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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

In the Headlines

Vermont Supreme Court Requires Equal Treatment for Same-Sex Couples, Leaves Solution in Hands of Legislature. The Vermont Supreme Court made history on December 20 by ruling that Vermont's denial of marriage benefits to same-sex couples violates the Vermont constitution's Common Benefits Clause. The court declared that same-sex couples are constitutionally entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." Chief Justice Jeffrey Amestoy, writing for the unanimous court, noted that "the extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity." The court did not rule that the couples were entitled to a marriage license, nor did it rule that they were not. It deferred the marriage license issue to another day, instead directing the state legislature to craft a remedy in response to the court's mandate in an "orderly and expeditious fashion."

On February 9, the Vermont legislature's judiciary committee voted 8 to 3 in favor of developing a broad domestic partnership system for lesbian and gay couples rather than expanding the marriage statute to include same-sex couples. Unlike Alaska and Hawaii, where progress on this issue has been stalled by referenda, the process for amending the Vermont state constitution is lengthy and would take up to five years at a minimum. In light of the charge by the court to work in an expeditious manner, legislative opponents likely would not be able to delay passage of a bill. Along with Vermont co-counsel, Gay & Lesbian Advocates & Defenders (GLAD) of New England represented the plaintiffs and continues to work on the matter. *Baker v. State*.

U.S. Supreme Court to Hear Appeal in Boy Scout Case. The United States Supreme Court has agreed to hear the Boy Scouts of America's (BSA) appeal of a New Jersey Supreme Court's ruling that BSA discriminated against assistant scoutmaster James Dale when BSA dismissed him for being gay. The U.S. Supreme Court will focus on whether the Scouts' First Amendment rights to free speech and association are violated by the imposition of the New Jersey statute.

The NJ court ruled the BSA violated a state civil rights law prohibiting discrimination on the basis of sexual orientation in public accommodations. It rejected the BSA's First Amendment defense, saying that the Scouts' free speech and association rights are not infringed by the requirement that gay young men be allowed to be scouts. It ruled that the evidence did not show that anti-gay sentiment was an integral component of the Boy Scouts' message and functions. Lambda Legal Defense and Education Fund (Lambda) is representing James Dale in this case. HRC is filing an *amicus* brief along with a spectrum of other civil rights organizations. *Boy Scouts of America v. Dale* (cert. granted, 1/14/00). (*In other Boy Scouts news...* School officials in Davis, California, have barred the Boy Scouts of America from any activities in school facilities because of the BSA's anti-gay policy).

Family Law -- Marriage and Domestic Partnership

See *Baker v. State*, page 1.

Hawaii Supreme Court Declares Same-Sex Marriage Case Moot But Finds Sexual Orientation to Be a Suspect Classification. The Hawaii Supreme Court ruled that the nine-year-old battle for the right to marriage for same-sex couples was mooted by Hawaiian voters' 1998 passage of a constitutional amendment that left the issue to be determined solely by the legislature. Significantly, however, the court noted in a footnote that cases involving sexual orientation discrimination require strict judicial scrutiny. It referred to the legislative history of the state constitution indicating that the legislature intended for sexual orientation to be covered under the constitutional prohibition against sex discrimination. This reference could make it easier for same-sex couples to obtain relief under Hawaii's state constitution for acts of sexual orientation discrimination. Lambda and Dan Foley represented the plaintiffs with *amicus* support from the ACLU Gay and Lesbian Rights Project. *Baehr v. Miike* (12/9/99)

New York Appeals Court Upholds New York City Domestic Partner Benefits. A New York appeals court unanimously upheld a New York City domestic partner benefits ordinance, defeating a challenge brought by the so-called American Center for Law and Justice (ACLJ) on behalf of three residents objecting as taxpayers. The state of New York began offering domestic partner benefits to its employees and retirees in 1993, and New York City followed suit in September 1998. The plaintiffs claimed that the city lacked authority to enact the ordinance because the law undermines the state's exclusive right to regulate marriage. Since the state had already offered domestic partnership benefits however, the court ruled that the city doing so as well did not contravene state or public policy. The court also rejected the notion that domestic partnerships are essentially common law marriages, noting that "there are enormous differences between marriage and domestic partnership." The ACLJ, which has sought further appeal in this case, continues to pursue suits challenging domestic partnership benefits in a number of jurisdictions across the country. Lambda filed an *amicus* brief supporting the law. *Slattery v. City of New York* (11/4/99).

