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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

IN THE HEADLINES

Maryland Becomes 12th State in Nation To Ban Sexual Orientation Discrimination. The Maryland Legislature voted on April 6 to make Maryland the 12th state to outlaw discrimination against lesbians, gays and bisexuals. The Senate had already passed Senate Bill 205, the Anti-Discrimination Act of 2001, when – with three days left in the legislative session – the House of Delegates voted 90-47 for final passage. Gov. Parris Glendening, who championed the measure, is expected to sign the bill into law within the next few weeks. The bill covers employment, housing and public accommodations. The law goes into effect Oct. 1, 2001.

Arkansas Court Strikes Down Anti-Gay Sodomy Law. On March 23, the Pulaski County Circuit Court ruled that it is unconstitutional for Arkansas to ban consensual sex for adult same-sex couples. “(I)t is consistent with this State’s Constitution to hold that an adult’s right to engage in consensual and noncommercial sexual activities in the privacy of that adult’s home is a matter of intimate personal concern which is at the heart of the right to privacy in Arkansas, and this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender.” Only three states – Kansas, Oklahoma and Texas – have gay-specific sodomy laws and only 12 others still criminalize sexual activity for both gay and non-gay consenting adults. Lambda Legal Defense and Education Fund represented the plaintiffs in the case named *Picado v. Jegley*.

Netherlands Becomes First Nation To End Discrimination in Marriage. As of April 1, same-sex couples in the Netherlands are able to marry. A large majority of the Dutch Parliament passed legislation to end sexual orientation discrimination in December 2000 in the nation’s marriage statutes. The Dutch action follows a period of increasing recognition for same-sex relationships throughout the world. Denmark implemented a registered partnership system in 1989 and was followed by Norway, Greenland, Sweden and Iceland. In test-case victories, courts in Columbia, Hungary, Israel, Namibia and South Africa have recognized the marital nature of gay relationships. The Canadian Supreme Court held that the definition of “spouse” in Canadian law included same-sex partners.

Split Supreme Court Limits Recourse Against States Under Americans With Disabilities Act. In February, the Supreme Court ruled 5-4 that the 11th Amendment bars state employees from bringing suit under Title I of the Americans with Disabilities Act in federal court in *University of Alabama v. Garrett*. In doing so, the court eliminated the primary means of recourse for individuals with disabilities when states discriminate against them. The court held that Congress lacked a strong enough record of state discrimination to include private

rights-of-action remedies. The ruling and underscores the need for federal government enforcement of the states' legal obligations under the Americans With Disabilities Act.

COURT REACTION TO THE DECISION IN BOY SCOUTS OF AMERICA V. DALE

Connecticut Commission Rules Against Participation of Boy Scouts in State Charitable Campaign.

The Connecticut Commission on Human Rights and Opportunities ruled that the Boy Scouts may not participate in the State Employee Charitable Campaign, or SECC. The commission found that under the Connecticut gay civil rights law, a discriminatory organization may not be included in the SECC which requires all groups to sign a non-discrimination statement, denying participation to those organizations that would not comply. In the Feb. 2001 decision, the commission stated, "a constitutional right to discriminate does not equate with a right to have the government sanction or support an organization's discriminatory policies."

California Judge Resigns from Boy Scouts and Joins Efforts to Change State Judicial Ethics Code.

Judge James R. Lambden resigned from his position as a scoutmaster with the Boy Scouts in light of the Supreme Court's decision in *Boy Scouts of America v. Dale*. Judge Lambden, in a letter sent to the Boy Scouts and news outlets, said that he could no longer be part of an organization with a discriminatory policy he finds "personally unacceptable" and "ethically questionable for judges everywhere." Judge Lambden has joined a state movement to remove an exemption for the Boy Scouts from a rule in the California Judicial Ethics Code barring judges from affiliating with organizations that discriminate on the basis of sexual orientation. On Dec. 21, 2000, the California Supreme Court issued a statement that judges, if they wish, may continue to be affiliated with the Boy Scouts.

