

In the Headlines

Vermont Adopts Civil Unions. Responding to the Vermont Supreme Court's charge in *Baker v. State* (see LAWbriefs, Winter 2000), the state of Vermont enacted a law granting same-sex couples the right to enter into civil unions with almost all the rights of married couples. The law establishes many of the same preliminary qualifications for a civil union as for marriage (*i.e.*, between two adults over 18 who are not related or married/partnered with someone else). The law also provides that anyone authorized to perform a marriage can perform a civil union and creates a process similar to divorce to dissolve such a union. Civil union partners have all the rights and responsibilities of married spouses, including (but not limited to) joint ownership of property, inheritance rights, group insurance benefits for state employees, protection against discrimination based on marital status, victim compensation rights, spousal immunities and privileges, tax benefits, adoption rights, decisions relating to medical treatment, family leave benefits, and homestead rights of surviving spouses. HRC applauds our allies, the Gay and Lesbian Advocates and Defenders (GLAD) and the Vermont Freedom to Marry Coalition for their work in support of the civil unions law.

Supreme Court Backs Mandatory Student Fees at Public Universities. The Supreme Court unanimously affirmed the right of universities to collect mandatory student fees to fund student groups who engage in extracurricular political speech. In the *Southworth* case, the University of Wisconsin's student fee structure was challenged by students who objected to the use of such fees to fund student groups with which they disagreed on ideological and religious grounds. Among the groups the students objected to were the campus gay, lesbian, bisexual and transgendered (GLBT) organization. Noting that dynamic discussion of all spectra of subjects is a fundamental aspect of university life, the Court said the First Amendment allows universities to charge fees to be used for extracurricular student speech, as long as the money is given out under neutral criteria that do not favor some points of view over others. *Board of Regents of University of Wisconsin v. Southworth* (3/22/00).

Oral Arguments Heard in Dale Boy Scouts Case. On April 26, the Supreme Court heard oral arguments in the case of *Boy Scouts of America v. Dale*. The Court must decide whether the Boy Scouts of America have a constitutional right to discriminate against gays even if a state law bars such practices — by claiming that the law infringes on the group's First Amendment rights. Earlier this year, HRC helped coordinate an *amicus* brief on behalf of the civil rights community in support of the ousted gay Eagle Scout. HRC urged a wide range of allies to sign onto the brief. Lambda senior attorney Evan Wolfson represents James Dale and argued on his behalf before the Court. *Boy Scouts of America v. James Dale* (No. 99-699).

Supreme Court Finds the Violence Against Women Act Unconstitutional. In a 5 to 4 opinion, the Supreme Court held that Congress exceeded its power under the Commerce Clause and the 14th Amendment when it enacted the civil rights remedy in the Violence Against Women Act (VAWA). VAWA created a federal cause of action against perpetrators of gender-motivated violence. The Court held that VAWA's provisions against gender-motivated violence lacked a substantial nexus to interstate commerce. It noted that to be a permissible use of the Commerce Clause power, a regulated activity must affect the channels or instrumentalities of interstate commerce, people and things in interstate commerce, or the regulated activity must have a substantial relationship to interstate commerce. The petitioner in *Morrison's* companion case, Christie Brzonkala, argued that gender-motivated violence substantially affected interstate commerce. The majority opinion rejected this justification for the use of the commerce clause as too attenuated, further stating that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." The Court also found fault in Congress's reliance on Section 5 of the 14th Amendment in enacting VAWA insofar as its enforcement provisions targeted individual perpetrators of violence rather than state actors. The Court asserted that to be a proper use of 14th Amendment power, Congress must be redressing discriminatory state action. In a scathing dissent, Justice Souter chastised the Court for encroaching into the role of the legislature. He noted the "mountain of data" gathered by Congress showing the effects of violence against women on interstate commerce and argued that the

sufficiency of the evidence could hardly be questioned. He argued that the job of the Court is not to review Congress's assessment of the evidence but whether Congress had a rational basis in fact to conclude that gender-motivated violence affects interstate commerce. *United States v. Morrison* (May 15, 2000).

