the Internal Revenue Service refused to acknowledge that she was married to the decedent. A.S.L.

State Civil Litigation Notes

Mississippi — The American Civil Liberties Union (ACLU) of Mississippi has reached an out-of-court settlement with the Forrest County Sheriff's Department that will result in a new phenomenon in the state: a government agency with a non-discrimination policy covering sexual orientation. ACLU had sued in U.S. District Court on behalf of André Cooley, a deputy corrections officer who alleged that he was discharged on account of his sexual orientation in violation of the Equal Protection Clause of the 14th Amendment. As a result of the settlement, Cooley will be reinstated and the department will amend its policy to forbid sexual orientation discrimination. The settlement also includes an undisclosed monetary payment as backpay and additional compensation. Cooley lost his job after he called 911 when his boyfriend became physically violent while Cooley was at home and off duty on June 14, 2010. Local police responded to the call and listed Cooley as the "victim" on their report. The Forrest County chief of corrections also responded to the call, and upon learning that Cooley was gay, told him not to return to work until reporting the incident to his supervisor. The next day, Cooley was notified of his termination. The Department has never indicated any reason for Cooley's termination, and a press release from the Sheriff expressed happiness at his return. *Hattiesburg American*, March 29.

New Jersey — A Hudson County jury has awarded damages of $3.15 million to two gay men who were the victims of a hate crime committed by employees of a Union City Burger King restaurant, NJ.com reported on February 25. A civil trial on complaints filed by Peter Casbar and Noel Robichaux under the New Jersey Law Against Discrimination began in Hudson County Superior Court on February 7, with the verdict rendered on February 24. Of the total damages, $1.7 consists of punitive damages. The damages are to be paid by corporate defendants, Food Services Properties Corp. and Union City Restaurant Corp., owners of the Burger King franchise restaurant in question. Two employees from that location previously pled guilty to aggravated assault charges. The plaintiffs had testified that they had some dispute with the person who was taking their order, which escalated and led to them being attacked by other employees when they left the restaurant.

New York — Westchester County Supreme Court Justice William J. Giacomo ruled on March 22 in *Taylor v. Taylor*, 27940/2010, NYLJ 1202488323741, at *1 (published March 29), in a case concerning a real property dispute between lesbian spouses. Jane and Diane purchased a house together as tenants in common in Hastings-on-Hudson in July 2008. In December of that year, they executed a pre-nuptial agreement, providing, in addition to other terms, "In addition, we do both mutually agree that the amount of money each of us paid for our home… will be returned to each of us upon the sale of the home. Any profit over and above that which we paid will be shared equally." Ten days after executing this agreement, they were married in Greenwich, CT. Jane subsequently filed for divorce, but the action was withdrawn by stipulation and instead she filed this action, seeking sale of the property and accounting of the proceeds along the lines of the pre-nup. Diane opposed, arguing that since they were married, the real property must be dealt with through a divorce proceeding under the equitable distribution law. Judge Giacomo ruled that the property acquired prior to marriage was not a marital asset, and that as a tenant in common Jane had a right to maintain an action to partition real property. Finding no triable issues of fact, and that no divorce action was pending, "any issue with respect to equitable distribution is irrelevant," wrote Giacomo. He found that before directing a sale, he had to direct an accounting to determine the contributions of each party and the expenses of the property since purchase. He denied Diane's motion to dismiss the action, and granted Jane's motion declaring the status of the parties as tenants in common and appointment a referee prior to the sale.

New York — The Transgender Legal Defense and Education Fund filed lawsuits on March 22 on behalf of Sam Berkley and Joann Marie Prinzivalli against the City of New York in New York County Supreme Court, challenging City Health Code requirements for the issuance of corrected birth certificates to accord with the gender identity of transsexuals. The Code requires "convertive surgery" as a prerequisite. In their lawsuits, the plaintiffs argue that this requirement is obsolete and unnecessary, in that the current medical consensus treats genitals as secondary to the issue of gender identity. An attorney for TLDEF, Noah Lewis, told the *New York Times* (March 23), "It's just a highly individual decision about whether you want to have surgery on your genitals. There are risks with this surgery. People might be more inclined to stick with what they have." Lewis also noted that gender reassignment surgical procedures are expensive and usually excluded from coverage under health insurance policies, as they are excluded from Medicaid coverage. In addition, some people are poor candidates for the surgical procedures due to their health status. The overwhelming majority of transsexual New Yorkers seeking birth certificate changes have not had such surgery. Lewis argued that New York must

adopt a standard akin to most other states — a letter from a doctor certifying the sex change — and noted that this is deemed adequate now for passports and driver's licenses in most jurisdictions. Speaking for the New York City Law Department, Gabriel Taussig told *The Times* that the Health Department "must be satisfied that an applicant has completely and permanently transitioned to the acquired gender prior to the issuance of a new birth certificate," but was not quoted as to any reason why this should be so when other forms of official documented are being issued without the surgical requirement.

Texas — The Texas Supreme Court found that a man being tried in a civil commitment proceeding is entitled to a new trial because his counsel was stopped by the trial judge from asking potential jurors whether they would be able to give a fair trial to a person whom they believed to be a homosexual. *In re Commitment of Hill*, 2011 WL 836933 (March 11, 2011). The State was attempting to have Hill committed as a violent sexual offender. One of the elements it would have to prove was that Hill suffered "from a behavioral abnormality" that made him "likely to engage in a predatory act of sexual violence." During Hill's pretrial deposition, the State questioned him about his sexual history, eliciting the information that he had sex with other inmates in an all-male facility. At trial, the State's expert testified that "if somebody has heterosexual preferences and then they later begin practicing homosexual acts, it infers that there is an instability within their personality which again, is more evidence of why I diagnosed him with a personality disorder." The Supreme Court concluded that because Hill's sexual history, which included homosexual activity, was "part of the State's proof of his alleged behavioral abnormality," the trial court's refusal to allow his counsel to ask questions on voir dire about potential anti-gay bias "went to the potential jurors' ability to give him a fair trial." Indeed, some jurors who were asked the question had responded that they could not give a fair trial, which may be what prompted the trial judge to cut off the line of questioning. The Supreme Court found that the trial judge abused his discretion in this regard, as well as in connection with another line of questioning that the judge had cut short, and remanded for a new trial.

Texas — The Fort Worth City Council has authorized a $400,000 payment to settle a lawsuit brought by Chad Gibson, who was severely injured by city police officers and state Alcoholic Beverage Commission agents in the Rainbow Lounge raid in 2009. Although both the police department and the state agency's investigations claimed that no excessive force was used, Gibson's severe injuries speak for themselves. The city dropped all charges that had been filed against Gibson and several other bar patrons arrested that night. Ft. Worth Mayor Mike Moncrief premised his support for the settlement on "minimizing the liability of exposure to the city," emphasizing that it was "not an admission of guilt. It is an attempt to put this behind us and move forward." *Associated Press, Chron.com*, March 18.; *Ft. Worth Star-Telegram*, March 23.

Wisconsin — Governor Scott Walker has removed the attorney who was representing the state as defendant in a lawsuit challenging the validity of the state's domestic partnership registry. Plaintiffs in the lawsuit claim that enactment of the registry was barred by the state's constitutional provision against same-sex marriages. Walker's predecessor, a Democrat, had selected Lester Pines, a prominent Madison attorney, to defend the statute. Walker, a Republican, gave no immediate signal as to who he will appoint to replace Pines. (*Milwaukee Journal Sentinel*, March 24). Is it possible that Walker, taking a leaf from President Obama's book, will announce that he agrees with the plaintiffs that the registry is unconstitutional and will no longer defend it in court? This sort of thing is why some have criticized Obama's decision not to defend Section 3 of DOMA as creating a dangerous precedent. A.S.L.

State Criminal Litigation Notes

California — In *People v. Wright & Brock*, 2011 WL 675933 (Cal.Ct.App., 6th Dist., Feb. 25, 2011) (not reported in Cal. Rptr. 3d), the court of appeals affirmed the convictions of Kevin Wright and Luther Clayton Brock for assault, but ordered a correction of the record on Wright's conviction and a remand on Brock's case for reconsideration of some fees imposed as part of the sentence. Wright and Brock were part of a group of five men who set upon and assaulted a transgender man in San Jose on March 29, 2009. From the court's summary of the evidence, what they did to the victim (who is referred to respectfully by her desired pronoun despite her male name by the court throughout the opinion) was frightening, humiliating, and potential quite harmful physically and psychologically, and many might consider the sentence imposed by the trial judge to be a mere slap on the wrist. The sentences mentioned by the court sound light compared to the description of the offense.

Florida — The 3rd District Court of Appeal rejected a challenge to the second-degree murder conviction of Baron Moore for the murder of Keith Culbertson, a gay man. *Moore v. State*, 2011 WL 798953 (March 9, 2011). Prosecutors' theory of the case had Culbertson being singled out as a victim due to his sexual orientation. Moore's attorney had tried to keep the sex angle out of the trial, but it was difficult to do when Culbertson's body was found apparently dragged to a field with his pants down and blood matching his DNA found in his motor vehicle, a set-up leading to the implication that Moore and Culbertson may have had sex in the car before Moore killed him. In addition, a witness testified that Moore had told her that he had killed a "faggot" and hidden the body. On appeal, Moore protested the trial judge's failure to declare a mistrial based on statements made in closing argument by the prosecutor alluding to the sex-related evidence, despite a motion in limine granted by the trial judge at the outset regarding comments about the sexuality of the victim or defendant. The court found that the prosecutor was merely accurately summarizing relevant evidence going to the motive for the crime. Moore had also challenged unsuccessfully the trial judge's charge to the jury on manslaughter.