Alaska, Washington State Employees File Suits Claiming Entitlement to Domestic Partnership Benefits. In Alaska, eight plaintiffs filed suit against the state and the city of Anchorage, claiming sexual orientation discrimination in denial of domestic partnership benefits. Alaskans have traditionally been hostile to such benefits. In 1998, Alaskan voters approved a constitutional amendment to ban same-sex marriages. Prior to that, the state human rights law had been amended to counteract a court ruling that denial of domestic partner benefits violated a statutory ban on marital status discrimination. The Washington suit, filed by the 19,000 member Washington Federation of State Employees, similarly alleges that the denial of domestic partner benefits is unconstitutional discrimination. The plaintiffs are represented by the Alaska Civil Liberties Union and the ACLU Lesbian and Gay Rights Project.

Pennsylvania Legislature Enacts Law Exempting Universities and Colleges from Providing Domestic-Partner Benefits to Unmarried Couples. In response to an ongoing lawsuit brought by the ACLU against the University of Pittsburgh for its failure to provide domestic partnership benefits in accordance with the city's anti-discrimination law, the Pennsylvania legislature hastily passed a law exempting educational institutions from having to comply with local laws requiring domestic partner benefits. The amendment was passed specifically in response to this case. In December, however, a court rejected the university's motion to dismiss in light of the new law. The ACLU contends that since the local ordinance is an anti-discrimination law, and does not deal specifically with health care, the university must still comply.

Local Developments. The city councils of Los Angeles and Seattle passed ordinances similar to San Francisco's requiring all companies that contract with the city to provide domestic partnership benefits for their employees. The Montgomery County, Maryland, council approved domestic partnership benefits for same-sex partners. The Denver City Council approved a registry for committed, unmarried couples regardless of sex.

Family Law -- Parenting

Supreme Court Hears Arguments in Non-parent Visitation Case. On January 12, the Court heard oral arguments in *Troxel v. Granville*, an appeal of a Washington Supreme Court decision holding that the federal constitutional rights of privacy and liberty bar a state from allowing “any person at any time” from suing to visit the child. The appellant, the paternal grandfather of the child, sought visitation under a state statute that allows anyone to seek visitation as long as it is in the child’s best interest. In deciding *Troxel*, the Court must consider a long line of precedent respecting the constitutional rights of parents to raise their child. In the past, lesbian and gay birth parents have relied on those cases to assert their right to custody or visitation with their children after leaving heterosexual marriages. These rights, however, could also be used when same-sex couples separate and the biological parent refuses to allow their former partner to have contact with the child they raised together. The ACLU and Lambda filed *amicus* briefs.

Supreme Court Lets Non-Biological Visitation Stand. The Supreme Court declined to take the appeal of a lesbian biological mother whose ex-partner was granted visitation rights to the child they raised together. The Court’s decision leaves the Massachusetts Supreme Court’s decision recognizing the rights of *de facto* parents intact. The Massachusetts court ruled, as few other courts have, that a partner in a dissolved same-sex relationship has rights to visitation even if he or she is not the biological parent. The *de facto* parent was represented by Gay & Lesbian Advocates & Defenders (GLAD). *L.M.M. v. E.N.O.*

Illinois Court Rejects Lesbian Co-Parent’s Visitation Petition. An Illinois Court of Appeals ruled that a statute contains an exhaustive list of non-parental parties who can petition for parental visitation rights. As a result, a lesbian co-parent lacked standing to challenge for visitation and could not invoke the common law principle of *de facto* parent status. In the past, courts had used this doctrine to grant standing to grandparents, stepparents and other parties who had developed relationships with the child. The court ruled that the statute was an attempt to end this practice and to provide the final list of parties eligible to challenge for visitation. Lambda represented the lesbian non-biological parent. *Matter of Visitation with C.B.L.; A.B. v. H.L.* (12/16/99)

Suits Challenge Utah Ban on Gay Adoption. Two lawsuits, one on behalf of Utah children and the other on behalf of prospective gay and lesbian parents, have been filed challenging the Utah Division of Child and Family Services’ ban on adoption by unmarried heterosexual couples, gay and lesbian partners, and women in polygamous relationships. The suits claim that the ban increases the waiting time for adoption in Utah, a serious concern in light of a 1994 suit that punished the agency for failing to provide permanent homes for children in its care. The suits further claim that the ban is discriminatory and that there is no rational basis for such a prohibition. The ACLU and the National Center for Lesbian Rights (NCLR) are the attorneys for the lawsuit on behalf of gays and lesbian prospective parents.

California Governor Reverses Ban on Gay Adoption. California Governor Gray Davis has ordered social workers to consider gays and lesbians, as well as unmarried couples, for adoption of children. Previously, through administrative rules by former governors Pete Wilson and George Deukmejian, the Department of Social Services routinely recommended rejection of adoption by gay couples.

