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LAW *briefs*

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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

Employment—Litigation

Following New Jersey's Lead, Chicago Judge Rules that Ban on Gays Violates Local Discrimination Law. A Cook County, IL, judge ruled that the Boy Scouts' ban on employment of gay people violates the Chicago Human Rights Ordinance. A former Scout was told that being gay would disqualify him from employment with the group; he promptly filed a complaint with the Chicago Human Rights Commission (the Boy Scouts also discriminate against gay scouts and volunteer troop leaders). The court agreed with the Commission that IL law specifically allows municipal ordinances to go further than state law in banning discrimination. The court rejected the Scouts' contention that they constitute a religious group, finding them to be a "nonsectarian organization" that recruits boys from different religious backgrounds. Since Richardson never applied for the job, he was not entitled to individual recovery. Instead, the Boy Scouts were fined \$100 and ordered to end the discrimination against gay people. The Scouts appealed the ruling, and the appellate court ruled that the hiring policy can stand until the court issues a ruling on the merits. The plaintiff in this case is represented by the ACLU. *Chicago Area Council of Boy Scouts of America v. City of Chicago Commission on Human Relations* (8/12/99).

Eighth Circuit Revives Anti-Gay Sexual Harassment Claim Under Title VII. The Eighth Circuit reversed the dismissal of a same-sex harassment claim, finding that plaintiff's claims of anti-gay harassment could possibly support a claim of sex discrimination under *Oncale v. Sundowner Offshore Services, Inc.* The plaintiff was taunted by co-workers, who perceived him to be gay. They spread rumors about his sexuality, touched him inappropriately, called him anti-gay names, and exposed him to other inappropriate sexual behavior. The court held that rumors about the plaintiff's sexual orientation could be construed as an effort to "debase his masculinity," thus constituting sexual harassment proscribed by Title VII. Sexual orientation discrimination is not prohibited by Title VII, underscoring the need for Congress to pass the Employment Non-discrimination Act (ENDA). *Schmedding v. Tnmec Company, Inc.* (8/19/99).

Court Accepts Sexual Stereotyping Theory in Anti-Gay Harassment Case. Although ultimately rejecting the claim for lack of severity and pervasiveness, a federal court recently noted that a case of homophobic harassment based on gender stereotyping might be actionable under Title VII of the Civil Rights Act of 1964. The plaintiff was apparently singled out for homophobic taunting because he was effeminate. Co-workers speculated about his sexual orientation based on his perceived gender non-conformity. According to the court, Title VII does not allow discrimination on the grounds that an employee's appearance or behavior does not comport to gender stereotyping. *Spearman v. Ford Motor Co.* (9/9/99). See also *Higgins v. New Balance Athletic Shoe, Inc.* (1st Cir. 1999) (rejecting the plaintiff's sexual orientation harassment claim, but noting that "a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity"); *Rosa v. Park West Bank* (D. Mass. 1999) (rejecting a claim of discrimination against a bank that refused to process a loan application of a biological man who appeared feminine in dress and manner until he returned to the bank looking more "traditionally masculine" and asserting that requiring someone to change their clothes or denying consumer services based upon dress is not illegal discrimination).

Louisville Employment Ordinance Protecting Sexual Orientation and Gender Identity Challenged. The American Center for Law and Justice has filed suit challenging a Louisville, Kentucky, ordinance that extends protected employment status to sexual orientation and gender identity. The suit was filed against the city, the mayor and other officials on behalf of an obstetrician, J. Barrett Hyman, who contends that his Christian beliefs require him to deny employment to anyone who is gay, lesbian, bisexual or transgendered. The suit alleges First, Fifth and Fourteenth Amendment violations, focusing in particular on the plaintiff's right to free exercise of religion. It seeks to declare the ordinance unconstitutional and enjoin enforcement. The case relies heavily on a Ninth Circuit case (currently in *en banc* reconsideration) that held that landlords could use religious grounds to refuse to rent to unmarried couples and not be in violation of an AK marital status discrimination law. Plaintiff also has a standing problem, since no one has been charged with a violation of the ordinance.

