



HUMAN
RIGHTS
CAMPAIGN

919 18th Street N.W., Suite 800
Washington, D.C. 20006-5509
phone 202 628 4160
fax 202 347 5323
website www.hrc.org

LAWbriefs

Winter 1999

Vol. 2, No. 1

Notable Legal Developments Affecting Lesbians and Gay Men

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

Employment - Litigation

Oregon Court of Appeals Rules that Lesbian and Gay State Employees Entitled to Domestic Partner Benefits.

In a ruling that could have broad implications in the state, the Oregon Court of Appeals ruled in *Tanner v. Oregon Health Sciences University* (12-9-98) that the state is required to make its employee spousal benefits available to same-sex domestic partners of state employees. The Court found that extending employment benefits, such as health insurance, only to married state employees is unfair to lesbian and gay state employees and violates the Oregon Constitution. The court held that gays and lesbians were a "suspect class" under the Oregon Constitution and thus entitled to constitutional protection from discrimination by government entities on the basis of sexual orientation. The Court also held that the state statute prohibiting sex discrimination, which includes discrimination based on the sex of a person with whom one associates, covers discrimination based on sexual orientation, but did not prohibit the discrimination at issue in the case because of an exemption in the statute for benefits plans. [The ACLU of Oregon initiated the lawsuit.](#)

Supreme Court Denies Review of Cincinnati Anti-Gay Initiative. On October 13, the U.S. Supreme Court announced it will not review the case of *Equality Foundation of Greater Cincinnati v. City of Cincinnati*. Although not a ruling on the merits, the result of the High Court's decision is to let stand Cincinnati's Issue 3, which prohibits the passage of any city-wide legislation to protect lesbians, gay men, and bisexuals from discrimination based on sexual orientation. Co-counsel ACLU and Lambda Legal Defense and Education Fund (Lambda) urged the Supreme Court to take the case, arguing that the 6th Circuit's holding was in conflict with the 1996 Supreme Court decision in *Romer v. Evans* (May 1996). In *Romer*, the Supreme Court struck down Colorado's Amendment 2, which was nearly identical to Cincinnati's Issue 3. In *Equality*, Justices Stevens, Souter, and Ginsburg urged the public not to read too much into this denial of review, explaining that the intended scope of the Cincinnati law was unclear, and that it was not the job of the Supreme Court to decide the exact meaning of local laws.

Utah Federal District Court Reinstates Lesbian Teacher after School Board Fails to Demonstrate that Teacher's Sexual Orientation Affected her Ability to Teach. In a victory for gay public school teachers, Wendy Weaver won her motion for summary judgment in a discrimination suit against the Nebo School District of Utah (11-26-98). Problems began when Weaver responded "Yes" when asked by a member of the volleyball team if she were a lesbian. After her truthful response, she was notified that she would not be reappointed to coach the girls volleyball team, and was warned not to discuss her sexuality publicly on pain of losing her job. Utah's civil rights statute – like that of 40 other states – does not protect against discrimination based on sexual orientation. The district court found that the school board's gag order was deemed a violation of Weaver's 1st Amendment rights, and its refusal to reappoint her to the volleyball team was deemed a violation of her 14th Amendment right to equal protection. Federal District Judge Bruce Jenkins held that "the record before the court contains no job-related justification for not assigning Ms. Weaver as volleyball coach. Nor have the defendants demonstrated how Ms. Weaver's sexual orientation bears any rational relationship to her competency as teacher or coach, or her job performance as coach - a position she has held for many years with distinction..." Weaver was represented by ACLU National Lesbian and Gay Rights Project attorney Jennifer Middleton, as well as ACLU Utah attorneys.