New York — The Manhattan District Attorney's Office is bringing murder charges against Renato Seabra, a Portuguese model, in the death of Carlos Castro, a fashion writer, in a Times Square hotel. Seabra confessed to the murder, then sought to retract his confession. His attorney, David Touger, indicated that he might pursue a psychiatric defense in the case. There was media speculation that Castro brought Seabra with him to New York on a business trip expecting sexual favors, and that Seabra eventually rebelled against these expectations and killed Castro, after which he attempted to commit suicide

by slitting his wrists. Seabra is being held without bail. *New York Post*, March 4.

Pennsylvania — A criminal complaint has been filed against John Thomas, 28, of Lansdowne, in the murder of Murray Seidman, 70. Seidman was killed in his apartment in January, his body found several days later. Thomas allegedly stoned Seidman to death with a rock stuffed in a sock, in accord with Biblical commands to execute homosexuals by stoning, or so Thomas is reported to have told police. The two men were friends and Thomas is the executor and sole beneficiary under Seidman's will. *SFGate.com*, March 18.

South Dakota — Minnehaha County Judge Bill Srstka approved a name change request from two Sioux Falls women who were legally married in Iowa and who sought to use their married surname at home in South Dakota for, among other things, getting new drivers' licenses. The Department of Public Safety had refused to accept their Iowa marriage license as a basis to issue new drivers' licenses, thus the petition for a legal certification of change of name. The court rejected any argument that South Dakota's mini-DOMA stood in the way of the name change. Judge Srstka told a reporter for the *Sioux Falls Argus Leader* (March 15) after the hearing, "It's just a name change. You can call yourself whatever you want, as long as it's not being done for fraudulent purposes." The newspaper reported that although the state's mini-DOMA was passed in 2006, it just became an issue in the Public Safety Department when they upgraded identification requirements for drivers' licenses to comply with new federal requirements to produce licenses that can be used to access aircraft. A.S.L.

Legislative & Administrative Notes

Federal — March 30 marked the reintroduction of the *Employment Non-Discrimination Act* in the House by lead sponsor Rep. Barney Frank (D-Mass.) The bill, which would apply to employers, employment agencies, unions and joint labor management committees covered under the Civil Rights Act of 1964, would outlaw discrimination in employment based on actual or perceived sexual orientation or gender identity, and would apply to both the public and private sectors. Although a prior version of this bill that did not include gender identity was approved by the House in 2007, the version of the bill including gender identity introduced in the last session of Congress did not come to a vote in either chamber. Frank conceded that introduction in the House was mainly symbolic at this time, since the Republicans control the chamber by substantial margins, and their party platform has traditionally failed to support banning anti-gay discrimination.

On March 16 the *Respect for Marriage Act*, a bill to repeal the *Defense of Marriage Act* and to ensure respect for State regulation of marriage, was reintroduced in both houses of Congress with numerous co-sponsors. First introduced on September 15, 2009, in the 11th Congress (the House version was H.R. 3567), the measure would repeal Section 2 of DOMA (which purports to relieve states of any constitutional obligation to honor marriages contracted in other states if the marriages involve same-sex partners), and would substitute for Section 3 (the federal non-recognition provision) a provision that the federal government will consider somebody to be married if their marriage is valid in the state or other jurisdiction where it was entered into. Thus, for example, a same-sex couple resident in Pennsylvania who were legally married in Connecticut or Vermont would be considered married for purposes of federal law, even though their state of residence does not recognize the marriage, were this law to be passed. Representative Jerrold Nadler of New York is the lead House sponsor. Senator Dianne Feinstein of California is the lead Senate sponsor.

On March 10, Rep. Jared Polis (D-Colo.) and Sen. Al Franken (D-Minn.) held a press conference to announce the reintroduction of the *Student Non-Discrimination Act*, which was first introduced in 2010. The measure was re-introduced with 27 Senate co-sponsors and 96 House co-sponsors. The bill would use the hook of federal spending to require schools to ban discrimination based on actual or perceived sexual orientation or gender identity, similarly to federal laws requiring schools that receive federal financial assistance to ban sex discrimination. The re-introduction is largely symbolic at this point, since the House of Representatives as presently constituted would never approve such a measure.

Also on March 9, Sen. Frank Lautenberg (D-NJ) and Rep. Rush Holt (D-NJ) reintroduced legislation originally introduced last year to help combat harassment and cyberbullying on college campuses by requiring colleges and universities that receive federal money to have anti-harassment policies in place. The measure is called the *Tyler Clementi Higher Education Anti-Harassment Act*, after the Rutgers University gay freshman who committed suicide after his roommate and another student allegedly harassed him and violated his privacy using the internet. They acted just after Sen. Bob Casey (D-PA) and Rep. Mark Kirk (R-IL) had introduced their *Safe Schools Improvement Act*, also intended to deal with the problem of bullying, focused on public schools and school districts that receive federal funds. In addition to requiring schools to put appropriate policies in place to deal with bullying and harassment on a variety of listed grounds, including sexual orientation and gender identity, the measure would require states to report incident data to the US Department of Education.

Colorado — The State Senate gave preliminary approval on March 23 to a bill that would make available civil unions carrying the rights and responsibilities of marriage under Colorado state law for same-sex couples. The measure was passed with the support of all Senate Democrats and some of the Republicans. Proponents cited Republican support in the Senate in the hope that the House, controlled by the Republicans, might take a similar bipartisan view of this legislation. *Pueblo Chieftain*, March 24. However, on March 31, the House Judiciary Committee defeated the bill on a party-line vote of 6-5. Republicans control the House by the razor-thin margin of one vote, and proponents hoped that if they could get the measure to the House floor, they could find at least two Republicans to join the Democrats in passing the measure, but it was not to be — at least for this session. *Denver Post*, April 1.

Delaware — A civil unions bill, S.B. 30, was approved on March 30 by the Senate Administrative Services Committee after a two-hour hearing, and was sent to the floor for debate. The civil unions to be established under the bill would be state law equivalents to marriage for same-sex couples, similar to such laws established in Vermont, Connecticut and New Hampshire (before those states moved to allow marriage for same-sex couples) and New

Jersey. *Wilmington News-Journal*, March 31.

Georgia — Rep. Karla Drenner, the first openly-gay member of the Georgia House, introduced a bill on March 30, H.B. 630, with 70 co-sponsors, to porhibit employment discrimination on the basis of sexual orientation or gender identity. About a dozen of the co-sponsors are Republicans. The bill came in the wake of a federal court ruling last year that the General Assembly unlawfully discriminated against one of its employees based on her gender identity. *Atlanta Journal & Constitution*, March 31.

Illinois — A legislative proposal to place a state constitutional amendment on the ballot to ban same-sex marriages was killed for this session when Senate President John Cullerton referred it to a sub-committee on constitutional amendments that currently has no members, a procedural device to terminate any consideration. Illinois recently enacted civil unions for same-sex partners, and has a state law banning same-sex marriages. *The Advocate.com*, March 31.

Indiana — The Indiana Senate Judiciary Committee voted 7-3 on March 23 to approve a proposal to amend the state constitution to ban same-sex marriages and domestic partnerships. The full Senate voted 40-10 to approve the measure on March 29. The measure previously passed the House. Attempts to amend it in committee, which would have required a new House vote if the full Senate approved it in an amended form, were unavailing. However, the process of constitutional amendment in Indiana is time-consuming, as the exact same proposal would have to be approved by both houses after the next legislative elections, and then would be put to the voters. The earliest that it could come before the voters would be 2014. At present, thirty states ban same-sex marriage by constitutional provision, of which twenty also ban domestic partnerships and/or civil unions for same-sex partners. (*Indianapolis Star*, March 24 & 29).

Iowa — Although it passed the House, a proposed constitutional amendment to overrule the Iowa Supreme Court and ban same-sex marriage in the state died in the Senate when it failed to be approved in committee within the mandated deadline for passage during the current session. (*Des Moines Register*, March 4)

Kansas — The U.S. Supreme Court may have decided that it would violate the 14th Amendment for a state to prosecute consenting adults for private consensual sex, but that has not persuaded Kansas legislators that the state's law against such conduct should be repealed. An effort to reform the state's sex crimes law to comply with the constitutional ruling faltered early in March, when two conservative legislators prevailed upon the House Judiciary Committee, which was considering a measure to "clean up" the state's criminal code, to remove the repeal language, according to an online report by KSN-TV on March 10.

Maryland — Although the State Senate approve a marriage equality bill by a narrow margin and the relevant House committee approved it as well, debate on the floor of the House proved inconclusive, as supporters, concluding they were a few votes short of a majority, had the measure tabled and returned to the committee on March 11 rather than suffer an adverse vote. It was generally believed that this had effectively killed the bill for the current legislative session, although the theoretical possibility of bringing it back to the floor exists. The governor, Martin O'Malley, had pledged to sign the bill if it was passed, but it was widely anticipated that opponents would quickly obtain the necessary signatures for a repeal initiative, so same-sex marriage would probably not have become available unless and until such a measure was defeated at the polls, even had the bill passed.

Michigan — On March 2, the Senate Reforms, Restructuring and Reinventing Committee approved a resolution to overturn the state Civil Service Commission's decision in January to extend health benefits to unmarried partners (including same-sex partners) of state employees. A spokesperson for the Office of the State Employer said that the motivation for the resolution was cutting costs, and that overturning the extension of benefits would save the state at least $8 million in the first year. The benefits are scheduled to go into effect on October 1. *Lansing State Journal*, March 3.

