



HUMAN  
RIGHTS  
CAMPAIGN

919 18<sup>th</sup> Street N.W., Suite 800  
Washington, D.C. 20006-5509  
phone 202 628 4160  
fax 202 347 5323

# LAWbriefs

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## Notable Legal Developments Affecting Lesbians and Gay Men

Tony Varona, Chief Counsel  
Kevin Layton, Staff Counsel  
Meredith Morrison, Law Fellow and Editor

### *Employment Discrimination - Litigation*

**Landmark Supreme Court Ruling on ADA an Important Victory for Americans Living with HIV.** On June 25, the Supreme Court ruled that HIV-infection could constitute a "significant impairment" under the Americans with Disabilities Act (ADA). The ADA, which prohibits discrimination against people with disabilities in employment and public accommodations (including health care), defines a person with a disability as someone who has a "physical or mental impairment" that "substantially limits a major life activity." The plaintiff, Sidney Abbott, is an HIV-positive, asymptomatic woman whose dentist, Dr. Randon Bragdon of Bangor, ME, refused to fill her cavity in his office.

Abbott sued and Bragdon argued that the ADA did not apply because Abbott is asymptomatic. The Court disagreed and found that in light of the impact of HIV infection on the hemic and lymphatic systems, HIV constitutes a physical impairment "from the moment of infection." The Court also held that Abbott's ability to reproduce is a major life activity that is substantially limited by her HIV infection. The Court remanded the case to the 1<sup>st</sup> Circuit for a determination as to whether Abbott's HIV infection poses a "direct threat" of injury to Dr. Bragdon, which was a defense Bragdon raised on appeal.

*Bragdon* was the first Supreme Court case to deal with HIV or AIDS and the Court's first interpretation of the ADA. (Ms. Abbott was represented by Ben Klein of Gay & Lesbian Advocates & Defenders (GLAD). The Human Rights Campaign (HRC) and a number of allies filed a joint *amicus* brief in this case, drafted principally by HRC legal consultant Chai Feldblum. Lambda Legal Defense and Education Fund (Lambda) and the American Civil Liberties Union (ACLU) filed separate *amicus* briefs.)

**Same-sex Sexual Harassment Prohibited under Supreme Court's *Oncale v. Sundowner* Ruling.** In *Ford v. Rigidply Rafters* (04-01-98), the U.S. District Court in Maryland upheld a verdict in favor of a plaintiff claiming same-sex sexual harassment. The defendant in the case had argued that same-sex sexual harassment is actionable under Title VII only when the harasser is gay. The Judge disagreed, based on the recent Supreme Court decision, *Oncale v. Sundowner Offshore Services* (03-04-98), and ruled that the plaintiff need only have a reasonable belief that a violation occurred to establish a claim for retaliatory firing. In *Oncale*, Justice Scalia wrote, "There is no justification in Title VII... for a categorical rule barring a [sexual harassment claim] merely because the plaintiff and the defendant are of the same sex." Other cases following *Oncale* that allowed same-sex sexual harassment claims include *Belanger v. Norton Co.* (05-21-98) in Massachusetts and *Willis v. WAL-Mart Stores* (06-24-98) in West Virginia.

**Turning to the Supreme Court for *Equality*: The Battle over Cincinnati's Issue 3 Continues.** On May 4, Lambda and the ACLU filed a petition for a writ of certiorari with the Supreme Court in *Equality Foundation, et. al, v. City of Cincinnati, et. al.* In 1993, Cincinnati voters adopted Issue 3 among other things to prohibit prospectively any protection from discrimination based on sexual orientation. In August 1994, an U.S. District Court declared Issue 3 to be unconstitutional. That decision was reversed by the 6<sup>th</sup> Circuit Court of Appeals in May 1995. Following the Supreme Court's decision in *Romer v. Evans* (May 1996), which struck down Colorado's Amendment 2 (which was nearly identical to Cincinnati's Issue 3), the Supreme Court ordered the 6<sup>th</sup> Circuit to review their decision in *Equality*. The 6<sup>th</sup> Circuit upheld its decision in October 1997, despite its possible conflict with *Romer*.