Red Lobster Ordered to Rehire Gay Employee. On September 11, the Cook County, IL, Commission on Human Rights ruled that Red Lobster must rehire Dale Hall and pay him \$95,000 in back pay and damages. The manager of

a Lincolnwood restaurant fired Hall in 1996 after repeatedly ridiculing him for being a gay man. The commission issued an injunction to stop discriminating and ordered Red Lobster to conduct diversity training at all of its Cook County restaurants. Following negative media attention, the restaurant dropped its initial challenge that the Cook County Human Rights Ordinance was unconstitutional.

Employment - Legislation

Riggs Amendment Dropped. A House-Senate conference committee agreed in early October to drop the Riggs Amendment from the VA/HUD appropriations bill. The Riggs Amendment would have prohibited San Francisco from using VA and HUD funds to implement the domestic partnership provision of its Human Rights Ordinance.

Non-Discrimination Policy for IRS. The IRS issued a policy statement in August declaring that the agency will not discriminate against employees or the public on the basis of sexual orientation. The policy resulted in part from several instances uncovered and protested by Lambda in which groups seeking tax-exempt status were asked to change or remove from their applications references to the gay and lesbian community.

Dade County Votes Protection of Gays. More than twenty years after a repeal referendum of a gay rights ordinance in Dade County made national headlines under the leadership of Anita Bryant, the Miami-Dade county commission has voted to pass a second ordinance prohibiting discrimination on the basis of sexual orientation in employment and housing. The 7-6 vote came after a heated debate by the Commissioners as well as participation from demonstrators in the audience. Local Christian Coalition leaders vowed to seek a new referendum to repeal the measure.

Domestic Partnership Developments

Among those corporations that have recently adopted domestic partnership benefits are **Merrill Lynch**, the largest American brokerage firm, **Maine Medical Center**, the largest employer in Portland, Maine, **Duke University**, **The Washington Post**, and **Clorox Co.**, the first major consumer products maker to offer benefits. **Columbus, Ohio** and **Petaluma, California** also added domestic partnership ordinances.

Boston Domestic Partner Benefits Challenged. On August 4, Boston Mayor Thomas Menino overrode Massachusetts Governor Paul Celucci and signed an executive order extending health benefits to the domestic partners of city workers, regardless of their sexual orientation. A dozen members and supporters of the Catholic Action League of Massachusetts have filed suit seeking to block implementation of the executive order. Gay & Lesbian Advocates & Defenders (GLAD) intervened in the case in its organizational capacity as well as on behalf of an employee and her partner. After a hearing, the trial judge granted the preliminary injunction but stayed the effect of the order. A single justice of the appeals court granted GLAD's motion to continue the stay throughout the appeals process, keeping the domestic partnership benefits in place. The case is on an expedited schedule for appeal. GLAD attorneys Mary Bonauto and Jennifer Levi represent the defendant-intervenors.

Civil Rights Groups Boycott United Airlines. The Human Rights Campaign has endorsed a boycott organized by a San Francisco-based group, Equal Benefits Advocates, against United Airlines. United is appealing a decision by U.S. District Judge Claudia Wilken which would have the airline provide the domestic partners of their workers with such benefits as bereavement leave, family leave, and equal travel benefits.

Family Law - Marriage/Coupling

Same-Sex Marriage in Hawaii, Alaska. Voters in Hawaii passed a referendum stating that the constitution of the State of Hawaii shall be amended to allow the legislature the power to reserve marriage to "opposite-sex couples." Right wing religious groups including the Christian Coalition, Focus on the Family, and the Mormon Church poured an estimated \$2.2 million into the Save Traditional Marriage campaign. HRC and allied organizations spent approximately \$1.4 million opposing the referendum. The court has requested further briefing, which is currently underway, on the effect of the referendum vote on the pending litigation, *Baehr v. Miike*. Evan Wolfson of Lambda serves as co-counsel with Hawaii attorney Dan Foley for the plaintiffs in *Miike*. Voters in Alaska similarly passed a

referendum stating that the constitution of the state of Alaska shall be amended to specify that "to be valid or recognized in this state, a marriage may exist only between one man and one woman."