Montana — The Senate Local Government Committee has approved H.B. 516, a measure that would prohibit local governments in Montana from including in their civil rights law any grounds of discrimination not forbidden by state law. The immediate impact of this would be to invalidate protection for LGBT people under the city of Missoula's civil rights ordinance, as the state's civil rights law does not provide protection based on sexual orientation or gender identity. Opponents of the Missoula measure, passed a year ago, sought the state measure specifically to get rid of the Missoula protections for LGBT people. The measure passed the House during February. * * * Although the U.S. Supreme Court ruled in 2003 in *Lawrence v. Texas* that a state may not enforce a criminal statute against consenting adults for engaging in private, non-commercial sex, and the Montana Supreme Court had previously issued a similar ruling, such a penal law remains on the books in Montana, despite attempts by Democratic legislators to secure its repeal. The Senate passed S.B. 276, a repeal measure introduced by Sen. Tom Facey (D-Missoula), by a final vote of 35-14, but on March 29 the House defeated an attempt b y Rep. Diane Sands (D-Missoula) to get the bill discharged from the House Judiciary Committee for a floor vote. Sixty votes are required to remove a bill from a committee to the floor without the committee's consent, but Sands' motion received only 51 votes. *BillingsGazette.com*, March 29. Quite a few states have failed to take any legislative action to repeal sodomy laws after the Supreme Court's 2003 decision, including — ironically — Texas, where it remains a misdemeanor for consenting same-sex partners to engage in sex in private, although anybody arrested under the statute would probably have a good case for false arrest.

New Hampshire — The House Judiciary Committee voted unanimously on March 3 to put off further consideration until 2012 of pending bills to repeal the state's law authorizing same-sex marriages. The bills will come up for a vote in the Republican-controlled legislature early next year. Governor John Lynch, a Democrat who signed the same-sex marriage bill into law, has indicated that he will veto any bill to repeal the same-sex marriage law. However, Republicans hold veto-proof majorities in both houses of the legislature, so unless a few Republicans are willing to depart from their party's official opposition to same-sex marriage and vote against overriding, it is possible that same-sex marriage will be ended in New Hampshire next year.

New York — Governor Andrew Cuomo convened a meeting of leading advocates for the Marriage Equality bill pending in the state legislature on March 9 to discuss strategy for enactment. The measure

has passed the Assembly several times, but fell short in the Senate in a December 2009 vote when all Republicans voted against it and several Democrats withheld their support. The governor promised to make the measure a priority after enactment of a budget. *New York Times*, March 10. The new state budget was subsequently enacted at the end of March. * * * Meanwhile, one of the Democratic senators who had voted against the bill, Carl Kruger of Brooklyn, was charged by federal prosecutors on March 10 with multiple corruption offenses as part of an indictment that also reached to the person widely speculated to be his same-sex partner, Dr. Michael Turano, the son of Community Board 18 Manager Dorothy Turano. The *NY Times* (March 11) danced around the issue, Kruger having consistently denied being gay, but the *Brooklyn Paper* (March 11), quoting from the complaint and statements by federal prosecutors, found a clear implication that Kruger and Turano were "romantically involved," and the *NY Post* and *NY Daily News* intimated as much in their coverage.

New York — The New York City Clerk's office has adopted a new policy designed to provide equal access to marriage licenses to transgender people, responding to an incident that occurred in the Bronx when a transgender couple applied for a license, presented government-issued photo ID, and then were required to produce birth certificates because the clerk wanted further proof that they were not a same-sex couple. Under the new policy, embodied in a memorandum issued by City Clerk Michael McSweeney, one piece of government-issued ID will be sufficient. The new policy also called for the city Clerk to apologize to the couple and institute a training program for employees of the Clerk's office on issues of gender identity and expression. *New York Post*, *New York Daily News*, March 9.

Pennsylvania — The Philadelphia City Council unanimously approved a completely revised and expanded version of the city's Fair Practices Code, and the new version was signed into law by Mayor Michael A. Nutter on March 24. The prior ordinance has been renamed as Fair Practices Ordinance: Protections Against Unlawful Discrimination. One of its purposes was to make expanded protection against discrimination available to the LGBT community. Although the prior Code already included sexual orientation and gender identity as prohibited grounds of protection, the new Code clarifies coverage against discrimination for persons living with HIV and also recognizes the newly-established categories of marital status and familial status, including the concept of Life Partnership, defined as "A long-term committed relationship between two unmarried [adult] individuals of the same gender" who have some connection with the city (residence, working there, own real property there) and who share at least one residence with each other. Life Partnerships must be registered with the city to obtain protection under the Ordinance, which also provides a procedure for dissolution. Discrimination against people who are in a Life Partnership would violate the ban on discrimination due to family status, since the definition of family status cross-references the definition of Life Partnership, and Marital Status includes the status of being a Life Partner. The ordinance applies to employment, housing, and public accommodations. At present it can be found on the City Council's website — Bill No. 110050 (Introduced February 3, 2011, as amended, February 24, 2011), but eventually will be available on the website of the Philadelphia Commission on Human Rights, the agency with enforcement authority.

Ohio — At the end of March, Gov. John Kasich signed into law S.B. 5, a measure intended to curb public sector collective bargaining in the state. An early version of this bill included a mini-DOMA provision that would have outlawed any extension of statutory benefits to non-marital relationships, but this provision does not seem to have been included in the version of the bill that was enacted, based on our extensive word-and-phrase-search of the 444-page unindexed measure.

Tennessee — Two Republican state legislators in Tennessee have introduced a bill — H.B.229/S.B.49 — intended to shelter elementary and middle school students from any classroom conversation about homosexuality. The operative language of the bills states: "No public elementary or middle school shall provide any instruction or material that discusses sexual orientation other than heterosexuality." The Tennessee Equality Project, which is opposing the bill, has dubbed it the "Don't Say Gay" Bill, and criticizes this attempt to censor teachers. Ben Byers, of the Project, observed, "It limits what teachers and students are able to discuss in the classroom. It means they can't talk about gay issues or sexuality even with students who may be gay or have gay family." We think it probably violates the First Amendment. *WVLT-TV.com*, Feb. 22.

Texas — Dallas County Commissioners have added sexual orientation to the county's non-discrimination policy as part of a general overhaul of the county code, the Dallas Morning News reported on March 31. A representative of Resource Center Dallas, a gay rights group, asked the commissioners to consider adding gender identity or expression, but received no comment on this request. After the commission meeting, County Judge Clay Jenkins said he would ask the county's lawyers to study the matter, but that he believed that adding "sexual orientation" would cover the matter.

Utah — The Ogden City Council approved a bill to prohibit employment and housing discrimination based on sexual orientation or gender identity by a 4-3 vote, but Mayor Matthew Godfrey announced his intention to veto the measure. Godfrey cited his concern that landlords sued under the ordinance could have a valid 1st Amendment free exercise of religion claim against the city, if they had a religious basis for refusing to rent housing to same-sex couples. The three council members who voted against the measure said that they support the concept of banning such discrimination, but could not support the bill in the absence of an express religious exemption from compliance, which the majority had refused to include. One of the three dissenters would have to change their vote if the mayor's expected veto is to be overridden. Two told the *Ogden Standard-Examiner* (March 12) that they were standing firm, while one indicated openness to reconsidering his position if some compromise on the issue could be worked out.

Washington — Domestic partnerships, civil unions and same-sex marriages performed out of state will be recognized in the state of Washington, but only as domestic partnerships. The measure authorizing such recognition passed the House 58-39, mainly a party-line vote, and was approved by the Senate 28-19 on March 30. It was widely expected to be approved by Gov. Christine Gregoire. *Seattle Times*, March 30.

Wyoming — A bill that was intended to prohibit the recognition of out-of-

state same-sex marriages, approved by the House by a vote of 31-28, was derailed in the Senate on a 16-14 vote. Republicans had argued that the bill was needed to close a loophole in the state's existing marriage recognition law, under which the lack of gender references in the law opened the possibility that the state's courts might find it appropriate to recognize such marriages. However, Rep. Pete Illoway argued that no change was needed in existing law. According to *Wyoming News*, he stated: "People are equal, whether you agree with their lifestyle or not. People that you may not agree with are still people. A.S.L.

Law & Society Notes

Organization of American States/United Nations Human Rights Council — The White House announced on March 22 that President Barack Obama and President Rousseff of Brazil had agreed to promote respect for the human rights of LGBT individuals through the establishment of a special rapporteur on LGBT issue at the Organization of American States, the first of its kind in the international system. On the same date, the U.S. joined with 85 other countries at the United Nations Human Rights council to reaffirm their commitment to end acts of violence and human rights abuses based on sexual orientation or gender identity. The next day, Archbishop Silvano Tomasi, speaking for the Roman Catholic Church at the UN Human Rights Council meeting, complained that people who criticize gay sex for religious or moral reasons are being attacked and vilified for their views. He stated that although the Vatican condemned violence against people because of their sexual orientation or behavior, it continued to condemn the behavior and should not be stigmatized or vilified for doing so. Sounds two-faced to us. After all, the Roman Catholic Church has been busy vilifying and stigmatizing (and even burning and torturing) gay people for centuries. Now that the shoe is on the other foot and more of the world is rejecting their point of view, it's not their place to whine about it.

Federal Policy — Under a rule proposed by the U.S. Office of Personnel Management on March 3 (76 Fed. Reg. 11684), federal employees' same-sex domestic partners would be presumed to have an insurable interest in the continued life of the employee for purposes of entitlement to a survivor's annuity. The proposal stems from President Obama's June 2, 2010, memorandum directing executive branch agencies to review policies that apply to married employees to determine the extent to which they could be extended to same-sex partners without need for legislation. Comments were due on the proposed rule by April 4. BNA Daily Labor Report, 42 DLR A-17 (3/3/2011).

ROTC on Campus — Many universities and colleges have had policies excluding the Defense Department's Reserve Office Training Corps (ROTC) programs from their campuses for a long time. Many of these policies began due to on-campus opposition to the Vietnam War during the late 1960s and early 1970s, but in many cases more recent exclusionary policies have been premised on the inconsistency between campus non-discrimination policies and the various military policies over the past thirty years concerning eligibility of openly gay people to participate in these programs and serve in the military. With the passage last year of the "Don't Ask, Don't Tell Repeal Act," universities have begun reconsidering their policies. Harvard University has been a leader in this area. On March 3, the University announced that it had concluded an agreement with Naval ROTC to establish a new relationship, which will take effect when the repeal of the current anti-gay military policy goes into effect. An announcement on the Harvard Gazette website summarizes the agreement as follows: "As a part of the agreement, Harvard will appoint a director of Naval ROTC at Harvard and will resume direct financial responsibility for the costs of its students' participation in the program. The University also will provide Naval ROTC with office space and with access to classrooms and athletic fields for participating students. Harvard Navy and Marine Corps-option midshipmen will continue to participate in Naval ROTC through the highly regarded consortium unit hosted nearby at the Massachusetts Institute of Technology (MIT), consistent with the Department of the Navy's determination that maintaining the consortium is best for the efficiency and effectiveness of the 'Old Ironsides Battalion.'"