**State Laws Lead to Split Decisions in Suits against the Boy Scouts for Anti-Gay Discrimination.** March 1998 saw the decisions in two cases brought against the Boy Scouts of America (BSA) by men who were denied positions as Assistant Scoutmasters once the Boy Scouts learned that the men were gay. Each plaintiff was a respected Eagle Scout, and the BSA discovered the sexual orientation of each man through a newspaper article. The different outcomes in the two very similar cases reflect the difference between the state laws under which each suit was brought:

- ▼ *Dale v. Boy Scouts of America* (03-02-98) was argued under New Jersey's Law Against Discrimination, which prohibits discrimination on the basis of sexual orientation in any place of public accommodation in New Jersey. The New Jersey Court of Appeals ruled that the Boy Scouts, like little league baseball, is a public accommodation, and that the discrimination against Dale was illegal. The Court also found dispositive the fact that the Boy Scouts often are sponsored by public

facilities (such as public schools and firehouses), contradicting their claim that they constitute a private organization not subject to New Jersey's anti-discrimination law. Lambda is presently defending this decision on appeal to the New Jersey Supreme Court.

- ▼ *Curran v. Mount Diablo Council of the Boy Scouts of America* (03-23-98) was argued under the California Unruh Civil Rights Act, which prohibits discrimination based on sexual orientation by business establishments in California. The California Supreme Court ruled that the BSA is not a business establishment, and thus the Unruh Act does not apply to the Boy Scouts. (Lambda and the ACLU jointly represented Curran, and many allies, including Parents, Friends and Families of Lesbians and Gays (PFLAG), submitted *amicus* briefs to the courts on behalf of the plaintiffs in each case.)

**Gay Teacher Wins Back Job in Discrimination Suit against Local Ohio School Board Proceeding.** On May 18, U.S. District Judge Susan J. Dlott ruled that the Board of Education in Williamsburg, OH discriminated against gay elementary school teacher Bruce N. Glover when it decided not to renew his teaching contract. Despite Glover's above-average performance evaluation, the School Board refused to renew his contract based on a false rumor that he had held his partner's hand at a school function. *Glover v. Williamsburg Local School District Board of Education* (05-18-98) was argued as an equal protection claim under the U.S. Constitution. The Judge ordered that Glover be offered a teaching contract for the next two years, and receive back-pay, compensation for emotional distress, attorneys fees and court costs.

## **Employment Discrimination - Legislation**

**President Clinton Adds Sexual Orientation to Federal EEO Policy. Congressional Attempt to Undo Amendment Fails.** On May 28, President Clinton issued an amendment to **Executive Order 11478** to protect all **Federal Government Employees** from discrimination based on sexual orientation. The amendment brought much-needed uniformity to existing policies forbidding employment discrimination based on sexual orientation in Federal employment. On August 5, 1998, the U.S. House of Representatives defeated the Hefley Amendment to the House Commerce, Justice and State Department appropriations bill – which would have gutted the President's amendment – by a vote of 252 to 176.

**Bar Harbor, Gainesville, Columbus and Ypsilanti Pass or Preserve Ordinances Prohibiting Anti-Gay Bias. Oklahoma House equates gay people with "sex offenders."**

- ▼ On April 21, **Bar Harbor, ME** became the first town in Maine to pass a local ordinance creating a civil action for discrimination on the basis of sexual orientation. In February, the State of Maine passed a referendum repealing statewide protection from such discrimination.
- ▼ The **Gainesville, FL** City Commission recently voted to add sexual orientation to the city's anti-discrimination ordinance, prohibiting discrimination in housing, employment, lending, and public accommodations.
- ▼ The **Columbus, OH** Board of Education recently adopted a ban against harassment based on sexual orientation.
- ▼ Voters in **Ypsilanti, MI** recently saved an ordinance banning discrimination based on fourteen categories, including sexual orientation, from an anti-gay attack, which included a rally featuring Green Bay Packer Reggie White.
- ▼ The **Oklahoma** House of Representatives recently amended a bill that would bar sex offenders from employment in any public school to include "homosexuals or lesbians" in the prohibition.