United Way Pulls Support for Boy Scouts Nationwide. United Way organizations in several cities have reacted to the Boy Scouts' ban on gay members by withdrawing support. The United Way of **Palm Beach County, Fla.**, has removed the Boy Scouts as a grant recipient and added sexual orientation to its non-discrimination clause that organizations will have to sign to participate in the campaign. The United Way of **Tompkins County, N.Y.**, rescinded a \$32,203 grant to local Boy Scouts activities. The United Way of **Pierce County, Wash.**, has adopted a new non-discrimination policy including sexual orientation and planned to cease Boy Scout funding in 2003 unless the organization has changed its policy.. The United Way of **Austin, Texas** is advising donors that they may specify that donations not go to the Boy Scouts. The United Way of **Evanston, Ill.**, will not renew its \$5,000 grant to the Boy Scouts in 2001. The United Way of **Greater Duluth, Minn.**, terminated its annual grant of \$30,000 to the Boy Scouts. The United Way of **Central Massachusetts** voted to withhold funds from all agencies, including the Boy Scouts, that discriminate on the basis of sexual orientation. The United Way of **Tucson and Southern Arizona** has announced that it will deny "unrestricted dollars" to organizations that discriminate based on sexual orientation. Donors can make directed donations, however, that will not be subject to the policy. In contrast, the United Way of **Forsythe County, N.C.**, resolved the Boys Scouts issue by dropping "sexual orientation" from its anti-discrimination policy.

Federal Court Strikes Down Public School's Anti-Harassment Policy. The 3rd Circuit struck down an anti-harassment policy in *Saxe v. SCASD* that included harassment based on race, religion, color, national origin, gender, sexual orientation, disability and other types of harassment relating to one's personal characteristics. The court found that the policy was overbroad and inhibited constitutionally protected speech. While the court acknowledged that schools have a compelling interest in promoting an educational environment that is safe and conducive to learning, the court found that the policy extended so far as to include speech that merely offends others.

EMPLOYMENT

Second Circuit Provides Guidelines for Gay Employees to Seek Relief under Title VII. The 2nd Circuit Court of Appeals ruled in *Simonton v. Runyon* that anti-gay harassment of a former postal employee, who suffered a heart attack and had to resign as a result of the harassment, does not violate Title VII's ban on sex discrimination in the workplace, thereby affirming dismissal of the complaint by the district court. The court held that Title VII does not cover harassment on the basis of sexual orientation, but suggested that a plaintiff may have been able to obtain relief under Title VII by alleging discrimination on the basis of gender non-conformity, similar to the argument successfully made by the plaintiff in the Supreme Court case *Price Waterhouse v. Hopkins* in 1989. The court concluded that the plaintiff might have prevailed if he had argued that he was discriminated by not conforming to gender norms and sexual stereotypes.

Seventh Circuit Rejects Title VII Claim of Sexual Harassment Brought by Gay Nurse. Offering another example of the need to pass the Employment Non-Discrimination Act, the 7th Circuit Court in *Hamner v. St. Vincent Hospital and Health Care Center Inc.* rejected a male nurse's Title VII claim of sexual orientation discrimination. Although the plaintiff also alleged sexual harassment, the court ruled that a finding of anti-gay harassment precludes a claim of sexual harassment. The court found that harassment was based solely on homophobia and was not "because of sex." The opinion indicated, however, that the plaintiff may have been successful if he had shown that he was harassed because of a perception that all male nurses are gay, whereas the same perception would not apply to female nurses.

Forth Worth, Texas, Adds "Sexual Orientation" to Discrimination Law. The City Council of Fort Worth, Texas amended its civil rights law to include "sexual orientation" discrimination in employment and public accommodations. Fort Worth and Austin are the only jurisdictions in Texas to prohibit anti-gay discrimination in private employment. Dallas and Houston prohibit anti-gay discrimination in public employment only.

Ohio Federal Court Finds Basis for Wrongful Discharge Claim on Account of Sexual Orientation. A federal district court in Ohio ruled that the city of Columbus' code prohibiting sexual orientation discrimination may provide a basis for a wrongful discharge suit. In Ohio, a wrongful discharge claim may be brought if the action violates a "clear public policy." In *Das v. Ohio State University*, the court found that the city code may constitute public policy.