Military Discharges — On March 24, Servicemembers United, an organization of LGBT Servicemembers and veterans, announced that it had obtained documents from the Defense Department showing that the total number of discharges under the "Don't Ask, Don't Tell" military policy during the federal fiscal year 2010 (the year that ended at the end of September 2010) was 261. This was described as an "all time low," documenting the conclusion reached by Judge Phillips in the *Log Cabin Republicans* lawsuit that in fact the Defense Department's arguments for the necessity of the policy were week. Around the end of the last fiscal year, Defense Secretary Robert Gates altered DoD procedures for handling such discharges, inserting procedural hurdles and clearances that effectively brought the discharges to a halt, although Servicemembers found to be gay continued to be processed through the system short of discharge.

North Carolina Rules of Professional Conduct — The leadership council of the North Carolina State Bar agreed last October to change the preamble of the state's Rules of Professional Conduct to add a non-discrimination statement covering race, gender, religion, age, sexual orientation and gender identity. Such changes in the Rules are subject to approval by the state's Supreme Court. The *Associated Press* reported on March 31 that the North Carolina Supreme Court refused to approve the change, without comment. State Bar Executive Director Tom Lunsford reported that Chief Justice Sarah Parker told him earlier in March that the court would not approve it, without giving any reason. The court's refusal, not expressed in any opinion, sets back a two year project to add a non-discrimination requirement to the rules. (The American Bar Association's Model Rules of Professional Responsibility include a non-discrimination policy, and have been adopted in many jurisdictions.) Perhaps it is noteworthy in this regard that North Carolina does not ban sexual orientation or gender identity discrimination by statute, although some municipalities have adopted such non-discrimination policies.

New Orleans Police — A U.S. Justice Department investigation of the New Orleans Police Department concluded that the department was "deeply dysfunctional." Among other problems, the report issued by the investigators included allegations that the department targeted establishments serving the LGBT community for harassment and subjected individual gay

people to shake-downs, harassment, and false prostitution charges. (*New Orleans Times-Picayune*, March 18).

Public School Bullying — The ACLU of Florida announced on March 17 the terms of an agreement it had reached with the Flagler County School District after it intervened on behalf of Luke Herbert, a Flagler Palm Coast High School student who alleged harassment by fellow students and a teacher. The agreement includes an apology to Herbert by the school for not dealing with his complaints adequately, an official reprimand to the teacher in question, who will be required to make a public apology to Herbert, assistance to Herbert to get him "back on track academically," a recommendation to the school board to add "sexual orientation and gender identity or expression" to the Student Code of Conduct and the district's bullying and harassment policy statement, and committing the district to work with a local LGBT rights group to create a series of public service announcements.

Public Support for Same-Sex Marriage — A *Washington Post/ABC News* poll taken during March showed a margin of majority support for marriages of same-sex couples, 53%, with support among voters age 18-29 at 68%. This represents a substantial change in public opinion since polling on this issue began more than two decades ago, when barely a third of the public supported same-sex marriage. (*Washington Post*, March 18). * * * Totaling up the population in states in which there is legal recognition for same-sex marriages, domestic partnership or civil unions, the new advocacy organization Equality Matters found that 42% of the American population lives in such jurisdictions, while noting, of course, that under federal law those couples who enjoy state recognition are entitled to none of the federal rights attending to marriage.

Institute of Medicine of the National Academies — The Institute of Medicine issued a report on March 31 on LGBT health. The report had been requested by the National Institutes of Health, to evaluate the current knowledge of the health status of the LGBT populations, identify research gaps and opportunities and to outline a research agenda. The bottom line of the report is that despite the HIV/AIDS epidemic, the LGBT community is comparatively understudied with respect to health, and the IOM called for a stepped-up research effort to generate the information needed to adopt appropriate public health strategies for the various LGBT communities. The Department of Health and Human Services responded to the report with an April 1 announcement that Secretary Sebelius would recommend several policy changes to implement recommendations in the report, including collecting LGBT-related data as part of federal health surveys and providing guidance to states on dealing with LGBT families in programs overseen or funded by HHS.

Domestic Partnership Benefits at Marquette University — The *Milwaukee Journal Sentinel* reported on March 25 that Marquette University President Robert A. Wild released a written statement announcing that the university plans to start offering domestic partnerships benefits in 2012, covering medical, dental and vision benefits for registered domestic partners of employees. The announcement came a year after the university suffered criticism when an offer to an openly-lesbian scholar to become dean of the university's arts & sciences faculty was rescinded, purportedly due to concerns about "incompatibility" between Jodi O'Brien's scholarly writing and the "Catholic mission and identity" of Marquette. The university denied that the offer was withdrawn due to O'Brien's sexual orientation, leaving the implication that an openly gay or lesbian scholar who avoided publishing on human sexuality or who published papers that accord with the official doctrine of the Catholic church would be an acceptable candidate for a deanship at Marquette. O'Brien charged that the withdrawn offer was discriminatory, but subsequently negotiated a mutually-agreed settlement, the terms undisclosed. There was speculation that the domestic partnership benefits may be an offshoot of the settlement. The newspaper report also noted that the university had commissioned a report, released in December, that indicated that many LGBT students felt harassed at Marquette, and that some LGB faculty sought more a more supportive attitude from university administration. * * * Having been contacted by some other schools, the *Milwaukee Journal Sentinel* reported on March 27 that two other Catholic institutions in the Milwaukee area are already providing domestic partnership benefits: Cardinal Stritch University and Alverno College.

Prom Dress Dispute Happily Resolved — Belinda Sanchez, an "out" lesbian senior at Proviso East High School in Maywood, Illinois, wanted to wear a tuxedo to the senior prom. The school's principal said no, she needed to wear a dress. Sanchez appealed the principal's ruling to the board of education, and asked the ACLU of Illinois to intercede on her behalf. John Knight of the ACLU of Illinois wrote to the school district arguing that Sanchez had a First Amendment right to her choice of tuxedo or dress for the prom. Sanchez then got word that the school district would allow her to wear the tuxedo. A spokesperson for the district claimed that a decision had been made to grant Sanchez's appeal before they received the ACLU letter. (Presumably they consulted an attorney who told them about the prior litigation in other school districts concerning this issue, as to which see further in this note…) Responding to a request for comment from the *Chicago Tribune*, the spokesperson said that Sanchez's request had opened up "a new, very interesting and healthy dialogue in terms of our prom review procedures. We support our students in all of their differences and we encourage them to express themselves in various ways as long as it is not disruptive to the school environment." One hopes this sentiment was conveyed to the high school's principal. *Chicago Tribune*, April 1. * * * The ACLU of Louisiana announced on March 28 that it had achieved an agreement with Terrebonne Parish School District, in Louisiana, that Monique Verdin would be allowed to wear a tuxedo to Ellender Memorial High School's prom. When school officials denied Verdin's request, the ACLU reminded them about the litigation it had conducted on behalf of Constance mcMillen against Itawamba County School, in which the federal court found a First Amendment right and awarded damages to a lesbian student whose request to wear a tux to the prom had been denied.

Bisexual Invisibility & Unrecognized Family Relationships — During March the San Francisco Human Rights Commission unanimously adopted a report prepared for the Commission by Lindasusan Ulrich titled "Bisexual Invisibility: Impacts and Recommendations." Copies of the report are available on the Commission's website. The report examines the consequences of rendering bisexuals "invisible" and includes policy recommendations. At

the same meeting, the Commission also received a report titled "Beyond Marriage: Unrecognized Family Relationships," copies of which are also available on the Commission's website. A.S.L.

International Notes

Australia — The Australian Capital Territory (ACT) has commissioned the Law Reform Advisory Council to conduct an inquiry into the legal needs of the transgender community. The commission was launched after press reports about a Family Court decision that allowed a teenage girl to start hormone treatment for gender transition, as she had been diagnosed with a gender identity disorder. Attorney General Simon Corbell said that the inquiry would investigate gaps in legal protection with an eye to proposing remedies for such gaps.

Austria — The Austrian Constitutional Court finds no violation of constitutional equality requirements in the government's failure to include incitement to hatred and discrimination against homosexuals in statutes that cite race, ethnicity and sex as ground on which those things are forbidden. Several of the applicants for a declaration from the court are LGBT rights activitists who claim to have been victims of such incitement and discrimination in the past. The court found that the state was not obliged by the constitution to lend its assistance to them. The applicants vowed to bring the question to the European Court of Human Rights. ILGA Europe, March 11, 2011.

Canada — A failed vote in Parliament is bringing new national elections in Canada, at a time when opinion polls show that the governing Conservatives do not have the support of an electoral majority but are likely to emerge again as the most popular among the major national parties. With an election pending early in May, Immigration Minister Jason Kenney announced a pilot project to work with the Rainbow Refugee Committee to share the cost of sponsoring gay, lesbian, transgender, transsexual and bisexual refugees. Under the terms of the project, financial assistance with go to Rainbow to provide $100,000 to cover three months of income support for refugees upon their arrival in Canada, and to underwrite provision of orientation services, accommodations, food and other basic needs for the refugees. The Executive Director of Egale Canada, the country's largest LGBT rights organization, hailed the project as a "welcome first step" at a time when 77 countries continue to impose criminal penalties for homosexual conduct. *Toronto Star*, March 25.