Employment—Legislation

Iowa Governor Issues Executive Order Banning Workplace Discrimination Based On Sexual Orientation or Gender Identity. Governor Tom Vilsack (D-Iowa) has issued an executive order that prohibits employment discrimination by state executive agencies on the basis of sexual orientation, gender identity, race, creed, color, religion, national origin, gender, age, marital status, or physical or mental disability. The order also reaffirms the state's affirmative action policy with regard to ethnic and racial minority groups, and extends affirmative action policies to persons with disabilities. Vilsack's order is the first by a governor to include gender identity.

Kentucky Cities Add Sexual Orientation Discrimination Protection. Henderson, Kentucky, recently approved an ordinance prohibiting discrimination in employment, housing, and public accommodations based on sexual orientation. Jefferson County, Kentucky (which includes Louisville), also passed an ordinance that outlaws discrimination based on sexual orientation and gender identity in housing, the workplace and public accommodations. Louisville and Lexington already prohibit sexual orientation and gender identity discrimination. Bowling Green is considering a similar proposal.

California Adds Sexual Orientation to Fair Employment and Housing Code. The California legislature passed a bill shifting the state's prohibition on employment and housing discrimination based on sexual orientation to their most appropriate place in the state code: the Fair Employment and Housing Code. Such a move provides a more logical and efficient means to enforce discrimination claims.

Election Victories On Discrimination Ordinances. Voters in Falmouth, Maine, defeated a proposed charter amendment that would have forbidden the town from making any "ordinance, policy, or regulation regarding sexual orientation." Voters in Spokane, Washington, defeated a measure to remove sexual orientation from the list of protected categories in the city's anti-discrimination ordinance.

Hate Crimes

California Law Protects Students from Harassment and Discrimination Based on Sexual Orientation. California has enacted a bill that prohibits discrimination and harassment in schools on the same bases that it currently prohibits hate crimes—race, color, religion, ancestry, national origin, disability, sexual orientation and gender (whether real or perceived). The measure is a scaled back version of an earlier bill that failed by one vote. It was resurrected in response to recent high profile acts of hate violence and a study of California Community College students where 18% of male students surveyed indicated that they had either assaulted or threatened with assault someone they perceived to be gay. California joins Massachusetts, Connecticut and Wisconsin in offering such protections to students.

Hate Crimes Prevention Act Killed in Conference Committee. Republican leadership allowed the Hate Crimes Prevention Act (HCPA) to be removed from the Commerce, State, Justice appropriations bill. In July, the Senate passed the HCPA without debate and by unanimous consent. HCPA would add gender, sexual

orientation and disability to the existing federal hate crimes statute, and would eliminate procedural barriers impeding federal officials' investigation and prosecution of these and other forms of hate crimes. Republican leadership omitted the HCPA legislation in conference, where a compromise between the House and Senate versions of the spending bill was crafted. Despite this setback, HRC and its allies continue to push for HCPA to pass before the end of this Congress.

Attacker Found Guilty in Murder of Matthew Shepard, Sentenced to Consecutive Life Terms. Aaron McKinney was found guilty of felony murder, which included second-degree murder, aggravated robbery and kidnapping, in the October 1998 murder of University of Wyoming student Matthew Shepard. The verdict made him eligible for the death penalty, but he received two consecutive life terms without possibility of parole. The sentence was the result of a deal with prosecutors approved of by Matthew's parents, Dennis and Judy Shepard, who agreed to spare McKinney from the death penalty.

Domestic Partnership Developments

Judge Overturns Georgia Insurance Commissioner's Ban on Domestic Partnership Benefits.