Employment

Salt Lake City Mayor Signs Executive Order Prohibiting Sexual Orientation Discrimination for City Employees. Salt Lake City, Utah, mayor Rocky Anderson signed an executive order on April 4 that protects city employees from sexual orientation discrimination. In 1997, the Salt Lake City council passed, and then repealed, a similar protection, ultimately settling on an ambiguously worded ordinance requiring hiring and firing based on "job-based criteria." Mayor Anderson said the guidelines are needed to directly attack the problem of sexual orientation discrimination.

Iowa Legislature, Governor Conflict Over Sexual Orientation Protection. Both Houses of the Iowa Legislature voted to override Governor Tom Vilsack's executive order protecting state employees from discrimination on the basis of sexual orientation and gender identity. Governor Vilsack, however, vetoed the bill and it does not have sufficient support for an override. Opponents of Vilsack's order argue that he overstepped his constitutional powers by adding the protection via an executive order. While six other states have similar executive orders in place, Iowa's is the only one to include gender identity. Additionally, eleven states and the District of Columbia offer statutory protection from sexual orientation discrimination. (Minnesota also provides protection on the basis of gender identity in the state law).

Local Developments. In other good news from Iowa, the city of Davenport passed an ordinance banning discrimination based on sexual orientation, becoming the fourth Iowa city to offer such protection.

West Virginia Arbitrator's Homophobia Results in Rejection of Decision. A U.S. District Court judge in West Virginia ruled that a labor arbitrator's ruling would not be enforced due to the arbitrator's antigay bias. Chapman was fired from his job after a dispute with a supervisor. He filed a grievance through the union and ended up in arbitration before Merle Hart. During the arbitration, it was revealed that Chapman thought his supervisor was gay. Hart said that if his supervisor was indeed gay, he could grant Chapman's grievance on that ground alone. Hart advised the company to discharge the supervisor. The trial court called Hart's arbitration a "corrupt substitute" for justice and observed that the only party who made the supervisor's sexuality an issue was the arbitrator. *Flexsys America, L.P. v. Local Union No. 12610* (2/16/00).

New York District Court Judge Finds Anti-Lesbian Harassment Actionable. A New York U.S. District Court judge found that the plaintiff was subjected to constant ridicule by her co-workers because she failed to meet her co-workers' expectations of what a woman should look like. The employer claimed the harassment was based on homophobia rather than sexism and therefore not actionable. Thus the question before the court was whether the defendant was harassed because of her sexual orientation or because of her sex. Relying on the precedent of *Oncale v. Sundowner Offshore Services*, the court found that the plaintiff was exposed to conditions that her coworkers were not, thus making her claim actionable as sexual harassment. *Samborski v. West Valley Nuclear Services Co.* (W.D.N.Y. 1999).

Same-Sex Sexual Harassment Suit Allowed. Plaintiff was a heterosexual man whose co-workers perceived to be gay, resulting in harassment and causing him much "devastation." His complaints to superiors went unaddressed. The defendant employer moved for summary judgment, saying the claims were not based on the plaintiff's sex and rather were "schoolyard taunts." Citing *Oncale v. Sundowner Offshore Services*, the judge said that same-sex sexual harassment is actionable where the plaintiff was harassed because of his sex, and that this might be proven by showing that one of his harassers was "oriented toward the same sex." Among other methods, *Oncale* said that the plaintiff can show the sexual harassment was based on sex if there is credible evidence that the harasser is a homosexual. *Fry v. Holmes Freight Lines, Inc.* (W.D. Mo. 11/15/99).

CT Must Offer Health Benefits to Same-Sex Partners of State Employees. A labor arbitrator decided that Connecticut must offer health benefits coverage to same-sex partners of state employees, a decision that will stand unless overridden by a 2/3 vote of one chamber of the state legislature. The union argued that the benefits must be offered to keep Connecticut employment policies competitive with other states in the region and with private businesses. State employees in Massachusetts and New York are also entitled to such benefits. Governor John Rowland responded to this ruling by extending domestic partner benefits not only to union state employees but to non-union employees as well.