Hungary — The Hatter Support Society for LGBT People reports that the Metropolitan Court of Budapest rejected an employer's appeal of a ruling by the Equal Treatment Authority that the employer had violated the country's equal treatment legislation — which covers sexual orientation — by harassing an employee who was believed to be gay. The claimant worked as a marketing coordinator and on-screen reporter for a local cable television company. Rumors about his sexual orientation got started after he shared a room with a male colleague during a business trip. Threatening and offensive comments by co-workers and the director of the company, including removing his on-screen role, were found to constitute unlawful harassment under the statute. The ETA fined the company approx. 3500 euros. It is reported that anti-gay discrimination remains widespread in Hungary, but that only a handful of discrimination claims have actually been brought to light through enforcement of the statute, presumably because victims fear the notoriety of bringing claims.

India — Mass consternation erupted in India as newspapers in the U.S. and U.K. published reviews of a new biography of Mahatma Gandhi by Joseph Lelyveld, in which Lelyveld relates in a matter-of-fact way that during his life Gandhi seems to have conceived a great affection for a German-Jewish architect and bodybuilder, Hermann Kallenbach, with whom he lived for several years. Lelyveld quotes from letters that carry an implication that Gandhi's feelings for Kallenbach were sexual. The implication is that Gandhi, who was married to a woman but who eventually proclaimed a dedication to celibacy, lived apart from his wife, and lived for several years with Kallenbach, may have been bisexual or even gay in his orientation. Lelyveld, defending his work against sensational press reports, pointed out that he had not stated or implied that the men had actually engaged in sex or that Gandhi had departed from his commitment to celibacy, but had merely reported what he found based on the records and correspondence of the time. What was most disturbing about the reaction in India was the fevered protest that any implication that Gandhi was other than heterosexual in his psychosexual orientation was a "slur" or "calumny" against the great leader who is revered as a founder of the nation. But is it that surprising? After all, implications by some biographers that both George Washington and Abraham Lincoln may have had emotional attachments to, or even sexual relationships with, other men, have generated hasty rejections and denials by individuals eager to protect the reputations of these iconic historical figures, again based on an assumption that any imputation of homosexuality is a slur. One may well recall that under traditional English common law, the false imputation of homosexuality was per se defamation, and may still be so in India. Although that rule has lost much force in common law jurisdictions with the removal of sodomy laws and the passage of laws against anti-gay discrimination, it actually remains the law in New York, at least so far as the courts are concerned. At the end of March, at least one Indian state had moved to ban distribution of the book (which was yet to be released in India), and there was local media speculation that the national government might seek to ban it as the secular equivalent of blasphemy.

Ireland — Mr. Justice Treacy of the High Court in Belfast ruled that protection of freedom of expression under Article 10 of the European Convention on Human Rights outweighed the offense that might be caused by the publication of a newspaper advertisement by a church headlined "The word of God against sodomy" and quoting scriptural passages. Sandown Free Presbyterian Church had paid for the publication of such an ad in a newspaper before a Gay Pride parade was scheduled in Belfast in August 2008. Several complaints about the ad were made to the Advertising Standards Association, which ruled that the ad should not be allowed to be published against in that form, and cautioned the church against ads that could cause serious offense. Wrote Treacy: "The applicant's religious views and the Biblical scripture which underpins those views no doubt cause offence, even serious offence, to those of a certain sexual orientation. Likewise, the practice of homosexuality may have a similar effect on those of a particular religious faith. But Article 10 protects expressive rights which offend, shock or disturb. Moreover, Article 10 protects not only the content and sub-

stance of information but also the means of dissemination, since any restriction on the means necessarily interferes with the right to receive and impart information." *Belfast Telegraph*, March 23. * * * History was made in recent elections when two openly gay men were elected to the lower house of Ireland's Parliament. Dominic Hannigan, formerly an appointed member of the upper house, represents Meath East, while John Lyons represents Dublin North West. The only other openly-gay member of Parliament, Senator David Norris, who was the plaintiff in an important European Human Rights case involving Ireland, is seen as a viable candidate to become the nation's first openly-gay president.

Isle of Man — The Isle of Man, a self-governing British dependency located in the Irish Sea, has enacted a civil partnership law which takes effect on April 6. It follows the lead of the United Kingdom's civil partnership law, creating a legally parallel status to marriage for same-sex partners with all the legal rights, privileges and benefits of marriage.

Liechtenstein — One of the world's smallest countries, has joined the trend toward legal recognition for same-sex partners. The Parliament of Liechtenstein, which borders Switzerland and Austria, voted to establish a registered partnership system for same-sex couples, which will go into effect in September 2011, unless opponents gather enough signatures to require a referendum. The registered partners will attain a list of rights that falls short of full equality with marriage. Adoption of this measure was a bit surprising in a country that has none of the other legislative or policy apparatus of gay rights support — no anti-discrimination legislation, no hate crime or hate speech protection, and no policy on parenting by same-sex couples. This was described as the first — and so far only — gay rights measure to be enacted in the country. ILGA Europe, March 22.

Moldova — The Moldovan government submitted a proposed antidiscrimination law to the parliament in February that would forbid discrimination based on religion, nationality, ethnic origin, language, religion, color, sex, age, disability, sexual orientation, political opinion, or social status. The measure is intended to advance Moldova's effort to associate with the European Union. However, the inclusion of sexual orientation has brought protest from conservative Christians in the country, with the encouragement of U.S. pastor and lawyer Scott Lively, who was invited to visit the country by Pro Familia and Moldova Crestina, groups that strongly opposed gay rights measures. Lively is credit with a role in stimulating the draconian anti-gay legislation pending in Uganda. He has now been spreading his anti-gay propaganda in Moldova, claiming that banning sexual orientation discrimination "puts the power of the law and the government into the hands of gay activists and makes people who disapprove of homosexuality criminals," or so he told Radio Free Europe, according to a March 14 article in Radio Free Europe Documents available on Westlaw, 2011 WLNR 5033223.

South Korea — South Korea's Constitutional Court ruled on March 31 that the military can ban homosexual conduct even though the nation's laws governing civilians do not impose criminal penalties for such conduct. According to a report by Agence France Presse, an army military court considering a case applying the law was confronted with an argument that it was improper anti-gay discrimination, and certified the question to the constitutional court, but the constitutional court voted 5-4 that the criminal law (which imposes a penalty of imprisonment up to one year) is constitutional "because such behavior, if left unchecked, might result in subordinates being harassed by superiors in military barracks." The AFP article does not state whether South Korea has any policy against gay people serving in the military.

Uganda — There were reports in March that the government has decided not to push for legislative consideration of the draconian Anti-Homosexuality Bill of 2009, which had excited much adverse comment from other countries, including the government of the United States. A cabinet sub-committee reportedly decided to put it 'on hold' as most of the provisions of the bill are already addressed in the existing penal code. The bill would have substantially ratcheted up penalties for homosexuality.

United Kingdom — The Employment Tribunal reports a rise in claims of anti-gay discrimination, which is now illegal under British workplace law. The professional journal *Lawyer* reported on March 28 about the case of a gay lawyer, Lee Bennett, described as a "non-practising barrister at niche London litigation firm Bivonas, who discovered a hand-written note by a partner at the firm referring to hims in homophobic and discriminatory terms that reflected on his professional standing. Bennett brought three claims against the firm in the Central London Employment Tribunal, claiming that the note was discriminatory, that his grievance about it was not properly investigated, and that because he was gay he was deprived of the regular annual salary reviews conducted by the firm. The Tribunal ruled for him on the first two grounds. Referring to the note, it said, "Reading the entire passage, what is being said is that the claimant, as a gay man, is passing work to somebody else because they are gay and not therefore for other meritorious reasons. This is a professional slur of the utmost gravity." The Tribunal's decision was seen by some commentators as marking some progress in enforcing the law.

United Kingdom — The Derby High Court ruled that city officials could refuse to place children for foster care with a Pentecostal Christian couple who asserted that their religious views against homosexuality should not disqualify them. The court held that the antidiscrimination policy of the law "should take precedence" over the right not to be discriminated against on religious grounds, according to a February 28 report on *BBC News* online. The ruling stirred much consternation and comment in the British media. A.S.L.

Professional Notes

The **LGBTQ Law Association of Greater New York** has announced its new officers for 2011. **Carlene Jadusingh**, elected by the Board of directors to be the new president of LeGal and the LeGal Foundation, is a NYC attorney with an immigration and general civil practice, and has previously served on the Board of Directors of the LeGal Foundation. Jadusingh, of Jamaican and Indian descent, is the first woman of color to serve as LeGal's President. The other officers of LeGal will be **Laurie Marin** (1st Vice President), **Paul Goetz** (2nd Vice President), **Caprice Bellefleur** (Secretary), and **Karl Riehl** (Treasurer). Other officers of the LeGal Foundation will be **Caprice Bellefleur** (1st Vice President), **Hon. Charles McFaul** (Secretary), and **Karl Riehl** (Treasurer). * * * The Association has also announced a major new public

service project, a monthly **Housing Clinic** that will be co-sponsored with the Bronx Community Pride Center, and staffed with volunteer attorneys from LeGaL. LeGaL member **George Santana** will chair the clinic, and LeGaL is partnering with NY County Lawyers Association on training for clinic volunteers. * * * The Association held its Annual Dinner on March 24, at which time it honored **Prof. Suzanne Goldberg** and **Servicemembers Legal Defense Network** (SLDN), whose Executive Director, **Aubrey Sarvis**, accepted the award on behalf of the organization.

The **Massachusetts LGBTQ Bar Association**'s Annual Dinner will be held on May 6. **Dr. Eliza Byard**, Executive Director of the Gay, Lesbian and Straight Education Network (GLSEN), will give the keynote address. Honorees will including retired Massachusetts Supreme Court Justice **Margaret H. Marshall**, who wrote the first decision by an American state supreme court to rule in favor of same-sex marriage, **Laura K. Langley** of Bingham McCuchen LLP, and Massachusetts State Representative **Byron Rushing**.

