

## Notable Legal Developments Affecting Lesbians and Gay Men

### *Employment – Litigation*

**Underscoring Need for ENDA, Ohio Court Reaffirms that Title VII Does Not Prohibit Sexual Orientation Discrimination.** In *Retterer v. Whirlpool* (3/26/99), an Ohio Court of Appeals held that Title VII's prohibition against discrimination "because of sex" does not cover discrimination based on sexual orientation. Two male Whirlpool supervisors physically assaulted Douglas Retterer based on a perception that he was gay. The court distinguished the 1998 Supreme Court *Oncale v. Sundowner Offshore Services, Inc.* decision, which held that same-sex sexual harassment is actionable under Title VII, by finding that *Oncale* did not directly address sexual orientation discrimination. Ohio state law – unlike that of 11 other states – does not prohibit sexual orientation discrimination.

**California School to Remedy Anti-Gay Bias.** The Bakersfield, CA school district settled a complaint filed by award-winning public school teacher James Merrick, following a finding that the district pandered to anti-gay bigotry and violated the state's anti-discrimination law when it removed 15 students from Merrick's class at the parents' behest. Merrick had alleged anti-gay harassment and called for the resignation of a commissioner who declared that "gay people are sick" and should be barred from teaching. As part of the settlement, the district will not appeal the decision, will change school policy so that parents could not compel schools to discriminate against teachers based on actual or perceived sexual orientation, and will expand its sexual harassment policy to cover anti-gay harassment. Lambda Legal Defense and Education Fund (Lambda) represented Merrick.

### *Employment – Legislation*

**ENDA Reintroduced in Congress.** Boasting 36 Senate and 167 House cosponsors and President Clinton's endorsement, the Employment Non-Discrimination Act (ENDA) was reintroduced on June 24, 1999. Once passed, ENDA will extend federal employment protections to sexual orientation. Existing federal laws prohibit discrimination based on race, religion, gender, national origin, age and disability. ENDA would prohibit employers from using sexual orientation as the basis for hiring, firing, promotion, compensation, and other employment decisions. Religious organizations and businesses with less than 15 employees are exempted. ENDA also forbids quotas and affirmative action programs to remedy sexual orientation discrimination.

**Nevada Becomes 11<sup>th</sup> State in Nation Banning Sexual Orientation Employment Discrimination.** The Nevada legislature enacted a law banning workplace discrimination on the basis of sexual orientation that will take effect on October 1, 1999. It applies to any workplace with 15 or more people, but does not cover non-profit organizations as defined by the Internal Revenue Service under sec. 501(c)(3) such as charities, private schools, and religious organizations. Nevada Governor Kenny Guinn, a Republican, told the Associated Press that "signing this bill was a matter of fairness and doing what's right for the people of Nevada."

**Seattle City Council Allows Private Action for Employment Discrimination.** The Seattle City Council has voted to grant people who have faced sexual orientation workplace discrimination the right to bypass cumbersome administrative procedures and to file suit directly. The mayor has agreed to sign the legislation.

### *Hate Crimes*

**Senate Judiciary Committee Holds Hearing on Hate Crimes.** The Senate Judiciary Committee held hearings on hate crimes prevention on May 11. Judy Shepard, Matthew Shepard's mother, testified about the need for passage of the Hate Crimes Prevention Act (HCPA), which would amend the existing federal

hate crimes statute to cover sexual orientation, gender and disability. Ms. Shepard was joined by Jeanine Pirro, Republican District Attorney of Westchester County, N.Y.; Professor Burt Neuborne of New York University Law School; and Deputy Attorney General Eric Holder in support of HCPA. With 38 Senate and 179 House co-sponsors from both parties, HCPA has the support of a wide range of organizations including the Anti-Defamation League, the NAACP, NOW Legal Defense and Education Fund, the National Sheriff's Association, and the Human Rights Campaign.