Vermont Supreme Court to Hear Same-Sex Marriage Case. On November 18, oral arguments were heard in the Vermont Supreme Court case of *Baker v. Vermont*. News organizations reported that the justices were skeptical of the state's position that discrimination is justified by an interest in the biological begetting of children. GLAD and Beth Robinson and Susan Murray of Longrock, Sperry & Wool are co-counsel for three gay couples who were denied marriage licenses.

California to Vote on Gay Marriage. California Secretary of State Bill Jones announced Nov. 17 that proponents of a ballot initiative to ban same-sex marriages in that state have submitted sufficient signatures for a place on the ballot in March 2000. The measure, labeled the "definition of marriage" initiative, mandates that the state only recognize as valid a marriage between a man and a woman.

Family Law - Parenting

Alabama Supreme Court Delivers Blow to Gay Parents. A unanimous ruling by the Alabama Supreme Court in the *Finney v. Finney* case will make it difficult for gay parents in Alabama to receive custody of their children in divorce cases. In awarding custody to the father of an eight-year-old girl rather than her lesbian mother, the Alabama Supreme Court – in direct contravention of expert testimony providing that sexual orientation has no effect on parenting ability – stated that "the evidence shows... that [the lesbian mother] has chosen to expose the child continuously to a lifestyle that is neither legal in this state, nor moral in the eyes of most of its citizens." The case was argued by attorneys associated with the National Center for Lesbian Rights.

Same-Sex Couples in D.C. Retain Right to Adopt. A House amendment to the D.C. Appropriations Bill that would have prevented same-sex couples from adopting children in the District of Columbia was removed in October.

Maryland Court Protects Gay Parents. The Court of Appeals, Maryland's highest court, rejected a trial judge's stringently anti-gay visitation restrictions placed on Glenn Boswell, a gay father. The court noted that the best interest standard does not permit a parent's visitation to be restricted based on a parent's sexual orientation unless "actual harm" to the children is at issue. The court also noted that "actual harm" cannot be "stereotypical presumptions of future harm" and that a court may not rule based on "personal bias or stereotypical beliefs." The appeal was argued by Lambda cooperating attorney Nancy Polikoff, who worked closely with Lambda Legal Director Beatrice Dohrn.

Proposal Would Prohibit Gays as Foster Parents in Arkansas. On January 7, the Arkansas Child Welfare Review Board approved a rule prohibiting homosexual adults from serving as foster parents. The agency must now hold hearings and take public comment for at least thirty days, and may submit the proposal to another body, the Arkansas Legislative Council, for review before implementation of the policy. If the ban is enacted, the ACLU is prepared to file a lawsuit challenging the new regulation.

Gay Father Appeals Custody Decision. Lambda filed a friend-of-the-court brief in an appeal of an Indiana trial court's denying a gay man custody of his four-year-old son. During the divorce proceedings of "Chris" and "Patricia," Chris discovered that Patricia was addicted to narcotic medication and requested that the court award him physical custody of their son because he was concerned about Patricia's ability to care for the child. In denying the request, the court noted that Chris' sexual orientation "raises the specter of an aberrant lifestyle," and that Chris' sexual orientation was equivalent to and canceled out Patricia's addiction to narcotic drugs. Lambda was joined in its brief by Justice, Inc. of Indiana, and by Indiana chapters of PFLAG.

Sodomy Laws

Georgia Sodomy Law Declared Unconstitutional. In a 6-1 ruling in *Powell v. State* issued November 24, the Georgia Supreme Court held that the state's 156-year-old sodomy law, which was upheld by the U.S. Supreme Court in the *Bowers v. Hardwick* decision of 1986, violated the right to privacy guaranteed by the Georgia constitution. Chief Justice Robert Benham wrote, "we cannot think of any other activity that reasonable persons would rank as more private and deserving of protection from government interference than consensual, private, adult activity." Georgia joins Kentucky, Tennessee and Montana as states that have recently invalidated their sodomy laws. Twelve other states still have laws that make heterosexual and homosexual sodomy a crime, while six other states have laws

that apply only to same-sex couples. Lambda filed a brief by Stephen Scarborough as a friend of the court, in conjunction with the ACLU of Georgia.