Federal Court Rejects Homophobic Work Environment Claim. The plaintiff suffered constant harassment, physical attacks, and disparate workplace treatment. His complaints to superiors went unanswered. The court found the discrimination was based on the plaintiff's sexual orientation and not sex as required by Title VII. The court said that "none of these statements indicated that plaintiff is exposed to conditions of employment different from members of the opposite sex." The court then granted the defendant's motion for summary judgment on the plaintiff's Title VII claim. *Bibby v. Coca Cola Bottling Company* (E.D. Pa. 3/2/00).

Family Law — Marriage and Domestic Partnership

California Voters Approve Limitation on Definition of Marriage. On March 8, 2000, California voters passed the so-called Knight Initiative, which defines marriage as being between one man and one woman. Consequently, California will not have to recognize same-sex marriages performed in other states. 61% of voters approved the measure, which has no practical effect since same-sex marriage is not legal in any state. President Clinton, Vice President Gore and California Gov. Gray Davis were among the many politicians who came out in opposition to the bill as unnecessary and mean-spirited.

CO, SD and WV Ban Recognition of Gay Marriage. The **West Virginia** legislature passed a law defining marriage as being between one man and one woman. The law forbids the state from recognizing a marriage between two people of the same sex. *f* Legislators in **Colorado** passed a similar ban on recognition. A joint committee stripped language from the Colorado bill affirming that the law did not affect city or county law or domestic partnership benefits provided by employers. *f* The **South Dakota** legislature, fearful that their previous ban on same-sex marriages might not be strong enough, passed a new law more strongly reiterating the ban. Thirty-three states now have laws denying recognition to gay marriages.

Washington State Appeals Court Disallows Gay Partner's Inheritance by Intestacy. The Washington Court of Appeals ruled that a gay man was not entitled to inherit the estate of his partner of 16 years. When his partner died, the gay man filed a claim against the estate, arguing that the two had been in a "meretricious relationship," thus entitling him to a share of their community property. The court rejected this argument, noting that Washington law defines a meretricious relationship as "a stable, marital-like relationship." The property distribution under a meretricious relationship is whatever would have been community property had the parties been married. Since the two gay men could not be married, their relationship was not "quasi-marital" and therefore the surviving partner was entitled to nothing. *Vasquez v. Hawthorne* (Wash. App. 2/11/00).

Virginia Supreme Court Invalidates Domestic Partnership Benefits. Unanimous as to outcome but sharply split as to methodology, the Virginia high court ruled that Arlington County's offering of health insurance eligibility to domestic partners of county employees violated a state statute authorizing municipalities to extend health benefits to "dependents" of county employees. The county argued that the term "dependents" was not defined in the statute and could be broadly interpreted to cover persons who live together and are financially interdependent. The court found the interpretation unreasonable. *Arlington County v. White* (04/21/00).

State Legislative Developments

Idaho Passes Religious Freedom Restoration Act. Idaho lawmakers have passed the Religious Freedom Restoration Act, a bill which some argue could allow employers and landlords to discriminate against lesbians and gay men. The bill provides that if non-compliance with any state or local law is religiously motivated, the state must prove a "compelling interest" in order for that law to be enforced. Many are concerned that the law legalizes discrimination against lesbians and gay men, as long as such discrimination is motivated by religious beliefs. The bill takes effect on Feb. 1, 2001. Until then there will be continuing discussions (called for by the governor) among the bill's sponsors, supporters and opponents about the new law's scope and reach.

Other Developments. Georgia failed to pass hate crimes legislation that *specifically* protects sexual orientation when the House amended a bill to delete such language passed by the Senate *f* The **New Hampshire** legislature overwhelmingly rejected a ban on same-sex marriages on March 29 *f* Coming on the heels of the passage of the Knight Amendment, the **California** State Assembly Judiciary Committee approved three different domestic partnership bills on March 28 that would give partners the right to participate in medical decisions of partners, give domestic partners intestate succession rights and the right to be administrators in intestate estates, and a broad bill to recognize the institution of domestic partners, allowing them to make funeral arrangements and bring actions for wrongful death and negligent infliction of emotional distress, as well as recognizing domestic partnerships registered outside California *f* A **Connecticut** House Judiciary Committee has approved a bill allowing joint adoption by same-sex couples.