Louisiana Federal Court Finds Same-Sex Harassment Actionable Under Title VII. A federal court in Louisiana appeared to accept that sexual orientation discrimination is sex discrimination while denying summary judgment to an employer accused of male-to-male harassment. In *Price v. Dolphin Services Inc.*, the court held that the harassment does not need to be based on sexual desire, but rather a general hostility toward men or women. The court commented that evidence of differential treatment toward men and women based on a perception of one's sexual orientation may demonstrate a claim under Title VII. The court relied on the Supreme Court's holding in *Oncale v. Sundowner Offshore Services Inc.*, which held that same-sex sexual harassment is actionable under federal law.

FAMILY LAW

Wisconsin Court Rejects Challenge to Teachers Domestic Partner Benefits Program. The Court of Appeals of Wisconsin ruled that local school districts have statutory authority to finance health insurance coverage for employees' domestic partners. The court found in *Pitchard v. Madison Metropolitan School District* that school boards' powers and duties should be construed broadly. The court rejected objections to public funds being used to pay for domestic partner benefits..

Court Awards Custody to Gay Father. A New York County Supreme Court Jan. 12, 2001, awarded a gay man sole custody of his son. He and his partner had arranged a surrogate agreement with the biological mother that stated the gay couple would adopt and raise the child and provide the mother with monetary compensation. In return, the mother was allowed visitation. After the child was born, the mother became more insistent on visitation and eventually filed the lawsuit to gain custody of the child. The court rejected the surrogate arrangement based on its illegality in New York. The court, however, used the agreement as evidence of the parties' original intentions regarding custody. The court held, using the "best interest of the child" standard, that when a child has been with one of the natural parents since birth, there is a presumption against switching custody unless there is a showing of harm to the child. The court determined that the child should, therefore, remain with the father. The mother was allowed "prescribed" visitation. *C, on behalf of T. v. G. and E*

Court Upholds Adoption by Lesbian. The Tennessee Court of Appeals upheld the adoption of a young boy by a lesbian. The birth mother's parents had challenged the adoption. The court held that the birth mother had voluntarily terminated her parental rights and had, in fact, chosen the adoptive mother. The court said that although the adoptive mother's home is a "nontraditional structure," the lifestyle of the adoptive parent couldn't control the outcome of the custody, especially without evidence of its effects on the child. In *re Adoption of M.J.S.*, the court found that there was no evidence to suggest that the adoptive mother's being a lesbian has an adverse effect on the child.

Florida Court Upholds Broward County Domestic Partnership Act. A unanimous 4th Circuit Court rejected a taxpayer's challenge to the Broward County Domestic Partnership Act in *Lowe v. Broward County*. The court held that "the act does not legislate within that domestic relations zone that is reserved for the state. The DPA does not curtail any existing rights incident to a legal marriage, nor does it alter the shape of the marital relationship recognized by Florida law." The court also held that the law does not violate the state's so-called "Defense of Marriage Act" because it does not address legally contracted same-sex marriages performed in other states. The Domestic Partnership Act put in place a domestic partner registry, open to all adult same-sex and unmarried opposite-sex couples. The law allows County employees to receive benefits for their partners, provides contractual preference to employers who provide benefits to domestic partners, opens domestic partnership visitation in healthcare and correctional facilities, and extends rights to domestic partners in the areas of guardianship and healthcare surrogate decision-making. The provision allowing healthcare surrogate decision-making was struck down as a violation of explicit Florida law.

Colleges Extend Domestic Partnership Benefits. **Tulane University**, the largest private sector employer in New Orleans, has adopted a domestic partnership benefits program extending only to same-sex couples. Tulane's program extends to health, dental and life insurance, family and medical leave, and tuition waivers. The program is the first for the private sector in Louisiana. **Wake Forest University**, in North Carolina, extended employee benefits to domestic partners of gay faculty and staff, effective Sept. 1, 2000.