Gays Granted Equal Protection in Enforcement of Sodomy Laws. Baltimore Circuit Court Judge Richard T. Rombro ruled in *Williams v. Glendening* (10-15-98) that Maryland's 1916 law banning oral sex does not apply to private, consensual, non-commercial behavior between adults of the same sex. Although the Judge declined to rule the statute unconstitutional, he said that a 1990 ruling by the Maryland Court of Appeals protecting heterosexual adults from prosecution for private and consensual oral sex would extend to consenting homosexual adults acting in private as well. To rule otherwise, he stated, would be an equal protection violation. The case was argued by attorneys from the ACLU of Maryland and the national ACLU Lesbian and Gay Rights Project.

Texas Case May Be Next *Bowers v. Hardwick*. John Lawrence and Tyrone Garner were engaged in adult consensual oral sex in Lawrence's unlocked apartment when police entered the apartment after receiving a false report of an armed intruder. Lawrence and Garner were arrested and charged with a violation of Texas' sodomy law, a misdemeanor which makes it a crime for two men or two women to have oral or anal sex. The two pled no contest, but plan to challenge the constitutionality of the law. Legal analysts think the fact pattern involved may make this a prime test case. The defendants are represented by Lambda.

The Military

"Don't Ask, Don't Tell" Stands in Circuit Court. A three judge panel of the 2nd Circuit Court of Appeals ruled unanimously to uphold the military's "Don't Ask, Don't Tell" policy. The decision overturned a 1997 ruling by U.S. District Court Judge Eugene Nickerson. The 2nd Circuit's decision declares that it is not the place of the judiciary to question the judgment of Congress regarding matters of the military, and focuses on the distinction between military and civilian life. Under this highly deferential review, the court found that the military policy is constitutional and does not offend equal protection. *Able v. U.S.A.* (09-23-98) The case was mounted by Lambda and the ACLU. Lambda's Legal Director, Beatrice Dohrn, and the ACLU's Matt Coles appeared as lead attorneys in the case.

Supreme Court Refuses Military Policy Case. On January 11, the United States Supreme Court rejected a challenge to "Don't Ask, Don't Tell, Don't Pursue" brought by former Lieutenants Andy Holmes and Rich Watson. The decision not to review the case leaves intact a 2-1 decision rendered on September 5, 1997 by the 9th Circuit Court of Appeals that upheld the policy, a decision in line with those by the 8th and 4th Circuits. Holmes and Watson were represented by attorneys from the SLDN.

Court Finds Discharge "Arbitrary and Capricious." On December 23, the District Court for the District of Columbia remanded a case back to the Navy, holding that the Navy's decision to uphold the discharge of former Petty Officer Jim Turner under "Don't Ask, Don't Tell, Don't Pursue" without explanation was "arbitrary and capricious" under the Administrative Procedure Act in light of a 2-1 ruling from the Bureau of Corrections for Naval Records that Turner had not violated the policy. The case has been remanded to the Navy Secretary for further proceedings, and is being handled by attorneys associated with SLDN.

General Litigation

Police Free to Associate with Gays in Puerto Rico. On September 30, U.S. District Court Judge Hector M. Laffitte ruled that the Puerto Rico Police Department policy that punished police officers who associated with gay people, Regulation 29, violates the police officers' 1st Amendment freedom of association rights. Lambda's Suzanne Goldberg represented the plaintiffs in the suit. *Ramos-Padro v. Commonwealth of Puerto Rico* (09-30-98).