The **LeGal Foundation** has announced that the Dr. M.L. "Hank" Henry Jr. Fund for Judicial Internships summer interns for 2011 will be **Jenelle DeVits** (Hofstra University Law School) and **Colin Hedrick** (Brooklyn Law School). The summer interns have the opportunity to spend time in the chambers of participating federal, state and local court and administrative judges over the course of the summer. The ultimate purpose of the internship is to build interest among law students in future judicial careers. Hank Henry, for whom the program services as a memorial, served for many years as Executive Director of the Fund for Modern Courts, a leading court reform advocacy organization in New York City, and took a leading role in encouraging the appointment of openly lesbian and gay judges in New York.

President Obama has nominated **Alison J. Nathan** to a seat on the U.S. District Court for the Southern District of New York. Ms. Nathan is the third openly-gay nominee for that court, following Daniel Alter, whose nomination was withdrawn after controversy about some of his past statements, and J. Paul Oetken, who recently had a confirmation hearing by the Senate Judiciary Committee. Ms. Nathan has served as special counsel to the Solicitor General of New York since last year, after serving as an associate legal counsel in the White House from 2009 to 2010. She graduated from Cornell Law School and clerked for Justice John Paul Stevens (Supreme Court) and Judge Betty Fletcher (9th Circuit). She practiced law at Wilmer Cutler, and taught at Fordham and NYU Law Schools. If Nathan and Oetken are confirmed, the Southern District will have the distinction of being the most gay federal district, as they would be joining Judge Deborah Batts, who was appointed by President Clinton in 1993.

Bloomberg News reports that openly-gay Illinois attorney **Michael McRaith**, who has been serving as director of the Illinois Department of Insurance since being appointed by Governor Pat Quinn in 2009, has been appointed to head the new Federal Insurance Office. The appointment was announced by Treasury Secretary Timothy Geithner at a Financial Stability Oversight Council meeting in Washington on March 17. The non-regulatory federal office was created as part of the recently-enacted finance industry reform law, and has an information-gathering and reporting function.

Kees Waaldijk, a Dutch legal academic who has occasionally contributed to *Law Notes*, has been appointed by Leiden University to a new endowed chair in Comparative Sexual Orientation Law. This chair, the first of its kind in Europe, is underwritten by private donations to the University's Fund, and will be based at the University's Law School located at the Hague campus. In May, the Max Planck Encyclopedia of Public Law will publish Dr. Waaldijk's newest work, an analysis of the protection that international law is providing to same-sex couples. Dr. Waaldijk has been teaching at the Law School since 1996, having studied law in Rotterdam, lesbian and gay studies in Amsterdam, and earned his PhD in Maastricht. He has guest lectured widely in Europe and the U.S.

Mary Morgan, the nation's first openly-lesbian judge, who was appointed to the San Francisco Municipal Court in 1981 by then (and now) Governor Jerry Brown, announced her retirement from the San Francisco Superior Court on March 5. Judge Morgan served on the Municipal Court until 1993, when she moved to Washington, D.C., to work in the Justice Department during the Clinton Administration. Gov. Gray Davis appointed her to the superior court in 2003. At present, there are ten openly gay or lesbian Superior Court judges in California, according to *Advocate.com*'s report of Judge Morgan's announcement. A.S.L.

HIV/AIDS Legal Notes

European Human Rights Convention Protects People Living With HIV Against Discrimination

A chamber consisting of eight judges of the European Court of Human Rights announced on March 10 that it had found Russia to be in violation of the European Convention on Human Rights for denying a residence permit to an Uzbeki man on the sole ground that he is infected with Human Immunodeficiency Virus (HIV), the pathogen associated with Acquired Immunodeficiency Syndrome (AIDS). Ruling unanimously in *Case of Kiyutin v. Russia*, Application No. 2700/10, the court found that this case presented an instance of impermissible discrimination affecting the right to private life, and awarded damages to the applicant.

The applicant, Viktor Kiyutin, was born in the Soviet Republic of Uzbekistan in 1971 and became an Uzbeki citizen upon the dissolution of the Soviet Union. In 2002, his brother bought land and a house in the Oryol Region of Russia, and the next year Viktor moved there with his half-brother and their mother. Viktor quickly married a local woman and they had a child, who was born early in 2004. Shortly after the wedding, Viktor applied to the authorities for a residence permit. Under a 1995 statute, applicants for a residence permit must provide documentary evidence that they are free of HIV infection. The medical examination for his residence application provided Viktor with the news that he was infected, which he claims not to have previously known. He was denied the permit by local authorities, and the denial was upheld by the Oryol Regional Court.

The court's opinion does not relate whether Viktor then returned to Uzbekistan or remained with his family in Russia at that time, but reports that he applied anew for a temporary residence permit in April 2009, which brought him to the at-

tention of the Federal Migration Service, which in turn imposed a fine of 2500 Russian roubles for unlawful residence and ordered him to leave within three days or be subject to deportation. He challenged this in court, but the Severniy District Court of Oryol rejected his appeal on August 13, 2009, finding that due to his HIV status his applicant was properly rejected. He appealed to the Oryol Regional Court, unsuccessfully, and then appealed to the European Human Rights Court in Strasbourg.

The 1995 Russian statute, called The HIV Prevention Act, apparently predates Russia's decision to become party to the European Convention. As the court cites no prior precedent on point, it appears that this case presented a question of first impression concerning HIV-discrimination in the context of emigration into a country and granting the privilege of permanent residence to a non-citizen. The court was careful to point out that countries do retain the right to control immigration and residence, but that the Convention imposes a supervening obligation not to engage in unjustifiable discrimination in wielding that authority.

The government argued that as a person who lacked a residence permit, Viktor would be able to stay in Russia for periods of 90 days, so long as he left and spent time outside the country before re-entering for another 90 days, and so on. The government maintained that the statute is justified by public health concerns about the spread of HIV.

The court found that in maintaining this policy Russia was out of step with the policy pronouncements on HIV by international bodies and the actual policies of the other countries that are parties to the Convention. According to a 2009 UNAIDS survey, "124 countries, territories and areas worldwide have no HIV-specific restrictions on entry, stay or residence," wrote the court. The other 52 countries surveyed did impose various restrictions. However, narrowing the focus to Member States of the Council of Europe, it appears that all member states allow visas and short-term stays to HIV-positive people. Three states (Armenia, Moldova and Russia) will deport foreigners who are found to be HIV-positive, and these and three other states (Andorra, Cyprus and slovakia) require proof that an individual is HIV-negative before issuing a residence permit. Lithuania has a more general requirement of a declaration whether an individual has a "disease threatening to public health" as part of the residence application process. The overwhelming majority of Member States do not impose a disqualification for residence permits upon HIV-positive individuals.

The court needed to determine whether being HIV-positive could be considered a "status" for purposes of the non-discrimination policy articulated in Article 14 of the Convention. Article 14 has a list of prohibited grounds which is non-exhaustive, as it extends to "other status" as a basis of discrimination. Reviewing recent history, the court found that persons living with HIV have been treated categorically in adverse ways, such that international bodies had adopted statements condemning discrimination on this basis. "Accordingly, the Court considers that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered — either as a form of disability or alongside with it — by the term 'other status' in the text of Article 14 of the Convention."

Article 14 adopts the general principle of non-discrimination, but is only actionable with respect to particular rights spelled out elsewhere in the Convention. An applicant must show that he is in a position analogous to others similarly situated, and that the discrimination against him does not lie within the "margin of appreciation" accorded to Member States in pursuing their policy interests. In this case, Article 8, respect for private life, came into play. Given his marriage to a Russian woman and the residence of his family members in Russia, the court found that Viktor occupied a position analogous to other aliens seeking residence permits, so the issue was whether Russia had an objective, reasonable justification for treating him differently from others who are not HIV-infected.

In a process somewhat analagous to the U.S. constitutional caselaw on "suspect classifications" and "heightened scrutiny" in the context of equal protection, the European Court will adjust the "margin of appreciation" according to the basis of discrimination. In this case, the Court "considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status." This meant that Russia would have to come up with a "particularly compelling justification," and the court found that the justifications argued by the government were insufficient.

The court said that Russia failed to show how its national security and public health needs were advanced by denying a residence permit to Viktor. The government's own position was that he could continue to live in Russia with his family so long as he stayed no more than 90 consecutive days, so clearly keeping him out was not the issue. The court noted that "the mere presence of an HIV-positive individual in a country is not in itself a threat to public health" because of the lack of casual transmission of the virus.

Inasmuch as Russia places no HIV-related restrictions on tourists and business travellers, and doesn't impose HIV testing on Russian nationals leaving and entering the country, "the Court sees no explanation for a selective enforcement of HIV-related restrictions against foreigners who apply for residence in Russia but not against the above-mentioned categories, who actually represent the great majority of travellers and migrants," the Court continued. "There is no reason to assume that they are less likely to engage in unsafe behavior than settled migrants." The Court stated its "great concern" with Russia's submission that Viktor could circumvent the rules without having a residency permit by limiting the length of his stays, saying that this "casts doubt on the genuineness of the Government's public health concerns relating to the applicant's residence in Russia."

Indeed, the main concern may have been that as a permanent legal resident, Viktor would have a claim on public health services, but the Court observed that because Viktor would be a resident alien rather than a Russian national, he would have to pay for his health care expenses, and thus "the risk that he would represent a financial burden on Russian health care funds was not convincingly established." The court also pointed out that the government's policy was not particularly well suited to combating the spread of HIV, since it would deter migrants from getting tested and seeking treatment and could lead to complacency in the general public, who could be led to believe that those allowed to stay in the coun-

try were all HIV-negative and that AIDS was a "foreign" problem.

The Russian constitutional court had one prior ruling from 1996, when it indicated that HIV-related decisions should be made on a case by case basis, upon which Viktor relied in bringing this case. The court observed that this prior ruling seems to have had little effect, since Viktor was denied categorically without any consideration of his actual health status and family situation, or at least none reflected in the opinions issued by the prior tribunals in his case.