A Fulton County judge ordered Georgia Insurance Commissioner John Oxendine to lift his self-imposed statewide ban on domestic partnership health insurance benefits. The judge condemned the commissioner's actions (including refusal to approve any insurance policy providing for domestic partners, even after the Georgia Supreme Court paved the way for such action), calling them unlawful, "outside the scope of his authority," and "an abuse of discretion." The court also adamantly rejected the commissioner's view that non-marital relationships are immoral. Commissioner Oxendine has declined to appeal the ruling, paving the way for both public and private entities to offer domestic partner coverage. The suit was brought by the City of Atlanta and Atlanta Councilmember (and former HRC staff member) Cathy Woolard, who sought benefits coverage for her domestic partner of 11 years. Lambda represented the council member. Robin Shahar (of *Shahar v. Bowers* fame) served as the City of Atlanta's attorney in the case. *City of Atlanta v. Oxendine*.

California Legislature Approves Domestic Partnership Registry. The California legislature established a domestic partnership registry that would authorize state employers to provide health and other employment benefits to domestic partners of state employees. The bill also includes an option for local governments to follow suit. The law would also require hospitals and similar facilities to extend visitation procedures to domestic partners and their families. The bill creates a formal registry with the Secretary of State and also provides a procedure for terminating such partnerships. The *San Francisco Chronicle* estimates that there are 35,000 same-sex couples in the state of California. The bill could face a challenge by statewide referendum.

Unmarried Connecticut Couples Challenge Town Pool's Discriminatory Family Membership Policy. The Connecticut Commission on Human Rights and Opportunities (CHRO) recently issued a reasonable cause finding in favor of five unmarried couples, gay and straight, who challenged West Hartford's policy denying them a preferential "family" membership rate at the town's pool. Each couple was told because they were not married, they could only join at the far more expensive individual rate. The CHRO found that the policy explicitly discriminated based on marital status by reserving the preferential rate for married couples only, and also discriminated against the three same-sex couples on the basis of sexual orientation. Attorneys from Gay and Lesbian Advocates and Defenders (GLAD) are working with New Haven attorney Maureen Murphy in representing the couples in the proceedings.

Family Law—Parenting

Alabama Court Rejects Anti-Gay Stereotypes. An Alabama Court of Appeals rejected a circuit court judge's conjecture that a father seeking custody was bisexual. He denied the allegation, and his wife admitted to never finding him in compromising situations, but said she felt "insecure" when he spent time with his male friends. The judge considered the husband taking "feminine-type furniture" as part of the divorce settlement to be

strong evidence of his bisexuality. The court of appeals rejected this reasoning as being based on conjecture and speculation, and noted that the inference of bisexuality seemed to be the sole grounds relied upon for denying custody to the father. The court of appeals awarded custody to the mother anyway, citing her stricter discipline and attention to the son's grades. *D.L. v. R.B.L.* (7/30/99).

Illinois Appeals Court Rebukes Rogue Judge who Interfered with Adoptions by Lesbian Couples.

An Illinois appeals court affirmed the right of gay and lesbian families to adopt, and in doing so rebuked a judge whose personal biases interfered with attempts to adopt by two lesbian couples. The court chastised County Judge Susan McDunn for "extreme and patent bias against the adoptive parents based upon their sexual orientation." The apologetic court said that Judge McDunn "inflicted anguish on the petitioners and needlessly prolonged what should have been a simple and straightforward process." She ignored the positive recommendations of social workers and appointed the infamously anti-gay Family Research Council to represent the best interests of the children. After the presiding judge removed Judge McDunn from the cases, she refused to relinquish control, issuing orders purporting to void her removal and blocking the adoptions. Judge McDunn has since been removed from active duty awaiting the outcome of a misconduct investigation before the Judicial Inquiry Board. Lambda helped represent the mothers in this case.

Texas Social Worker Files Suit to Ban Foster and Adoptive Placements in Same-Sex Couples' Homes. The Liberty Legal Institute has announced a suit against Texas Child Protective Services (CPS) to restrict the placement of children in households headed by same-sex partners. The suit is being brought on behalf of Rebecca Bledsoe, a former CPS worker who was demoted for removing a child from a household because the parents were lesbians. The group claims that they are trying to prevent the placement of children in households where there is "criminal activity." Texas' antiquated and rarely-used sodomy law has twice been ruled unconstitutional but remains on the books, making homosexual sodomy a Class C Misdemeanor similar to traffic violations or littering. The group also plans to utilize 28 children awaiting adoption or foster care to testify against state placement of children in gay and lesbian households. The ACLU Lesbian & Gay Rights Project has intervened in the suit on behalf of lesbian foster parents.