**Washington Court Upholds Hate Crimes Convictions for Malicious Harassment.** On January 25, the Washington State Court of Appeals upheld the juvenile court malicious harassment convictions of three teenagers. Malicious harassment, under Washington law, is a more serious crime than simple assault, and is defined as a crime in which the victim was physically injured and was targeted for personal characteristics such as perceived sexual orientation, race, religion, or disability. The court found that slurs used by the assailants during the attack were evidence of victim selection. *State v. Lynch* (01/25/99).

## ***Domestic Partnership Developments***

**Same-Sex-Only Domestic Partnership Benefits Not a Title VII Violation.** A federal district judge in New York ruled that Bell Atlantic's policy of granting domestic partner benefits to same-sex but not opposite-sex couples does not violate Title VII of the Civil Rights Act of 1964 or the Equal Pay Act. Plaintiff Paul Foray, who is heterosexual, argued that if he were a woman he could obtain benefits for his female domestic partner and that therefore he was a victim of sex discrimination. The court disagreed, reasoning that "a woman with a female domestic partner is differently situated from [plaintiff] in material respects because under current law, she, unlike [plaintiff], is unable to marry her partner." *Foray v. Bell Atlantic* (6/8/99).

**Federal District Court Upholds San Francisco Equal Benefits Ordinance.** In two recent decisions, U.S. District Judge Claudia Wilken upheld a San Francisco ordinance that requires city contractors to provide domestic partnership benefits to their employees. Wilken's decision in *Air Transportation Association v. San Francisco* (5/27/99) orders United Airlines to provide "marital" leave, travel benefits, and other non-economic benefits of nominal cost to domestic partners of its employees. In a previous case Wilken had ruled that federal airline regulations preempt the San Francisco ordinance with respect to pension and health benefits. In a companion case, *S.D. Myers v. San Francisco*, Wilken rejected a claim by an Ohio company that the ordinance was invalid. Lambda, the ACLU National Lesbian and Gay Rights Project (ACLU), and the National Center for Lesbian Rights (NCLR) filed an *amicus* brief supporting the ordinance.

**PricewaterhouseCoopers Extends Domestic Partner Benefits.** PricewaterhouseCoopers, the world's largest accounting and management consulting firm will begin providing domestic partner benefits on July 1, 1999. PricewaterhouseCoopers is the largest of the Big Five accounting firms with 150,000 employees in 150 countries. PwC becomes the second of the Big Five to offer such benefits; KPMG Peat Marwick has done so since last year. All of the Big Five have non-discrimination policies that include sexual orientation.

**Canada's Supreme Court Defines "Spouse" to Apply to Same-Sex Couples.** The Canadian Supreme Court on May 20<sup>th</sup>, in the *M v. H* case, held that the Ontario Legislature could not extend spousal support obligations to unmarried heterosexual couples, without also extending them to same-sex couples. The court wrote that "[S]ame-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner or the other." The court noted that to exclude same-sex couples "perpetuates the disadvantages and contributes to the erasure of their existence....Therefore...the human dignity of individuals in same-sex relationships ...is violated."

**California Extends Domestic Partnership Health Benefits to Legislators and Staff, Works on Domestic Partnership Bill.** Voting on party lines, the California Legislature extended health benefits to domestic partners of state legislators and their staff. A California bill to establish a statewide same-sex domestic partnership registry is awaiting action in committee. Under this bill domestic partners would be granted rights of hospital visitation, beneficiary rights under wills, and certain conservator rights in probate cases. California Governor Gray Davis is likely to sign the bill.

**Illinois Court of Appeals Rejects Challenge to Chicago Domestic Partnership Ordinance.** On March 31, an Illinois Court of Appeals rejected the arguments that Chicago lacked authority under the Illinois Constitution to pass its Domestic Partnership Ordinance. The court concluded that the Illinois Constitution gives local municipalities broad law-making power including the power to pass its Domestic Partnership Ordinance.