The court stated its conclusion: "The Government overstepped the narrow margin of appreciation afforded to them in the instant case. The applicant has therefore been a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken together with Article 8." The court awarded Viktor 15,000 euros for damages and 350 euros for his expenses in connection with the case, in which he was represented by Ms. L. Komolova, a lawyer practicing in Oryol, Russia. A.S.L.

EEOC Issues Final Regulations Under Americans With Disabilities Act Amendments of 2008

On March 24, the U.S. Equal Employment Opportunity Commission announced its final regulations interpreting the Americans with Disabilities Act Amendments of 2008, a measure passed in the waning days of the Bush Administration in response to almost two decades of accumulated court rulings that were widely seen as having misconstrued Congress's original intentions in passing the ADA. The new regulations, which will be codified at 29 CFR Part 1630 and become effective 60 days after formal publication, are intended to adopt a broad view of coverage under the ADA, contrary to the narrow view espoused by the majority of the Supreme Court, not limiting coverage by reference to the estimated number of people living with disabilities at the time the law was originally passed two decades ago. Among other things, the regulations make clear that people living with HIV should be construed to qualify for coverage as a person with a disability, due to the effect of HIV infection on the immune system in its non-medicated state. (The Supreme Court had ruled that potentially disabling conditions that are controlled or corrected by medication or assistive devices are not disabilities under the statute, a conclusion with which a majority of Congress emphatically disagreed.) Litigation under the ADA by people living with HIV had produced wildly varying results, due to the Supreme Court's holding that the determination whether a person has a disability is to be made on a case-by-case basis depending on whether the alleged impairment they suffered actually substantially limited their performance of any of a rather limited list of major life activities, taking into account any medications or assistive devices they were using. The regulations should substantially simplify the determination of whether a plaintiff's situation is covered by the non-discrimination requirements of the statute. 2011 BNA *Daily Labor Report* No. 57, March 24, 2011. A.S.L.

Pennsylvania District Court Raises the Bar on HIV Disability Discrimination Claims

In Haynes v. AT&T Mobility, LLC, 2011 WL 532218 (Feb. 8, 2011), the U.S. District Court for the Middle District of Pennsylvania ruled against an individual living with HIV who had brought a claim against AT&T, his former employer, for failure to make an accommodation in the form of reassignment to a new position.

In awarding summary judgment to AT&T, the court emphasized the failure of the plaintiff to provide evidence that he was "better qualified" than other candidates for the new position or even qualified at all to perform the essential duties of the job with reasonable accommodation. The decision appears to impose a tall hurdle for disability discrimination claims premised on an employer's failure to reassign an employee to a new position.

The plaintiff, Mikhail Haynes, was formerly employed by AT&T as a customer service representative at a call center in California. As a result of physical challenges associated with his HIV status, Haynes required several accommodations in order to perform his job duties, all of which were provided with little trouble during his tenure in California, which began in late 2000.

In September 2006, Haynes transferred to a call center in Pennsylvania. Haynes was initially unsatisfied with the timetable for or the quality of the accommodations he requested at the new location, which included, for example, a motorized moveable desk to enable Haynes to stand while working to combat Haynes' muscular atrophy, and a workspace located close to a restroom.

After approximately four months at the new location, Haynes submitted a medical evaluation from his treating physician stating that he required a less stressful job environment as an accommodation for his medical needs. After AT&T submitted the evaluation for two peer reviews, with the final one also concluding that a less stressful work situation was required, Haynes was placed on a thirty-day period of paid leave and was encouraged to apply for a more suitable position in the company.

Haynes applied for several positions but received no offers. Haynes was then placed on a second leave, this time an unpaid thirty-day period of leave, which also expired without any offers of employment. AT&T then terminated Haynes' employment.

Haynes asserted claims of disability-based discrimination under the Americans with Disabilities Act (ADA) and its state law counterpart, the Pennsylvania Human Relations Act. AT&T moved for summary judgment, a motion referred to a magistrate judge. The relevant issue before the district court concerned the magistrate judge's denial of AT&T's summary judgment motion concening Haynes' disability discrimination claim based on AT&T's failure to reassign.

The district court agreed with AT&T that the magistrate judge erred in framing the dispositive question. Specifically, the court endorsed the view that the "relevant question is not simply whether reassignment to a vacant position is a reasonable accommodation, but rather, whether reassignment to a vacant position — over a more qualified applicant when the employer has a policy of hiring only the most qualified candidate — is a reasonable accommodation 'in the run of cases.'"

Thus, the district court, saying that it was applying the test articulated in U.S. Airways v. Barnett, 535 U.S. 391 (2002), held that the magistrate judge erred by putting aside the question of whether other applicants were "better qualified" than Haynes. In other words, the district court ruled that absent "special circumstances," never articulated by Haynes, the requested accommo-

dation in the instant case — a reassignment to a new position — was not reasonable.

The court's analysis is notable on two fronts. First, U.S. Airways v. Barnett concerned the reassignment of an employee to a new position where such reassignment would violate a seniority system in place at the employer. In that instance, according to the Barnett court, a reassignment is not a reasonable accommodation in ordinary cases. The question of seniority, however, is generally an objective evaluation not typically subject to dispute. The question of whether "better qualified" candidates exist, in contrast, seems destined to be a highly fact-specific inquiry capable of significant dispute. As a result, similarly situated plaintiffs may face a greater burden in the future.

Second, the court emphasized that it could dispose of Haynes' claims based on one factor alone: his failure to meet his burden of demonstrating that he was qualified to perform the essential duties of the vacant position with reasonable accommodation. Though emphasizing the 'narrowness' of its holding elsewhere, the court's consideration of issues beyond this limited question — e.g., its consideration of the best qualified policy — seems curious at best. At worst, it may serve to block otherwise viable disability discrimination claims from achieving success. *Brad Snyder*

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

Immigration Equality has announced an opening for a staff attorney to be located either in New York City or Washington, D.C. The attorney will lead the organization's legal work on behalf of lesbian and gay bi-national couples. Applicants must be admitted to practice, with a demonstrated commitment to LGBT rights issues, and — preferably — with experience in immigration law and administrative law. For a full description of the position and eligibility requirements, consult Immigration Equality's website. Applications should be submitted by email to jobs@immigrationequality.org with Staff Attorney in the subject line. They should include a detailed cover letter and resume. Those who are interviewed with be asked to submit a writing sample and three references.

Lambda Legal, the largest national LGBT public interest law firm, has announced an opening for the position of senior staff attorney in its Western Regional Office in Los Angeles. Applicants should have considerable experience (at least ten years) in litigation and public speaking, and be capable of considerable independent action and ability to manage and supervise staff and cooperating attorneys. The application can be made by letter or email to: Jamie Farnsworth, Lambda Legal, 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010; jfarnsworth@lambdalegal.org. The envelope should state "senior staff attorney" and/or the email should have that phrase in its subject line. Anyone applying as a result of seeing this announcement should indicate that this is where they saw it! Much detailed information about the position and qualifications can be found on Lambda Legal's website in the "about-us" folder under "jobs."

Gay & Lesbian Advocates & Defenders, New England's LGBT public interest law firm, has announced an opening for a full-time staff attorney whose main role will be to deal with legal issues involving LGBTQ youth. Admission to practice, preferably in a New England jurisdiction, is a prerequisite. Familiarity with LGBT and HIV issues, strong research, writing, analytical, advocacy and public speaking skills are needed for this position. Send a confidential resume, cover letter and writing sample to Gary Buseck, GLAD, 30 Winter St., Suite 800, Boston MA 02108, or email to gbuseck@glad.org. Applicants will be considered on a rolling basis through May 20, 2011, or until the position is filled.

All of the LGBT rights public interest organizations are committed to staff diversity and welcome applications from people of all different backgrounds.

LGBT & RELATED ISSUES

Adler, Libby, *Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 Colum. J. Gender & L. 595 (2010) (Symposium: Gender on the Frontiers — Confronting Intersectionalities).

Allen, Anita L., *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 Calif. L. Rev. 1711 (Dec. 2010).

Aloni, Erez, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 Duke J. Gender L. & Pol'y 105 (Fall 2010).

Anderson, Chase D., *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry*, 60 Duke L.J. 1413 (2011).

Araiza, William D., *Don't Ask Don't Tell and Its Impact on Gay Rights*, 2011 Aspatore Special Rep. 2 (March 2011).

Berg, Nicole C., *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 Univ. Ill. L. Rev. 267.

Blocher, Joseph, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (Jan. 2011)(suggesting that federal courts should consider state constitutional rulings and not just the other way around).

Boyden, Bruce E., *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federal System*, 62 Ala. L. Rev. 111 (2010) (Argues that the Privilege & Immunities Clause, not the Full Faith and Credit Clause, is the appropriate vehicle for dealing with interstate same-sex marriage recognition issues).

Bulfer, Dan J., *How California Got It Right: Mining In re Marriage Cases for the Seeds of a Viable Federal Challenge to Same-Sex Marriage Bans*, 41 Cal. W. Int'l L.J. 49 (Fall 2010).

Buzuvis, Erin E., *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1 (2011).

Cox, Barbara J., *Why Appellate Courts Have Rejected the Argument That the Defense of Marriage Act Trumps the Parental Kidnapping Prevention Act*, 41 Cal. W. Int'l L.J. 189 (Fall 2010).

Crocker, Thomas P., *The Political Fourth Amendment*, 88 Wash. U. L. Rev. 303 (2010) (uses *Lawrence v. Texas* to argue for a more expansive view of liberty protected by the 4th Amendment).

Dale, Danielle R., *Gender Identity Protection: The Inadequacy of Shareholder Action to Amend Corporate Employment Discrimination Policies*, 36 J. Corp. L. 469 (Winter 2011).