Corporate Recognition of Same-Sex Partners. **Dow Jones** announced that it is extending domestic partnership benefits to unmarried employees in same-sex and opposite-sex relationships. **Bank One** extended medical, dental, vision and legal service benefits to domestic partners on Jan. 1, 2001. Investment company **Bear Stearns** also has instituted a domestic partners benefits program that extends to same-sex and unmarried opposite-sex couples. **Delta AirLines** announced that beginning in July 2001, it will extend medical, dental, optional life insurance and short-term disability benefits to same-sex partners of employees. Delta has already extended bereavement leave and family medical leave to employees. **America West Airlines** and **Southwest Airlines** will offer domestic-partner benefits beginning in 2001. **BellSouth Corp.** has extended domestic partnership benefits to employees.

Same-Sex Marriages in South Texas Demonstrate Futility in Marriage Laws. A 1999 Texas appeals court decision continues to provide a basis for same-sex marriage. In *Littleton v. Prange*, the court ruled that a person's sex at birth is permanent for purposes of marriage in Texas. Based on the *Littleton* precedent, a number

of transgender and/or transsexual individuals have been able to legally marry their same-gender domestic partners. Texas attorney Phyllis Frye represented Christie Littleton and has done so for many such couples.

In a Sharply Divided Opinion, Court Rejects Second-Parent Adoptions. The Pennsylvania Superior Court has rejected second-parent adoptions for gay and lesbian parents. *In re Adoption of C.C.G.* and *In re Adoption of R.B.F. and R.C.F.*, the court interpreted Pennsylvania law narrowly by holding that under the state's Adoption Act, a person can only adopt if the legal parents surrender all rights. The only exception allowed by law is for "step-parents," and since the state's so-called "Defense of Marriage Act" prohibits same-sex partners to be treated as the legal equivalent of heterosexual spouses, gay and lesbian partners cannot adopt as second-parents. The dissent criticized the majority for failing to consider the best interests of the child, and interpreting the statutory language too narrowly.

See also "New Spate of Anti-Gay 'Super-DOMA' Bills Introduced" and "Several Pro-Gay Marriage, Civil Union and Domestic Partnership Bills Introduced" under State Legislative Developments.

TRANSGENDER/GENDER ISSUES

Puerto Rico Court Orders Recognition of Sex Change. The Supreme Court of Puerto Rico ordered public officials to issue a birth certificate reflecting a male-to-female sex change. Local officials had refused to issue a new birth certificate indicating female sex. The court acknowledged transsexuality as a "reality that demands a legal solution."

Transgendered Recognition in Many U.S. Cities. The cities of **Madison, Wis.; Portland, Ore.; Atlanta, Ga.; and Boulder, Colo.;** have included "gender identity" recognition in their city ordinances.

Court Rules Transgender Girl May Dress According to Gender Identity at School. A Massachusetts Superior Court held that a school cannot prohibit a transgender teen from attending school in feminine attire. In *Doe v. Yunits*, the court held that the girl's conduct constitutes constitutionally protected speech that the school may not suppress..

Connecticut Commission's Ruling Favors TransgenderPeople. The Connecticut Commission for Human Rights and Opportunities issued a declaratory ruling that the state's anti-sex discrimination laws protect transgender persons. The commission's ruling recognizes that the form of discrimination many transgender people face is also grounded in enforcing sex stereotypes, a practice harmful to all people. The ruling clarifies that transgender people may bring claims of sex discrimination and defines transgender people to include a broad range of individuals who do not conform to gender stereotypes.

See "Same-Sex Marriages in South Texas Demonstrate Futility in Marriage Laws" under Family Law

SODOMY LAWS

New York Repeals Criminal Penalties for Sodomy. The New York State Legislature has repealed criminal penalties for consensual adult sodomy. The repeal measure went into effect Feb. 1, 2001.

HIV/AIDS

Third Circuit Strikes Down HIV Discrimination in Foster Care System. The 3rd Circuit Court unanimously reversed a lower court decision that upheld a Pennsylvania county's policy of refusing to place foster children in a home because a child in the family has AIDS. In *Doe v. County of Centre*, the court criticized the lower court for relying on generalized statistics about risks of sexual abuse among foster children and of HIV transmission through physical interaction. The court cited the probability of HIV transmission between housemates – including foster siblings – is next to zero.