**University of Pittsburgh Seeks to Overturn Pittsburgh's Human Relations Ordinance.** In response to a suit from an employee alleging a violation of the Pittsburgh Human Relations Act (which prohibits sexual orientation discrimination) for the university's refusal to extend medical benefits to her same-sex partner, the University of Pittsburgh has filed a separate suit challenging the ordinance itself. The university claims that the city cannot provide greater protection for same-sex employees than the state of Pennsylvania provides. The plaintiffs in this case are being represented by the ACLU.

**Pittsburgh Moves Closer to Offering Domestic Partner Benefits to Non-Union City Employees.** In Pittsburgh, the City Council has preliminarily voted to extend health insurance benefits to non-union employees' domestic partners on a showing of financial interdependence. The City Council plans to hold a hearing before the end of summer.

### ***Family Law - Marriage***

**New York Judge Enforces Lesbian Couple's Asset Division Contract.** New York Supreme Court Justice Herman Cahn enforced a contract to equally divide the assets of a lesbian couple in the event of their break up. The contract, signed by one of the women, read simply: "Because you are leaving your job and moving with me to Atlanta next month, I want to ensure you that should anything occur between the two of us to split us apart that you and I are to divide our assets 50/50 to reflect the partnership that we share and the life we built together." *Oms v. Joseph* (5-20-99).

### ***Family Law – Parenting***

**New Hampshire Repeals Ban on Gay People Adopting and Serving as Foster Parents.** New Hampshire Governor Jeanne Shaheen signed a law that repeals a 1987 ban on adoptions by gay people and permits them to adopt children and become foster parents. The law took effect July 2. It passed in the state Senate by a vote of 18-6 and in the House by a margin of 233-123. This action leaves Florida as the only state that prohibits by statute adoptions by gay people although at least two other states—Arkansas and Utah—prohibit such adoptions through agency regulations.

**Arkansas Foster Parent Policy Prohibiting "Gay Contact" Challenged.** Suing on behalf of six prospective foster parents, including a gay couple who are currently raising two adopted children, the ACLU of Arkansas is challenging the state's policy against placing foster children in homes where there is any gay person living in the household. In *Sands v. Child Welfare Agency Review Board* (filed 04/06/99), the plaintiffs allege violations of agency regulations, state laws, and state and federal constitutional privacy, intimate association and equal protection rights. Under current Arkansas law, even a married couple may not foster parent if anyone in the home is gay.

**Massachusetts Supreme Court Grants Visitation Rights to Lesbian Co-Parent.** On June 29, 1999 the Supreme Judicial Court of Massachusetts voted 4 to 2 to allow visitation rights to a lesbian who had co-raised her partner's biological son. The couple had been together 13 years and had signed co-parenting agreements both before and after the child's birth. Using an inclusive definition of "parent," the court noted that children in nontraditional families form bonds with both parents whether they are legal or *de facto* parents. This decision is binding on courts in Massachusetts. The *de facto* parent was represented by Gay & Lesbian Advocates and Defenders (GLAD). *E.N.O. v. L.M.M.*

**New Jersey Appellate Court Grants Visitation Rights to Non-Biological Mother but Denies Joint Custody.** An appellate court in New Jersey granted a lesbian visitation rights with her non-biological children but refused to grant her joint custody, leaving the children in full custody of their biological mother. The same-sex couple separated two years after their twin children were born. Two of the three judges on the panel agreed that the non-biological mother was a "psychological parent" and that denying visitation rights would not be in the best interests of the children. The appeal followed a trial court's refusal to grant the non-biological mother either joint custody or visitation rights. Generally, third party parents (people who are neither biological nor adoptive parents of a child) do not have standing to request custody in New Jersey. The appellate court, however, rested its decision on a common-law exception, permitting third parties with close bonds to children to be granted certain parenting privileges. *V.C. v. M.J.B.* (03/05/99).