Employment -- Litigation

Court Rules Workplace Harassment Not Sufficiently Outrageous to Support Intentional Infliction of Emotional Distress Claim. An effeminate man, subjected to ongoing harassment and taunting over his gender expression, was unable to prove the pervasiveness sufficient to establish a claim for intentional infliction of emotional distress. The standard for such cases is generally conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Though the court found this conduct unacceptable, it claimed that the severity of the conduct did not rise to the level required for proving intentional infliction of emotional distress. *Redden v. Conti Mortgage Corp.* (E.D. Pa. 12/99)

Exxon-Mobil Merger Detrimental to Gay Employees. The newly merged corporation of Exxon-Mobil announced it would only offer health benefits to “legally recognized” partners of employees. Employees already receiving domestic partner benefits will continue to do so, but new employees will not.

Transgender/Gender Issues

Boulder, Colorado, Adds “Gender Variance” to Local Human Rights Ordinance. The Boulder city council unanimously amended its Human Rights Ordinance to protect transgendered people from discrimination. The law, which becomes effective on March 1, prohibits discrimination on the basis of gender variance, defined as “a persistent sense that one’s gender identity is incongruent with one’s biological sense.” Boulder’s Human Rights Ordinance bars discrimination in housing, employment and public accommodations on the basis of sex, race, religion or sexual orientation. The gender-variance amendment allows employers to require a “reasonably consistent gender presentation” from their workers, meaning employers can limit workers to three gender changes in an 18-month period. Boulder joins a handful of cities and the state of Minnesota in prohibiting discrimination against transgendered individuals. Local activists praised the use of the term “gender variance,” saying it more accurately portrays the people it intends to protect.

Damages in Brandon Teena Murder Appealed. Lambda will appeal a meager damage award in the 1993 murder of Brandon Teena. Teena was born female but was living as a man in Falls City, Nebraska, when two men raped him after discovering his sex. After Teena reported the rape to the sheriff, the two men hunted him down, shot and killed him. Teena’s mother, Joann Brandon, sued Richardson County Sheriff Charles Laux, alleging that he negligently failed to protect Teena after the report of the rape. Sheriff Laux notified the attackers of the rape charge but did not arrest them or do anything to protect Teena. The trial court found that the sheriff was negligent but awarded only \$23,520 in damages. *Brandon v. County of Richardson, Nebraska*

International Developments

South African Court Recognizes Rights of Same-Sex Couples in Immigration Cases. The Constitutional Court of South Africa has ruled that the country’s immigration law must be changed to recognize the immigration rights of same-sex couples, granting them the same rights as legal spouses. The ruling was based on provisions of the South African constitution that ban sexual orientation discrimination and that guarantee human dignity. The court chose to insert the words “or partner, in a permanent same-sex life partnership” after the word “spouse” in the current law. The court also provided an in-depth discussion of the evolving status of legal families both in South Africa and abroad. In doing so, the court rejected the oft-cited argument that limiting recognition of marriages to same-sex couples is justified by the connection between marriage and procreation. They noted that many significant relationships, marital and otherwise, are not focused on the goal of procreation.

European Court of Human Rights Bans Sexual Orientation Discrimination in Child Custody Decisions. The European Court of Human Rights (ECHR) ruled that a Portuguese court’s use of a father’s sexual orientation to deny him custody of his daughter violated the European Convention on Human Rights section on respect for family life and non-discrimination. The father was originally given custody of the child, but then her mother abducted her. Subsequently, the appellate court awarded her custody of the child, based on the father’s sexual orientation and (unproven) allegations of abuse. The ECHR rejected using the father’s sexual orientation as a factor, saying that difference in treatment is permissible only if there is a legitimate aim and a reasonably proportionate relationship between the means and the aim. The court held that although the aim (the welfare of the child) was legitimate, the means (sexual orientation discrimination) was not proportional.

Military Issues

Frank-Campbell Amendment Eases Restrictions of Solomon Amendment. Reps. Barney Frank (D-MA) and Tom Campbell (R-CA) attached an amendment to this year's defense appropriations bill which says that the Solomon Amendment does not apply to federal funds that are made available solely for student assistance or related administration costs. This amendment, which is a permanent change in U.S. law, means that law schools can deny military recruiters access for on-campus interviewing under their own non-discrimination policies without jeopardizing the federal financial aid of students in both the law school and the larger university. *Public Law 106-79.*

British Military Ends Ban on Gay Servicemembers. Quickly complying with a recent ruling by the European Court of Human Rights that ruled the ban on gays impermissible, on January 12, the British military changed its policy of discrimination against homosexuals. A new code of conduct for all service members will now offer personnel protection from sexual harassment, discrimination and other forms of harassment and bullying. The code will apply to all service members, regardless of sexual orientation. The lifting of the British ban leaves the United States and Turkey as the only NATO allies with bans on gay servicemembers.