Activities Fees Can Be Withheld. A three-judge panel of the 7th Circuit Court of Appeals ruled unanimously on August 8th that the University of Wisconsin must create an opt-out system to accommodate students who do not want their student fees used to support ideologically or politically oriented activities to which they object. The lawsuit, *Southworth v. Grebe* (08-10-98), was brought by five Christian students who objected on religious grounds to supporting eighteen of the student organizations, including two gay groups, an AIDS support group, and a pro-choice women's organization. The court held that the use of the mandatory student activity fees to create a content-neutral forum was not germane to the educational purpose of a university and that the university's interest in promoting robust debate and free exchange of ideas on the campus did not outweigh the free speech and association rights of the students. The circuit denied rehearing *en banc*, producing a strong dissenting opinion. The University intends to file a Supreme Court petition for review. Lambda provided an amicus brief in support of the University.

Report Confirms that Gays Face Bias in Jury System. Reuters News Service reported October 23 that a poll showed that jurors are biased against big corporations, gay people, and politicians, and would follow their beliefs regardless of instructions from the bench. The poll showed that gays and lesbians who are involved in a trial are three times as likely to face a biased jury as are African-Americans, Hispanics, or Asians.

HIV/AIDS

Abbott Wins on Remand. The US 1st Circuit Court of Appeals ruled on December 29 that use of “universal precautions” rendered the risk of transmission of HIV in a dental office “insignificant,” and found that Randon Bragdon of Bangor, Maine, violated the Americans with Disabilities Act by refusing to treat Sidney Abbott in his office in 1994 for fear of contracting HIV. The case was heard on remand from the Supreme Court’s ruling last June in *Bragdon v. Abbott* that HIV infection, regardless of the stage of a disease’s progression, constituted a disability under the Americans With Disabilities Act. *Bragdon* was the first Supreme Court case to deal with HIV and AIDS. Ms. Abbott was represented by Ben Klein of GLAD. The Human Rights Campaign joined other allies in filing an *amicus* brief for the Supreme Court case, drafted principally by Georgetown Law Professor Chai Feldblum.

Federal Judge Finds AIDS Caps a Violation of ADA. Federal judge Suzanne Conlon of the US District Court for the Northern District of Illinois ruled that Mutual of Omaha Insurance Company’s limitation of coverage for care related to HIV and AIDS was violative of the ADA. Plaintiffs John Doe and Richard Smith had health insurance policies that limited HIV-related care to \$100,000 and \$25,000 respectively, while the company provides up to \$1 million for other medical conditions and even allows policyholders who reach this limit to get an additional \$1 million in coverage if the policyholder goes two years without additional expenses. Lambda attorney Heather Sawyer, Chicago AIDS Legal Council attorney Ann Fisher and cooperating attorney Stuart Graff are counsel to Plaintiffs.

HIV Disclosure Law Upheld. In *People v. Jensen* (08-28-98), the Michigan Court of Appeals upheld the Michigan AIDS and HIV Disclosure Law, which makes it a crime to fail to inform a sexual partner that one has AIDS or is HIV-positive prior to engaging in sexual activity.

Woman Charged with Violation of HIV Disclosure Law. A woman in Richmond County, Georgia was indicted on a felony charge for reckless conduct because she had sex with a man without first telling him that she was HIV-positive. The charge is the first of its kind under a new law, which is being challenged by attorneys from the ACLU. A felony conviction for non-disclosure of HIV carries a penalty of up to 10 years in jail.

HIV-Positive Man Must Pay Damages to Former Partner. A Federal Bankruptcy Court Judge ordered an HIV-positive man in San Francisco to pay his ex-lover \$25,000 in damages for the emotional distress his former lover experienced during a six month waiting period before he tested negative for HIV. The man had lied about his HIV status to his lover, thus vitiating the partner’s consent to sex and making him liable for sexual battery. *In re Alan Louie* (08-03-98)

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/lgl.htm>> and materials 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).

© 1999 – by Human Rights Campaign. HRC grants permission for the reproduction and redistribution of this publication only when reproduced in its entirety.