De La Torre, Annette, *Is Ze an American or a Foreigner? Male or Female? Ze's Trapped!*, 17 Cardozo J. L. & Gender 389 (2011).

Eichner, Maxine, *Beyond Private Ordering: Families and the Supportive State*, 23 J. Am. Acad. Matrim. Law. 305 (2010).

Eltis, Karen, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 McGill L.J. 1 (2011)(Are you outing your clients when you e-file litigation papers?).

Estin, Ann Laquer, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267 (Spring 2009).

Farra, Adam, *Theories of Discrimination & Gay Marriage*, 69 Md. L. Rev. Endnotes 1 (2010).

Garmon, Teresa Marie, *The Panic Defense and Model Rules Common Sense: A Practical Solution for a Twenty-First Century Ethical Dilemma*, 45 Ga. L. Rev. 621 (Winter 2011) (proposes amending Model Rules of Professional Responsibility to allow attorneys to withdraw from criminal defense representation if they have moral objections to the client's preferred defensive strategy, using "homosexual panic" defense as an example).

Hansen, Mark, *And Baby Makes Litigation*, 97 ABA Journal No. 3, 52 (March 2011) (legal issues surrounding surrogate parenting).

Harbeck, Hon. Dorothy A., *Asking and Telling: Identity and Persecution in Sexual and/or Gender Orientation Asylum Claims — Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law*, 25 Geo. Immigr. L.J. 117 (Fall 2010).

Herchenbach, Nellie, *Giving Back the Other Mommy: Addressing Missouri's Failure to Recognize Legal Parent Status Following the Same-Sex Relationship Dissolution*, 44 Fam. L.Q. 429 (Fall 2010).

Hogue, L. Lynn, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 Cal. W. Int'l L.J. 229 (Fall 2010).

Hopkins, C. Quince, *Introduction: Family, Life, and Legacy: Planning Issues for the Lesbian, Gay, Bisexual and Transgender Communities*, 12 Fla. Coastal L. Rev. 1 (Fall 2010)(symposium introduction).

Infanti, Anthony C., *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 Utah L. Rev. 605.

Isaac, Kendall D., *Familial Status Discrimination: Will Employment Law Build upon What Housing Law Started?*, 36 Emp. Rel. L. J. No. 4, 50 (Spring 2011).

Jerke, Bud W., *Queer Ruralism*, 34 Harv. J. L. & Gender 259 (Winter 2011).

Johnson, Jaime, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 L. & Psychology Rev. 153 (2010).

Joslin, Courtney G., *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 Harv. C.R.-C.L. L. Rev. 81 (Winter 2011).

Kamatali, Jean-Marie, *The U.S. First Amendment Versus Freedom of Expression in Other Liberal Democracies and How Each Influenced the Development of International Law on Hate Speech*, 36 Ohio Northern Univ. L. Rev. 721 (2010).

Knauer, Nancy J., *Gay and Lesbian Elders: Estate Planning and End-of-Life Decision Making*, 12 Fla. Coastal L. Rev. 163 (Fall 2010).

Konnoth, Craig, *Section 5 Constraints on Congress Through the Lens of Article III and the Constitutionality of the Employment Non-Discrimination Act*, 120 Yale L.J. 1263 (March 2011).

Kosbie, Jeffrey, *Misconstructing Sexuality in Same-Sex Marriage Jurisprudence*, 6 NW J. L. & Soc. Pol'y 238 (Spring 2011).

Kozell, Rick, *Striking the Proper Balance: Articulating the Role of Morality in the Legislative and Judicial Processes*, 47 Am. Crim. L. Rev. 1555 (Fall 2010).

Lau, Holning, and Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 U. Minn. L. Rev. 107 (Winter 2011).

Mahaffey, Leslie Cooper, *"There Is Something Unique . . . about the Government Funding of the Arts for First Amendment Purposes": An Institutional Approach to Granting Government Entities Free Speech Rights*, 60 Duke L.J. 1239 (Feb. 2011).

McElroy, Lisa T., *Sex on the Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex*, 34 N.Y.U. Rev. L. & Soc. Change 708 (2010).

Moghaddam, Amanda, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes From an Empirical Perspective*, 40 Southwestern L. Rev. 223 (2010).

Morrissey, Joseph F., *Lochner, Lawrence, and Liberty*, 27 Georgia St. Univ. L. Rev. 609 (Spring 2011).

Myers, Richard S., *The Right to Conscience and the First Amendment*, 9 Ave Maria L. Rev. 123 (Fall 2010) (why the First Amendment does not privilege religiously-observant health care providers to deny care to patients).

Nejaime, Douglas, *Winning Through Losing*, 96 Iowa L. Rev. 941 (March 2011) (Explores how social movements advance their agenda's by using courtroom losses as mobilizing tools; uses examples from LGBT rights litigation).

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

Nicolas, Peter, *Common Law Same-Sex Marriage*, 43 Conn. L. Rev. 931 (Feb. 2011) (Three jurisdictions that authorize marriages for same-sex couples — Iowa, New Hampshire, and the District of Columbia — also allow common law marriages. This article argues that same-sex couples are entitled to form common-law marriages in those jurisdictions and discusses the pros and cons of same-sex couples using this device to form marital relationships).

Novak, Benjamin David, *Freeing Jane: The Right to Privacy and the World's Oldest Profession*, 66 Nat'l Law. Guild Rev. 137 (Fall 2009).

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

Panel Discussion, *Don't Ask, Don't Tell: Beyond the Log Cabin Republicans Injunction and the Defense Authorization Act*, 1 Am. U. Labor & Emp. F. 127 (2011).

Piar, Daniel F., *Keepers of the New Covenant: The Puritan Legacy in American Constitutional Law*, 49 J. Cath. Legal Stud. 143 (2010).

Pusey, Lisa, Book Review, *Gender Stereotyping: Transnational Legal Perspectives*, by Rebecca J. Cook and Simon Cusack, 11 Melbourne J. Int'l L. 531 (Nov. 2010).

Ristroph, Alice, *Third Wave Legal Moralism*, 42 Ariz. St. L.J. 1151 (Winter 2011-2011).

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

Rogers, John, *The Defense of Marriage Act (DOMA) and California's Struggle With Same-Sex Marriage*, 23 Regent U. L. Rev. 97 (2010-11) (Argues that denial of same-sex marriage does not violate 14th Amendment equal protection and that the courts should leave the question of marriage to

Congress and the state legislatures. Also contends that Congress has power under the Commerce Clause to adopt a national definition of marriage, but that federalism concerns justify leaving that policy question to the states).

Sabatello, Maya, *Advancing Transgender Family Rights Through Science: A Proposal for an Alternative Framework*, 33 Hum. Rts. Q. 43 (Feb. 2011).

Saunders, William L., *Neither by Treaty, Nor by Custom: Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understandings of Human Rights*, 9 Georgetown J. L. & Pub. Pol'y 67 (Winter 2011).

Seidman, Louis Michael, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 Calif. L. Rev. 2129 (Dec. 2010).

Sherry, Suzanna, *The Four Pillars of Constitutional Doctrine*, 32 Cardozo L. Rev. 969 (January 2011) (asserts that *Lawrence v. Texas* is "impeccable" when evaluated according to her "four pillars" of constitutional doctrine).

Simson, Gary J., *Religion, Same-Sex Marriage, and the Defense of Marriage Act*, 41 Cal. W. Int'l L.J. 35 (Fall 2010).

Smith, George P., *Regulating Morality Through the Common Law and Exclusionary Zoning*, 60 Catholic Univ. L. Rev. 403 (2011).

Strasser, Mark, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L. Rev. 135 (Fall 2010).

Sung, William C., *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S.Cal. L. Rev. 487 (Jan. 2011).

Todd, Ross, *Marriage Brokers*, 33 American Lawyer No. 3, March 2011, p. 64 ("Why did two former adversaries pair up to take on California's Prop 8? Ted Olson and David Boies make their case.)

Valentine, Sarah, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 Colum. J. Gender & L. 773 (2010).

Varona, Anthony E., *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 Colum. J. Gender & L. 805 (2010).

Wallace, Jason A., *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 Ind.L.J. 735 (Spring 2011).

Wardle, Lynn D., *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past and Future*, 9 Ave Maria L. Rev. 1 (Fall 2010) (Why the law should privilege religiously-observant people to deny health care to patients in need).

Woods, Dan, *Consequences and Opportunities Springing From Don't Ask Don't Tell's Repeal*, 2011 Aspatore Special Rep. 2 (March 2011) (Woods is counsel for Log Cabin Republicans in the pending federal court constitutional challenge to DADT).

Yecies, Sharon, *Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights*, 11 Chi. J. Int'l L. 789 (Winter 2011).

Specially Noted

West Academic Publishing has announced the fourth edition of *Cases and Materials on Sexual Orientation and the Law*, by William Rubenstein, Carlos A. Ball, and Jane S. Schachter, to be published in May 2011. Foundation Press has announced the third edition of *Sexuality, Gender and the Law*, by William N. Eskridge, Jr., and Nan D. Hunter, also to be published in May 2011.

Symposium on DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex Relationships, in the Fall 2010 issue of the California Western International Law Journal. Individual articles noted above.

HIV/AIDS & RELATED ISSUES

Ahmed, Aziza, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 Harv. J. L. & Gender 225 (Winter 2011).

Ashford, Chris, *Barebacking and the 'Cult of Violence': Queering the Criminal Law*, 74 J. Crim. L. (UK) 339 (2010).

Bennett, A. Dean, and Scott E. Randolph, *Is Everyone Disabled Under the ADA? An Analysis of the Recent Amendments and Guidance for Employers*, 36 Emp. Rel. L.J. No. 4, 3 (Spring 2011).

Koehler, Pamela, *Using Disability Law to Protect Persons Living with HIV/AIDS: The Indian and American Approach*, 19 J. Transnational L & Pol'y 401 (Spring 2010).

EDITOR'S NOTE:

All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. 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.