Soldier Guilty in Murder of Gay Colleague. Private Calvin Glover was convicted of premeditated murder for beating Private First Class Barry Winchell to death at Ft. Campbell, Kentucky, in July 1999 because Winchell was perceived to be homosexual. Glover was sentenced to life in prison with possibility of parole in ten years. His alleged accomplice in the murder, Specialist Justin Fisher, pled guilty to two counts of obstructing justice, three counts of making false statements, and one count of providing alcohol to a minor and was sentenced to 14 years in prison; he will be eligible for parole in about four years. The Servicemembers Legal Defense Network was the leader among those calling for the strict and swift punishment of these individuals.

Hate Crimes

Utah Hate Crimes Law Proves Ineffective. A Utah district court judge dismissed felony charges against two men accused of an anti-gay hate crime, citing a lack of coverage under Utah's hate crimes law. Although the state does indeed have a hate crimes law, debate over whether or not to include sexual orientation became so contentious that the legislature removed all specific categories from the law, rendering it basically useless. The judge himself labeled the law "incomplete." The Utah legislature is currently considering a "beefed up" hate crimes bill. The bill, however, avoids addressing the issue of sexual orientation-motivated hate crimes

HIV/AIDS

Supreme Court Denies Certiorari in Appeal by HIV-Positive Inmates Segregated in Alabama Prisons. The Supreme Court, without comment, declined to hear an Eleventh Circuit holding that the complete segregation of HIV-positive prisoners from all programs where the prisoners may come into contact with HIV-negative prisoners *did not* violate the Americans with Disabilities Act. The Eleventh Circuit ruled that since a "theoretical risk" of transmission from HIV-positive prisoners to HIV-negative prisoners exists, HIV-positive prisoners present a "significant risk" to the health and safety of others and that the complete segregation is justified. This ruling is contrary to the 1998 decision in *Bragdon v. Abbot*, which held that under the ADA, policies and procedures must rely on objective, scientific evidence regarding the "statistical likelihood" of transmission. Many organizations, including the National Commission on AIDS, the National Commission on Correctional Health Care, and the Federal Bureau of Prisons, have insisted that there is no legitimate public health basis for segregation. The case was litigated by the ACLU Prisoner's Rights Project, with Lambda providing an *amicus* brief. *Davis v. Hopper*

Supreme Court Declines to Hear HIV Insurance Caps Case. The United States Supreme Court declined to hear a Seventh Circuit case that sought to clarify that the Americans with Disabilities Act prohibits insurance

companies from imposing caps that limit coverage for policy holders with certain diseases, especially HIV. Although the policy has no basis in actuarial policies, a Seventh Circuit panel upheld the caps, but the full court was divided at 5-5. The panel ruled that the ADA does not prohibit companies from offering inferior care based on policyholders' disabilities, although at the trial, the companies admitted that HIV and AIDS related care is not more expensive than other conditions. Lambda appealed the case with amicus support from the ACLU Lesbian and Gay Rights Project. *Doe v. Mutual of Omaha*

Other Notable Litigation

California Court Rules Gays Cannot Be Excluded from Juries. An Orange County, California, appellate court ruled that gays and lesbians are entitled to the same protection as minorities and women and cannot be discriminated against in jury selection. The unanimous court noted that doing otherwise would send an intolerable message that gays and lesbians are unfit for jury service merely because of their sexual orientation. The court noted that "it cannot be seriously argued that . . . homosexuals do not have a common perspective. They share a history of persecution comparable to that blacks and women share." The court also emphasized that lawyers may not ask prospective jurors about their sexual orientation.

California Students Sue to Create Gay-Straight Alliance. Two students at El Modena High School in Orange County, California, won a preliminary injunction ordering the school district to allow the creation of a Gay-Straight Alliance. The school board barred the creation of the alliance in December, citing fears that the club would interfere with the district's sex education curriculum. A federal judge, anticipating a likely victory by the students at trial, issued an injunction that allows the Gay-Straight Alliance to meet on school grounds until the case can be heard in federal court later this year. The students are represented by Lambda and People for the American Way.

New York City Man Settles Anti-Gay Bias Complaint with Health Clinic. Shawn Smith, a gay New York City man, has settled a complaint made after a doctor made references to his sexual orientation on his medical records, labeling his sexual orientation a "problem." After the visit to the clinic, Smith filed a complaint with the New York City Human Rights Commission alleging discrimination based on his sexual orientation and perceived HIV status. As a part of the settlement, clinic officials have agreed to pay Smith \$1,000 and have the clinic train all employees in proper methods for taking patients' medical histories. Lambda negotiated the settlement between Smith and the clinic.

Acknowledgments/Sources

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