Family Law — Parenting

Lesbian 'Ex' Awarded Visitation. The New Jersey Supreme Court has ruled that a lesbian who helped raise her partner's twins has the right to visit the children following their break-up. The court said the partner was a "psychological parent" to the children and had a right to share parenting duties. The court ordered visitation, as is typical in many divorced families, and turned down a request for joint custody because the biological mother had made the decision to become pregnant before the committed relationship began. The court said, however, that the non-biological mother had developed a "parent-like relationship" with the children and established a four-part test to determine when someone is a "psychological parent," including that the legal parent consented to and fostered the relationship between the non-biological parent and the child; that the third party lived with the child; that the third party performed parental functions for the child; and that a parent-child bond was formed. *V.C. v. M.J.B.* (4/6/00).

Minnesota Appellate Court Approves Tripartite Sharing of Custody Between Lesbian Co-Parents and Gay Sperm Donor. The Minnesota Court of Appeals has awarded parental rights to three parents (all gay or lesbian) of a child conceived through donor insemination. The mothers are lesbian co-partners, and the donor was a gay man who formed a relationship with the child though he was not designated as the father on the child's birth certificate. The mothers eventually terminated visitation between the biological father and the child, and he filed suit seeking parental rights. Subsequently, the two lesbians terminated their relationship, and the non-biological mother petitioned for custodial rights. The biological mother then moved to Michigan with the child. The Court of Appeals affirmed the trial court's decision to award sole physical custody to the biological mother, and joint legal custody between the biological mother and her former partner, while also allowing the biological father to have visitation rights and some participation in making decisions for the child. *LaChapelle v. Mitten* (3/14/00).

Texas Courts Prohibit Lesbian Mother from Taking Daughter to Gay-Inclusive Church. The Texas Court of Appeals has upheld a lower court ruling that a lesbian mother cannot take her child to the gay-inclusive Metropolitan Community Church. The father objected to the mother doing this on the basis of the parties' divorce decree, which gave the father the right to direct the moral and religious training of the child. The National Center for Lesbian Rights (NCLR) litigated this case, and the ACLU Gay and Lesbian Rights Project submitted an *amicus* brief. *In Re WKG* (3/23/00).

Utah and Mississippi Pass Bans on Gay Adoption. Utah and Mississippi passed bans on gay adoption, joining Florida as the only states to prohibit such adoption. Mississippi law prohibits couples of the same

gender from adopting children. The Utah measure prevents placement of children in homes where unmarried couples — gay or straight — are cohabiting. The Utah law also precludes placement of child in foster care with unmarried couples. The ACLU and the NCLR, along with other groups, are considering a challenge against this law. The ACLU is currently challenging Florida's ban in Federal Court.

Transgender/Gender Issues

Atlanta City Council Bans Gender Identity Discrimination in City Employment. On March 6, the Atlanta City Council added "gender identity" as a protected category in the city's non-discrimination law, which bans discrimination in city employment based on marital status, national origin, race, religion, sex and sexual orientation.