**Illinois Appeals Court Rejects Anti-Gay Claims and Grants Custody to Lesbian Mother.** An appellate court in Illinois affirmed a grant of custody to a lesbian mother after the break-up of a fourteen-year marriage. The former husband argued that the trial court had not placed enough negative weight on the fact that the

mother is a lesbian. The appellate court ruled that "homosexuality, standing alone, does not give rise to a presumption of harm" to children, and courts should not assume that the fact that a parent is gay adversely affects children. The mother was represented by Lambda. *In re Marriage of W.*

**Mississippi Supreme Court Strikes Down a "No Other Gays" Visitation Restriction But Refuses to Grant Custody to Gay Father.** The Mississippi Supreme Court denied a gay man's request to modify custody of his son, citing the man's "sexual conduct" as a basis for the decision. The father maintains a well-paying job, a stable, eight-year, monogamous relationship, and contributed towards his son's education. The mother's new husband is unemployed and a convicted felon, with a history of abusing drugs and of physically abusing the mother in the child's presence. In spite of this, the court in *Weigand v. Houghton* (02-04-99) reasoned that the father's admitted violation of Mississippi's sodomy statute justified a refusal to grant custody. However, the court also held that the trial court acted improperly when it prohibited visitation in the presence of the father's life partner. The plaintiff was represented by the ACLU.

**Georgia Court Imposes Stifling Visitation Restrictions on Gay Father.** The Superior Court of Cherokee County Georgia has refused to vacate extraordinary restrictions on a gay father that forbid him from discussing sexual orientation with his three daughters in any manner. If the subject comes up he must refer the question to the mother who belongs to a conservative religious sect that condemns homosexuality. The mother has told the children not to kiss their father, and tried to cast out demons from him in front of the children. The order also prohibits any lesbian or gay friend from spending the night while the children are visiting. And, it forbids the father from encouraging the children to "accept or participate in the gay/lesbian lifestyle." Lambda assisted the father, Michael Whitfield. (*Whitfield v. Whitfield*).

**Texas Judge Bars Lesbian Mom from Taking Daughter to Church.** Keith Nelson, a district judge in the 78th Judicial District of Texas, ruled in March that the predominantly gay Metropolitan Community Church is not an acceptable church for the daughter of a lesbian mother. The judge required that the child attend "mainline" churches like the Catholic, Presbyterian, Methodist or Baptist churches. The judge addressed this issue in the course of considering custody during divorce proceedings between the mother and her husband. The judge's order concerning the church, which has 300 local congregations in 15 countries, was appealed on April 23.

## ***Sodomy Laws***

**Unanimous Louisiana Appeals Court Strikes Down Sodomy Law Unconstitutional.** A unanimous three-judge panel of the Louisiana Court of Appeals (4th Circuit), found that Louisiana's sodomy statute is unconstitutional as applied to adults engaging in consensual, non-commercial sexual activity. The court found in *State v. Smith* (02/09/99), that the sodomy statute violated the Louisiana constitution's express guarantee of an individual's right to privacy from unreasonable invasions. The court applied strict scrutiny and found no compelling state interest justifying the statute.

**Puerto Rico Sodomy Law Challenge Clears Hurdle.** On March 5, a Puerto Rico Superior Court Judge refused to dismiss a challenge to the commonwealth's sodomy statute. The judge said that the ACLU has standing to file the suit on behalf its members who are affected by the statute.

## ***The Military***

**Students at Vermont Law School Challenge the Solomon Amendment.** Three student groups at the University of Vermont Law School have filed suit in federal court challenging the Solomon Amendment. The Solomon Amendment is a federal budget-related bill that penalizes schools for keeping military recruiters off campus. In the past, many schools, especially those with non-discrimination policies that include sexual orientation, have objected to the military recruiters' presence on campus because of the military's ban on gay servicemembers. Under the Solomon Amendment, however, any campus that bars military recruiters risks losing funds, including government-sponsored student loans, from the departments of Education, Labor, and Health & Human Services. The Vermont challenge is based on a series of 5th and 10th Amendment claims as well as state law claims.