Colorado Judge Gives Full Parental Rights to Lesbian Partner. A Boulder, Colorado, judge has awarded full parental rights to two lesbian partners even though one of the women has no biological ties to the other's unborn child. Both women will be allowed to place their names on the child's birth certificate and will share parenting duties. Several recent trend-setting decisions across the country have given gay parents legal rights over their non-biological children. The judge based her ruling on Colorado law, which allows people who have no biological connection to a child to assume parental rights in certain circumstances. The couple's daughter will now be eligible for inheritance rights, medical coverage and other privileges from both women.

Transgender/Gender Issues

Court Orders Iowa Medicaid Program to Cover Sex Reassignment Surgery. In *Smith v. Rasmussen* (7/14/99), a U.S. District Court judge ruled that Iowa's refusal to pay for sex reassignment surgery was impermissibly arbitrary and based solely on his diagnosis of gender identity disorder. The court relied on past rulings which held that decisions concerning medical treatment must be made in consultation with one's physician and not by government bureaucrats. Ignoring medical evidence (including the testimony of the plaintiff's physician), the state argued that the surgery was experimental and unnecessary. The court rejected this argument, noting that sex reassignment surgery is used only when medically necessary and typically only in cases of gender identity disorder. This case was the latest in a long line of unsuccessful attempts by the Iowa Department of Human Services to deny funding for medically necessary sex assignment surgery. The judge permanently enjoined the department from denying Medicaid payments for the costs associated with the defendant's surgery.

Supreme Court to Hear Appeal on Violence Against Women Act. The Supreme Court will hear an appeal in *Brzonkala v. Virginia Polytechnic*, a challenge to the constitutionality of the civil rights remedy enacted by

Congress as part of the Violence Against Women Act ("VAWA"). The Fourth Circuit Court of Appeals invalidated this section of VAWA as an unconstitutional exercise of congressional authority, though twelve district courts have reached the opposite conclusion. *Brzonkala* is one of a number of cases accepted for the Court's next term addressing the limitations of congressional authority to enact statutes granting a right of action against state entities. An adverse decision by the Court in *Brzonkala* could have two significant impacts. The case will decide the immediate question of the constitutionality of VAWA's civil rights remedy, and may also call into question the extent of congressional power to enact statutes providing individuals with the ability to sue a state entity. Cases raising similar issues on the Court's docket are *Kimel v. Florida Board of Regents*, *Reno v. Condon*, and *Vermont Agency of Natural Resources v. United States*.

Kansas Federal District Court Finds Violence Against Transgendered Male Not Within Coverage of Violence Against Women Act. According to the Kansas Federal District Court, the family of a transgendered prisoner murdered by other inmates cannot recover under a wrongful death action based on the Violence Against Women Act. The inmate was beaten to death by other inmates who singled him out because he regularly dressed and acted as a woman (*i.e.*, his gender expression). While dismissing for failure to exhaust administrative remedies, the court opined that the claim was invalid because VAWA was intended solely to deal with violence against women and because none of the defendants were charged with committing the violence.

Texas Appeals Court Rules That Post-Operative Female Transsexual Is Male, Denies Her Right to Sue for Husband's Wrongful Death. A Texas Appeals court, ignoring medical evidence to the contrary, ruled that a post-operative transsexual female was still biologically male, and therefore could not be legally married to her husband of seven years. The decision had the effect of precluding her claim of medical negligence in her husband's death. Christie Littleton had been through extensive therapy and ultimately underwent sex reassignment surgery in 1980. She had her name legally changed and obtained a court order changing her sex on her birth certificate. In 1989, she married Jonathon Littleton, who was fully aware of her background. The marriage lasted for seven years until he died as a result of a doctor's alleged negligence. The appeals court refused to recognize Littleton's sex change, holding that "Christie inhabits a male body in all aspects other than what the physicians have supplied." The case leaves open the question of how Christie, or any gay or transgendered person could recover for the negligent death of their partner.