## **Domestic Partnership Developments.**

- ▼ **San Francisco Human Rights Ordinance Extends Beyond County to all City Contract Workers.** San Francisco's human rights ordinance was amended in 1997 to require that all city contractors extend domestic partnership benefits to their employees to avoid discrimination on the basis of sexual orientation. U.S. District Court Judge Claudia Wilkin placed limits on the ordinance in *Air Transport Association of America v. City and County of San Francisco* (04-10-98). Judge Wilkin ruled that the ordinance could not apply to workers outside of San Francisco whose work does not directly relate to a San Francisco city contract. Her ruling suggests, however, that the ordinance does apply to workers outside of the county who are working on a city contract. (Lawyers from the ACLU, Lambda, and the National Center for Lesbian Rights (NCLR) submitted *amicus* briefs to the court on behalf of San Francisco.)
- ▼ **Anti-San Francisco Riggs Amendment Passes House.** On July 29, the House of Representatives, by a vote of 214-212, passed a measure sponsored by Rep. Frank Riggs, R-CA, that would prohibit San Francisco from using VA and HUD funds to implement the domestic partnership provision of its Human Rights ordinance. Considering that the Senate version of the VA/HUD appropriations bill has no similar language, it is likely that the Riggs language will not survive conference.
- ▼ On July 7, **New York City** Mayor Giuliani signed into law one of the broadest domestic partner policies in the country. Under the new law, City agencies must treat same or opposite-sex domestic partners as they would married couples, including visitation rights in city-run facilities, bereavement leave for city employees, and tenancy succession rights under city programs. The bill applies to all who interact with city agencies or policies.
- ▼ The **State of Oregon; Vancouver, WA; Oakland, CA; and Philadelphia, PA** all voted to extend domestic partnership benefit plans to employees, regardless of sex or sexual orientation.

## **Regulatory/Administrative Law Developments**

**PFLAG Family Wins Historic Title IX Victory Against Anti-Gay Harassment in Arkansas Schools.** In January 1997, high school student William Wagner and his parents filed a sex discrimination complaint with the Office of Civil Rights of the U.S. Department of Education alleging that he had suffered repeated, sometimes violent, harassment from other students at his public high school in Fayetteville, AR. Lambda represented the Wagners in this administrative action. Theirs was the first complaint to be filed under the revised Title IX guidelines, which explicitly extend coverage under Title IX to include sexual harassment aimed at gay or lesbian students. The federal government recently reached an agreement with the Fayetteville Schools under which the school district must revise its policies and procedures and train its faculty, staff, and students in recognizing and preventing sexual harassment aimed at gay and lesbian students.

**SEC Reverses "Cracker Barrel" Policy.** On May 20, the Securities and Exchange Commission reversed its infamous "Cracker Barrel" policy and adopted changes that require companies to consider shareholder proposals on "significant social policy issues," including employment discrimination. The new rule became effective on June 29, 1998.

**IRS Backs Down from its Discriminatory Stance against Cancer Support Group for Lesbians.** The IRS continues to raise questions concerning its treatment of gay and lesbian organizations seeking 501(c)(3) tax-exempt status. It told Kathy's Group, a Rhode Island support group for lesbians with cancer, that it must broaden its mission to include all women in order to get 501(c)(3) approval. Lambda, which represented the group, demanded withdrawal of the *quid pro quo*, which the agency did remove on May 5 and proceeded to process Kathy's Group's application.

## **Family Law – Marriage/Coupling**

**Alaska Superior Court Declares Marriage is a Fundamental Right for all Citizens, Straight or Gay.** On February 27, Alaska Superior Court Judge Peter Michalski declared that "marriage, i.e., the recognition of one's choice of a life partner is a fundamental right" under the Alaska State Constitution. He ruled that to deny this right to same-sex couples violates the State Constitution, and in order to do so, the State must first show a compelling interest. Judge Michalski wrote in *Brause v. Bureau of Vital Statistics* (02-27-98), "It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place." The Judge also criticized the Hawaii Court for failing to recognize marriage as a fundamental right, regardless of sex and choice of partner. He also emphasized that the denial of licenses discriminates on the basis of sex, saying "Sex-based classification can hardly be more obvious." The Alaska Supreme Court declined to rule on an appeal filed by the State, sending it back to the Superior Court for a full trial whether the state can carry its burden to justify the discrimination. The case is now in the discovery phase.