Court Rules Absolute Protection of HIV Confidentiality in State Law. A Massachusetts court ruled in *Commonwealth of Massachusetts v. Ortiz* that a criminal defendant does not have to reveal his HIV status. Officers were exposed to the defendant's blood and two of the officers requested that his HIV status be disclosed in order to determine whether to undergo prophylactic treatment to prevent HIV infection. Massachusetts state law provides that any HIV testing requires "written informed consent" from the patient, and that health care providers are forbidden from revealing the results of HIV testing to "anyone other than the person tested absent that person's" consent. The court ruled that the state law provides absolute confidentiality for HIV testing.

New California Law Seeks to Help Insured AIDS Patients. California enacted a law that requires health maintenance organizations, or HMOs, to provide its members with referrals to AIDS specialists without consulting general practitioners.

Employees With AIDS Have Protection in California. The California Supreme Court ruled in *Galanty v. Paul Revere Life Insurance Company* that an insurance company cannot deny benefits to policyholders who develop AIDS after becoming insured.

California Law Expands Protection to Persons with HIV and AIDS. California enacted a law Dec. 31, 2000, that broadens disability discrimination to include more than "correctable" disabilities, and ensures that HIV and AIDS are covered under the state's anti-discrimination law.

Second Circuit Finds That Patients Mistakenly Diagnosed With HIV Have Cause of Action. The 2nd Circuit Court of Appeals held in *Baker v. Dorfman* that under New York law, a plaintiff who has been falsely diagnosed as HIV-positive may bring suit for negligent infliction of emotional distress..

Court Rejects Officer's "Right to Know" Under State's AIDS Confidentiality Act. An Illinois appellate court held Dec. 22, 2000, that an officer did not have a right know a suspect's HIV status after the officer was exposed to the suspect's blood. The court reasoned in *Bitner v. Pekin Memorial Hospital* that the language of the statute may allow medical facilities to release such information to law enforcement officers under such circumstances, but the information is not required.

Recently Enacted AIDS Legislation. Former President Clinton, before leaving office, signed the Global AIDS and Tuberculosis Relief Act of 2000. The act authorizes approximately \$300 million for AIDS prevention and education overseas. Clinton also signed a bill reauthorizing the Ryan White Comprehensive AIDS Resource Emergency Act for five years, which provides more than \$1 billion a year for AIDS prevention and treatment activities. The new version includes HIV infections and diagnoses of AIDS to be used in determining how money will be allocated.

See "Split Supreme Court Limits Recourse Against States Under Americans with Disabilities Act" under headlines.

LITIGATION NOTES

Ninth Circuit Rules School May Remove Teacher's Anti-Gay Message. The 9th Circuit Court held in *Downs v. Los Angeles Unified School District* that the First Amendment does not require a school to provide a forum to teachers who espouse ideas in conflict with the school's views. A Los Angeles High School set up a bulletin board in recognition of Gay and Lesbian Awareness Month. Subsequently, a teacher posted materials on a different bulletin board with anti-gay themes. The court ruled that the bulletin board constituted government speech, therefore the school has a First Amendment right not to be compelled to support speech with which it disagrees.

Texas Federal Court Rejects Censorship of Gay-Themed Books. A federal district court ruled in *Sund v. City of Wichita Falls* that a city council's attempt to remove gay-themed children's books from a local library amounted to unconstitutional censorship. After pressure from religious leaders, the City Council of Wichita Falls, Texas passed a resolution allowing library patrons to petition for the removal of *Heather Has Two Mommies* and *Daddy's Roommate*. The court held that the resolution amounted to viewpoint regulation in violation of the First Amendment and violated the Texas constitutional ban on delegation of governmental powers to private citizens.

Third Circuit Holds Right to Privacy Bars Disclosure of Sexual Orientation. The 3rd Circuit Court ruled in *Sterling v. Borough of Minersville* that the 14th Amendment protects against the unauthorized disclosure by public officials of a person's sexual orientation. An 18-year-old male committed suicide after two police officers threatened to disclose his sexual orientation to his family. The court distinguished *Bowers v. Hardwick* as pertaining to sexual conduct, not sexual status as in this case. The court stated that the constitutional right to privacy includes "not only an individual's autonomy in intimate matters, but also an individual's interest in avoiding divulgence of highly personal information." Applying strict scrutiny, the court held that state actors may not reveal, or even threaten to reveal, a person's sexual orientation without a "genuine, legitimate and compelling" state interest..