**Congressmen Barney Frank and Tom Campbell Seek to Limit Solomon's Reach.** Congressmen Barney Frank (D.-Mass.) and Tom Campbell (R.-Cal.) introduced legislation (H.R. 1123) that would partially repeal the Solomon Amendment. The change would allow the government to withhold funding from educational institutions that violate Solomon but would prevent the government from withholding student financial

assistance funding. Thus schools would be able to deny access to military and ROTC recruiters without jeopardizing student aid programs.

## General Litigation

**U.S. Supreme Court Takes University Student Organization Funding Case.** In March, the U.S. Supreme Court agreed to hear an appeal from a case in which the U.S. 7th Circuit Court of Appeals required universities to allow students to opt-out of having their fees support political student groups that espouse views with which they disagree. The case, *Board of Regents v. Southworth*, was brought by a group of conservative law students at the U. of Wisconsin (Madison). These students prevailed in both the district and circuit courts, arguing that the existing fee practices violated their First Amendment right to free speech. Lambda filed an *amicus* brief, supporting the university's appeal on the grounds that the 7th Circuit's decision undermines the role of universities as "centers of free speech." In a similar case, the 9th Circuit found no free speech violations.

## HIV/AIDS

**Supreme Court Ruling Makes ADA Claims Easier for SSDI Recipients.** In a May 24<sup>th</sup> decision that will help HIV positive people who wish to return to work, the Supreme Court held that a previous application for Social Security Disability Benefits is not necessarily inconsistent with pursuing an employment discrimination claim under the Americans with Disabilities Act (ADA). If, however, a claimant alleges different facts on the two applications the claimant must explain any discrepancy. *Cleveland v. Policy Management Systems Corp.*

**Supreme Court Disables Reach of the ADA, Implications for People Living with AIDS/HIV Unclear.** In three recent decisions, the U.S. Supreme Court held that impairments correctable by mitigating measures (*i.e.*, poor vision or high blood pressure) do not "substantially limit a major life activity," and that those who have them are not covered by the ADA when they face job actions based on these conditions. In the *United Parcel Services, Inc.* case, Justice O'Connor, for the majority, wrote that "a disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' or 'could' or 'would' be substantially limiting if mitigating measures were not taken....[A] person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity." In a forceful dissent, Justice Stevens wrote that court's decision "would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication." Stevens argued that such a result is anathema to Congress' intent in passing the ADA, which was to protect persons with substantially limiting impairments who can do their jobs but who, nevertheless, because of misconceptions, stereotypes or bigotry, are discriminated against based on their impairments, regardless of whether the effects of those impairments could be mitigated. *Murphy v. United Parcel Service, Inc.*; *Sutton v. United Airlines, Inc.*; *Albertsons, Inc. v. Kirkingburg*; (all 6/22/99).

**Doctor's Refusal to Treat a Gay Man's Emergency Appendicitis until after Testing Him for HIV Actionable under Emergency Medical Treatment and Active Labor Act.** U.S. District Judge Lungstrum (Kansas) denied a motion to dismiss in a suit brought by Joseph Blake under the Emergency Medical Treatment and Active Labor Act (EMTALA). Blake arrived at the emergency room of Overland Park Regional Medical Center and was diagnosed with acute appendicitis. Blake alleges that before treating him, Dr. Ralph Schutz asked Blake if he were gay. Blake said yes. Dr. Schutz then informed Blake, who was in great pain and in need of immediate treatment, that he would not treat him until after Blake underwent an HIV test. Blake consented, and the doctors performed the appendectomy after they received the negative test result. EMTALA requires emergency rooms that receive federal funds to treat all patients equally. (4/1/99)

**Massachusetts Dentist Settles HIV Discrimination Claim.** Dr. Guillermo Recinos, a Massachusetts dentist, will provide free dental care to people with HIV/AIDS and pay \$20,000 to settle a claim that Recinos refused to treat patients with HIV. (4/22/99)

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