**Hawaii Supreme Court's Marriage Decision Still Pending.** The Hawaii Supreme Court has not yet ruled in *Baehr v. Miike*, formerly *Baehr v. Lewin*, the 1993 case arguing for equal protection of same-sex couples' right to civil marriage. In 1993, the Court ruled that the state's denial of civil marriage for same-sex couples constitutes discrimination on the basis of sex. The case then went back to the lower court where the State failed to show a compelling interest in denying that right, and therefore, the court ruled, marriage should be available to gay and lesbian couples. That ruling has been on hold pending appeal by the State back to their Supreme Court. The State Supreme Court has had the briefs in the case for a year, but has not heard oral arguments. The Court may schedule arguments or may rule at any time based on the briefs alone. Voters will be asked on the November ballot to decide if the Hawaii State Constitution should be amended to allow the legislature to restrict marriage to different sex couples. Local activists have begun to campaign against this discriminatory alteration of the state constitution, and HRC is providing financial and technical support to their efforts. (Evan Wolfson of Lambda serves as co-counsel with Hawaii attorney Dan Foley for the plaintiffs in this case.)

**Vermont Supreme Court Expected to Hear Arguments on Same-sex Marriage in the Fall.** Three same-sex couples sued for equal protection of their right to marry in Vermont in *Baker v. State*. The trial court dismissed their complaint, finding that same-sex marriage is not a fundamental right because it is "not rooted in the people's traditions and consciousness." The opinion also stated that Vermont's marriage laws do not discriminate on the basis of gender because they affect men and women equally. The court accepted only one of the state's seven justifications for denying same-sex couples the right to marry: the furtherance of procreation and child rearing. The plaintiffs' appeal will be before the Vermont Supreme Court this Fall. (Mary Bonauto of GLAD is co-counsel for the plaintiffs, and Lambda submitted an *amicus* brief along with others.)

**Anti-Marriage Legislation Passes in Three States, Dies in Two Others.** In the past few months, Alabama, Iowa, and Kentucky state legislatures passed new laws explicitly discriminating against same-sex couples by banning the recognition of same-sex marriage. Similar measures in Maryland and West Virginia were killed in committee. These developments raise the number of states with discriminatory marriage laws to 28.

**New York Judge Recognizes and Enforces Lesbian Separation Agreement.** A NY judge ruled in *Silver v. Starrett* (04-16-98) that a lesbian couple's separation agreement was enforceable, reasoning that both parties freely consented to the agreement without duress. The contract provided financial support for one partner for several years.

**Massachusetts High Court Recognizes Written Contracts of Unmarried Couples.** The MA Supreme Judicial Court, in *Wilcox v. Trautz* (No. 07621), announced that it will enforce written contracts of unmarried couples that meet the requisites for a valid contract. The Court stated “[w]e do well to recognize the benefits to be gained by unmarried cohabitants to enter into written agreements” regarding “property, financial and other matters.”

### ***Family Law – Parenting***

**North Carolina Supreme Court Takes Custody of Sons from Gay Father.** On July 30, the North Carolina Supreme Court overturned an appeals court and reinstated a ruling that revoked a gay father’s custody of his two sons solely because of his relationship with his male partner. The ruling, which says it applies equally to efforts to take custody away from any heterosexual parent who has a relationship without being married, means that Fred Smith will not regain primary custody of his sons, whom he had raised alone from the time his wife left him and the two boys when they were 12 and 9 in order to live with another man. The court justified its decision with no evidence of Smith being a poor parent, instead only offering references to how Smith and his partner would kiss each other in the presence of the children and would allow the children into the bedroom when the two men were in bed together. Lambda and North Carolina Gay and Lesbian Attorneys (NC GALA) represent Smith.

**New York Appellate Court Denies Lesbian Co-Parent’s Petitions for Custody and Visitation.** In the *Matter of Lynda A.H. and Diane T.O.* (06-10-09), a New York appellate court overturned a Family Court ruling awarding visitation rights to the lesbian co-parent of a child conceived by her partner through artificial insemination. The couple separated seven months after it had petitioned the court for a second-parent adoption of the child, and the biological mother revoked her consent to that adoption. The court decided that as a “nonparent,” the biological mother’s former partner had no standing to seek custody or visitation rights of the child.