STATE LEGISLATIVE DEVELOPMENTS

Atlanta Amends Civil Rights Law to Broaden Protection for Sexual Orientation and Gender Identity. Atlanta has become the first city in the South to provide to gay, lesbian and transgender people a cause of action for discrimination by employers, landlords and businesses that serve the public.

New Spate of Anti-Gay "Super-DOMA" Bills Introduced. In the wake of the enactment of Vermont's civil unions in 2000, state legislators have begun introducing bills that ban not only same-sex marriage, such as existing so-called Defense of Marriage statutes, but that also ban civil unions and other legal recognitions of same-sex relationships. Bills with varied language banning apparently only same-sex marriage to bills specifically banning civil unions to some with even broader language have been introduced in the 2001 legislative sessions in Colorado, Louisiana, Maryland, Massachusetts, Missouri, New Hampshire, New Mexico, Ohio, Texas, Utah, Vermont, West Virginia and Wyoming.

Several Pro-Gay Marriage, Civil Union and Domestic Partnership Bills Introduced. On a more positive note, legislators in six states – California, Connecticut, Hawaii, New York, Rhode Island and Washington – have introduced bills that would actually establish same-sex marriage or create civil union status have been introduced. A handful of states, including Alabama, California, Maine, Massachusetts, Minnesota and Nevada, are considering legislation that would give same-sex partners a more limited package of rights.

Six States Pass State Civil Rights Bills Through One Legislative Chamber. Civil rights bills prohibiting sexual orientation discrimination only recently passed in one legislative chamber in both Delaware and New

York, while a bill prohibiting both sexual orientation and gender identity discrimination passed in one chamber in Illinois. In addition, Arizona passed through one legislative chamber an employment non-discrimination protection for state employees covering sexual orientation and gender identity. Hate crimes bills covering sexual orientation passed in one legislative chamber in both West Virginia and Texas.

INTERNATIONAL

Studies Find Australian and UK Militaries Having Little Difficulty Integrating Gay Servicemembers.

The University of California's Center for the Study of Sexual Minorities has concluded a study of Australia's integration of openly gay members into the defense forces. The study finds that the presence of gay soldiers had no real impact on discipline or fighting skills. Gay members actually reported that since the lift of the ban, they have experienced a more supportive environment. Additionally, a Defense Ministry study reports that lifting the ban on gay soldiers in the U.K. forces has had little to no impact on morale or enlistment. The study reports widespread acceptance and that the new policy is of little debate or reaction. The report supports the same results in lifting the ban in the Canadian and Australian forces.

Germany Approves Legal Recognition of Same-Sex Couples. Germany has approved legislation that extends legal recognition to same-sex couples. Couples will be able to register their relationships and have many of the same rights as heterosexual couples, such as inheritance and tenancy rights, treatment as relatives in certain situations and insurance benefits. The law will go into effect in 2001.

European Directive to Include Anti-Gay Discrimination in Employment. The Council of the European Union reached agreement on a directive banning employment discrimination including sexual orientation. The council consists of the employment ministers from the 15 member states. The directive will be formerly adopted under Article 13 of the European Community Treaty.

Ireland Enacts Anti-Gay Discrimination. Ireland has put into effect the Equal Status Act, which prohibits discrimination in public accommodations, including on the basis of sexual orientation.

Europe Adopts Broad Measure Respecting Gays and Lesbians. The Parliamentary Assembly of the Council of Europe adopted "Recommendation 1474 (2000) on the Situation of Lesbians and Gays in Council of Europe Member States." Among other remedies, the measure calls on the 41 member states to: (1) prohibit anti-gay discrimination by means of national legislation; (2) adopt measures to combat homophobic attitudes in schools, medical profession, armed forces, police and the judiciary; (3) ensure equal treatment in employment; and (4) adopt legislation allowing registered partnership.

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