See also Schmedding and Spearman cases profiled under Employment – Litigation, above.

International Developments

European Court Invalidates British Ban on Homosexuals in the Military. The European Court of Human Rights has ruled that Britain's ban on homosexuals in the armed forces is a breach of human rights. The court, finding in favor of three men and a woman who were discharged from the British armed forces after they admitted their sexual orientation, said the British policy violated Article 8 of the European Convention on Human Rights which defends the right to respect for private and family life. The Court labeled the investigations and interviews of the applicants "exceptionally intrusive . . . interferences with their private lives." Though the victory does not change British law, the government must now determine how to be in compliance with the ruling. The British ban on service by homosexuals has long been a source of justification for the similar policy of the U.S. military.

Ugandan President Calls for Arrest of All Homosexuals; Kenyan President Joins Bashing. Ugandan President Yoweri Museveni has called homosexuality "abominable" and recently urged police to round up and charge homosexuals. Homosexuality is illegal under Ugandan law which states that "carnal knowledge of any person against the order of nature" is punishable with a maximum sentence of life in prison. Kenyan President Daniel arap Moi also lashed out at homosexuals, saying their behavior is abnormal and contradicts biblical teachings and African traditions. The U.S. State Department issued a statement saying the U.S. would view such arrests as a "serious human rights violation." The release also noted that Uganda is party to the Universal Declaration

of Human Rights and other conventions on civil and social rights. This marks the first time the department has issued a statement regarding the rights of homosexuals abroad.

French Legislature Grants Rights to Non-Marital Partners. French legislators have adopted a law that gives unwed gay and straight couples many of the same rights previously limited to married couples. Proponents said the law would better protect couples, regardless of their gender. The law would let couples file tax forms together after three years; help people bring foreign partners to France; force employers to take couples' joint vacation plans into account; and make partners accountable for each others' debts. The proposition also would make separation easier. A partner who wants to split would be able simply to send a letter of separation to their partner and to the court. Similar legislation already exists in several other European countries.

Other International Notes. The British House of Lords has recognized same-sex couples as families under the nation's rent and eviction laws, meaning that a surviving member of a couple could continue living in the home that had been rented to a deceased partner. The parliament of Ontario, Canada, passed a comprehensive amendment to 67 provincial laws to extend recognition to same-sex couples, thus bringing the province's laws within the requirements of last summer's Canadian Supreme Court ruling that requires spousal support legislation to apply to same-sex couples.

The Military

Soldier Killed in Apparent Anti-Gay Hate Crime. A military investigative hearing into the death of Pfc. Barry L. Winchell at the hands of fellow soldiers has revealed that the murder was most probably an anti-gay hate-crime that was premeditated in cold blood. Early on July 5, 1999, Winchell was found unconscious in the hallway outside his barracks at Fort Campbell, Kentucky. He was beaten repeatedly with a baseball bat, cracking his skull. His alleged attacker, Spc. Justin Fisher, awaits trial on charges of premeditated murder; acting as an accessory after the fact; making false statements under oath; and obstructing the investigation. Servicemembers Legal Defense Network has been at the forefront of this case.

HRC and Allies Petition Senate In Support of Clemency For Airman Douglas A. Gilley, Jr. Airman Douglas A. Gilley, Jr., was arrested in Atlanta in August after fleeing Moody Air Force base out of fear for his personal safety. Gilley had been harassed and received threats from other squadron members as a result of his perceived sexual orientation. He was sentenced to seven months in prison after being found guilty in a court-martial of being absent without leave (AWOL). Prior to going AWOL, Gilley requested that his First Sergeant help him separate from the military, but he received no assistance and instead was told he had to remain in the Air Force. Airman Gilley did not believe he could safely disclose the source of the danger to his First Sergeant, and he believed that the "Don't Ask, Don't Tell, Don't Pursue" policy prevented him from discussing matters of sexual orientation with him, so he fled. HRC and allies have petitioned the Senate to grant Gilley clemency.

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