**Virginia Appeals Court Upholds Discriminatory Custody Decision.** The Virginia Court of Appeals affirmed the order in *Piatt v. Piatt* (05-26-98) granting primary custody of a child to the father, despite expert opinion that the mother had “demonstrably broader” parenting skills. Circuit Judge Plummer referred to the mother as “promiscuous” because she had two short, monogamous lesbian relationships after her formal separation from her husband. Chief Judge Fitzgerald wrote that the trial court ruling was unbiased, ignoring the requirement that Virginia cases show a negative impact on the child in order for a parent’s sexual conduct to be relevant to a custody determination. Judge Annunziata’s dissent noted that there was no such evidence in this case. (NCLR submitted an *amicus* brief on behalf of the mother.)

**Alabama Supreme Court Declares Heterosexual Home to be in Child’s Best Interest.** In *J.B.F. v. J.M.F.* (06-19-98), Justice Lyons affirmed the decision to change custody of a daughter from her mother to her father based only upon the fact that the mother is now living in an openly lesbian relationship. Despite expert psychological testimony that the child has a strong bond with her mother and a healthy, loving relationship with her mother’s partner, Justice Lyons concluded that it would be in the child’s best interest to be raised in a heterosexual home. He cited an earlier Alabama decision, referring to a “lesbian lifestyle” as “neither legal in this state, nor moral in the eyes of most of its citizens,” and he footnoted the State’s sodomy law, with the legislative intent of making “all homosexual conduct criminal.”

**Alabama Appeals Court Upholds Gay Father’s Right to Visitation in the Company of his Partner.** In *K.T.W.P. v. D.R.W.* (06-12-98), the Alabama Court of Civil Appeals refused to restrict a gay father from having his life partner present during visitation with his daughter. Based on concerns about the practices of the child’s mother, the trial court ordered that both parents refrain from any sexual activity in the child’s presence, and the appeals court deemed that to be sufficient protection the best interests of the child, although it affirmed a visitation restriction if the trial court had imposed one.

**Largent D.C. Adoption Ban Passes House.** During debate on the D.C. appropriations bill, the U.S. House of Representatives voted on August 7, 1998, to pass an amendment offered by Oklahoma Republican Steve Largent, 227-192, prohibiting joint adoptions by unrelated persons. This amendment would not preclude single D.C. residents from adopting children. The Senate has not yet voted on the underlying bill.

### ***Sodomy Laws***

**Kansas Court Upholds One of the Country’s Six Remaining “Same-Sex Only” Sodomy Statutes.** The Kansas Court of Appeals, in *City of Topeka v. Movsovit* (04-24-98), upheld the Kansas sodomy law as constitutional under the Kansas Constitution. The law prohibits sexual interaction between consenting adults of the same sex, but does not ban the same acts between heterosexuals. Relying heavily on *Bowers v. Hardwick* (1986), the court cited the state’s interest in promoting morality as a sufficient basis to sustain the discriminatory statute. The Kansas Supreme Court has declined to review the decision. (Movsovit is represented by the ACLU.)

**Rhode Island Repeals Sodomy Law.** Following an April ruling in state court that declared Rhode Island’s sodomy law unconstitutional, the Rhode Island Legislature voted in early June to repeal the statute.

**Gay and Lesbian Arkansans To Have Their Day in Court -- Challenge Against Sodomy Law Proceeds.** On June 23, Arkansas Judge Collins Kilgore rejected the State's motion to dismiss *Picado v. Bryant*, a case in which Lambda attorneys argue that the Arkansas sodomy law violates the equal protection guarantee and privacy rights of the state and federal constitutions, thereby treating lesbians and gay men as second-class citizens. The case will proceed on the merits.

## ***The Military***

**Asking, Telling, Pursuing, Harassing.** Secretary of Defense William Cohen released an internal Pentagon report on April 6 verifying that discharges from the military for homosexuality have increased substantially since the "Don't Ask, Don't Tell" policy was adopted in 1993. The report was ordered by Cohen in response to the 1997 annual report of the Servicemembers Legal Defense Network (SLDN) which documented that the armed services continue to ask, pursue and harass personnel in violation of the "Don't Ask, Don't Tell, Don't Pursue" policy. Cohen's report states that to curtail the increasing violations of the policy by military personnel, the Pentagon will instruct commanders that anti-gay harassment will not be tolerated and that commanders should investigate reported harassment, not those who are the brunt of it. The report also clarifies that military psychotherapists are no longer required to report gay people who out themselves in the course of therapy.