Court of Appeals Finds Protection for Transgendered Individuals Under Federal Law. Relying on precedent which holds that discrimination on the basis of sex stereotypes is illegal, a 9th Circuit Court of Appeals panel said in *dicta* that a transgendered individual *may* be protected under Title VII of the Civil Rights Act of 1964 if the discrimination stems from gender stereotypes. The plaintiff, who self-identifies and dresses as a female, was an inmate in a Washington state prison who was harassed by a guard (and subjected to requests for oral sex and an attempted rape). The plaintiff sued under an 8th Amendment claim and under the Gender-Motivated Violence Act (GMVA), a provision of the 1994 Violence Against Women Act that outlaws gender-motivated violence. The district court, over the defendant's objections of being entitled to qualified immunity under 42 U.S.C. § 1983, denied the defense motion for summary judgment. The Court of Appeals upheld the denial of summary judgment for the 8th Amendment claim because the defendant's treatment of the plaintiff was beyond the scope of the immunity under § 1983. The court said there is "no societal interest in allowing prison guards to rape (or attempt to rape) inmates 'with independence' or 'without fear of consequences.'" On the GMVA claim, the court rebuffed the defense argument that it only applies to women. It said that the law protects anyone subjected to violence motivated by their gender, and that in this case, the harassment was motivated by the plaintiff's gender. The court, however, granted the summary judgment for the defendant on the grounds that the statute was not clear on its face as to whether a sexual assault on a transgendered person would be covered under the law. Since the law was not clearly established, the defendant enjoyed qualified immunity. However, as a result of the ruling, transgendered individuals in the 9th Circuit have a stronger case for arguing they are protected from gender-motivated violence by the GMVA. *Schwenk v. Hartford* (9th Cir. 2/29/00).

No Immunity for Prison Officials Who Cut Off Transsexual Inmate's Hormone Treatments. The 9th Circuit Court of Appeals has ruled that prison officials did not enjoy immunity from suit by a transsexual inmate after cutting off hormone therapy. The court rejected the defendant's argument that there was no established authority holding that transsexual inmates are entitled to receive hormone therapy, instead framing the issue as whether the defendants were "deliberately indifferent to serious medical needs." The court found here that the treatments were discontinued with no consideration of the plaintiff's needs, posing a serious risk to the patient. *South v. Gomez* (9th Cir. 2/25/00).

Texas High Court Refuses to Review Ruling. On May 18, the Texas Supreme Court denied the motion for rehearing in the *Littleton v. Prange* (see *LAWbriefs*, Fall 1999) case, in which it had earlier ruled that a post-operative transsexual retained her birth sex for purposes of the state wrongful death statute. In so doing, the court invalidated Ms. Littleton's 10-year marriage to her husband. Attorney Phyllis Frye represented Ms. Littleton before the Texas Supreme Court. She and attorney Alyson Meiselman will represent her in an appeal to the U.S. Supreme Court.

Litigation Notes

Gay New York City Couple Settles Suit for Housing Discrimination. With Lambda's help, a gay New York City couple has reached settlement in an unlawful discrimination suit arising from a landlord's refusal to rent to them because they are gay. The couple was the first to respond to an apartment listing when they filled out a rental application and left a deposit with the broker. They were denied when the landlord told

the broker he was unwilling to rent to two men. The Open Housing center subsequently verified that the landlord was refusing to rent to same-sex couples. The parties agreed to a monetary settlement; additionally, employees of the brokerage will sign a statement attesting to their understanding and compliance with fair housing laws. The realtor has also agreed to institute anti-discrimination training. *Beaton v. Vinje Realty & Kazeroid Realty Group*.

Judge Orders School to Let Club Meet. Over objection of some administrators and parents, a federal judge has ordered that a student club that would look at classroom subjects from the perspectives of gays and lesbians be allowed to meet at their Salt Lake City high school. The suit is the latest chapter in an ongoing effort by the district to deny recognition to these groups and forbid voicing of gay-positive views. Lambda, NCLR, and the ACLU of Utah filed suit to challenge the denial of approval for a gay student group in the Salt Lake City, Utah, school district. *East High School Prism Club v. Seidel*.

Judge Limits Protection of Kentucky Anti-Discrimination Law. A Kentucky Circuit Court judge ruled that a Jefferson county law prohibiting discrimination against homosexuals in housing, employment and public accommodations applies only to unincorporated parts of the county. The city of Louisville, which is in Jefferson County, has employment protections but no other protections. The judge issuing the decision offered no explanation for his decision. The American Center for Law and Justice has filed suit on behalf of a doctor claiming that the city of Louisville's ordinance banning sexual orientation discrimination violates his religious rights (*see LAWbriefs*, Fall 1999).

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