**Appealing.** On April 2, the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit heard the government's appeal in *Able v. USA*, in which the District Court ruled last July that the "Don't Ask, Don't Tell" policy is unconstitutional. This case is unique because the plaintiffs sued the government proactively, not in response to being discharged, and because they address the unfairness of both the ban on speech and the unequal rules of conduct regarding service members' private, off-base sexual interactions. (The plaintiffs are represented by Lambda and the ACLU.)

**Settling.** Timothy R. McVeigh has reached settlements with both the U.S. Navy and America Online. McVeigh will retire from the Navy with full benefits for his 18 years of service, and America Online will pay him an undisclosed sum of money for violating his privacy. In January, U.S. District Court Judge Stanley Sporkin ruled that the Navy "impermissibly embarked on a search and 'outing' mission," which violated the "Don't Ask, Don't Tell" policy, by researching McVeigh's AOL user profile in which he identified himself as gay. The Navy's action leaves intact a federal court ruling that the Navy violated McVeigh's privacy rights under the Electronic Communications Privacy Act and "Don't Ask, Don't Tell, Don't Pursue." (SLDN and Proskauer Rose LLP represented McVeigh.)

**California Judge Says "Don't Ask, Don't Tell, Don't Pursue" Violates State Anti-Discrimination Law.** California Superior Court Judge David Garcia ruled that the federal military policy of "Don't Ask, Don't Tell, Don't Pursue" may not be implemented by the California National Guard because it violates the California law banning sexual orientation discrimination. Judge Garcia ruled that gay and lesbian individuals may serve openly in the California National Guard even if disqualified for national military service because of their sexual orientation. *Holmes v. California Army National Guard* (06-19-98).

## ***HIV / AIDS***

**Clinton Administration Panders to Politics, not Public Health, on Needle Exchange.** The Clinton Administration announced in April that it will not fund needle exchange programs, despite certifying that scientific evidence indicates that needle exchange reduces HIV transmission and does not increase drug use.

**Is HIV a Deadly Weapon? Ohio says yes. California says no.** In *State of Ohio v. Jimmy Lee Bird* (05-06-98), the Ohio Supreme Court upheld Bird's conviction of assault with a deadly weapon for spitting at a police officer, because Bird is HIV-positive. Lambda submitted an *amicus* brief and present the oral argument in the case. The court's opinion ignored the fact that HIV cannot be transmitted through saliva. In *Guevara v. Superior Court* (03-27-98), a California Appeals Court affirmed the holding that a man could not be charged with assault with a deadly weapon for having consensual sex with young women while knowing that he is HIV-positive.

**Federal Court Outlaws AIDS-Related Caps in Insurance Policies.** A U.S. District Court in Illinois ruled that Title III of the ADA applies to AIDS-related caps in insurance policies. The policies in *Doe and Smith v. Mutual of Omaha Ins. Co.* (04-03-98) each had maximum lifetime benefits limits of \$1,000,000, but they discriminated against people with AIDS or AIDS-related complications by limiting their recovery to \$100,000 (Doe) and \$25,000 (Smith). (The plaintiffs are represented by attorneys from AIDS Legal Council of Chicago and Lambda.)

**Texas Sets Limits on Partner Notification.** The Texas Supreme Court declared in *Santa Rosa Health Care Corp. v. Garcia* (03-13-98) that the Texas HIV confidentiality statute authorizes disclosure by a health care official to a spouse only if the patient has tested positive. The court rejected Garcia's contention that Santa Rosa had a duty to warn her that her husband may have been exposed to HIV from blood transfusions in the 1980s.

**Acknowledgments/Sources:** In addition to primary court and legislative materials, sources for the above summaries include Professor Arthur S. Leonard's invaluable *Lesbian/Gay Law Notes* <<http://www.qrd.org/qrd/usa/legal/lglm>> and press releases from the American Civil Liberties Union (ACLU), Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal Defense & Education Fund (Lambda), National Center for Lesbian Rights (NCLR), and Servicemembers Legal Defense Network (SLDN).