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LAW *briefs*

March 2002

Vol.5, No. 1

RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

IN THE HEADLINES

Same-Sex Partners of Sept. 11 Victims May Apply for Federal Victim Compensation Funds.

Same-sex partners may file claims with the federal Sept. 11 Victim Compensation Fund, set up to assist families affected by the tragedies. But the lack of clarity in the new regulations may leave some same-sex families in limbo. With no explicit mention of same-sex partners, it remains unclear what obstacles these survivors of victims of the tragedy may face in receiving fair and equitable benefits. If any affected member of the gay, lesbian, bisexual and transgender community encounters difficulty receiving proper assistance, please contact Jennifer Middleton, staff attorney at Lambda Legal Defense and Education Fund at 212/809-8585.

New Virginia Governor's EEO Policy Does Not Bar Discrimination Based on Sexual

Orientation. Recently elected Virginia Gov. Mark Warner failed to include sexual orientation in an executive order on equal opportunity that he signed Jan. 12. The Democratic governor's new order regarding equal opportunity within the state government prohibits discrimination based on race, sex, color, national origin, religion, age, political affiliation or disability, and is identical to that signed by James Gilmore, his Republican predecessor.

DNC Proposes Social Security Benefits for Same-Sex Partners. The Democratic National Convention passed a resolution in January in support of Social Security benefits for same-sex partners and their families. "Gay and lesbian Americans and their families know that this party will fight for them," said DNC Chairman Terry McAuliffe in a news release. Social Security officials, however, caution that Congress would have to enact into law any such change to the existing system. The Human Rights Campaign hailed the proposal as a "bold move" and "a step toward equality for gay and lesbian Americans."

Georgia Court Says Civil Union Is Unequal to Marriage. The Georgia Court of Appeals refused to recognize a Vermont civil union as creating a legal relationship in a case involving a custody agreement that required that neither parent host overnight guests who were unrelated by blood or marriage during visitation with the children. The court found that the plaintiff and her same-sex partner were not married or related in the sense contemplated by Georgia law and by the language of the consent decree governing the custody and visitation case itself. The court also left open the possibility that recognition of civil unions for the purposes of regulating cohabitation for custody and visitation purposes could be accomplished in the language of consent decrees in the future. Lambda Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders, the National Center for Lesbian Rights and the American Civil Liberties Union filed *amicus* briefs in the case. *Burns v. Burns*, 2002 Ga. App. LEXIS 85.

EMPLOYMENT

Bush Inks D.C. Domestic Partnership Measure. President Bush signed into law a measure allowing the District of Columbia to use local funding to administer a health insurance plan in which employees of the district may buy health insurance for their domestic partners. For nine years, Congress blocked the use of local or federal funds to implement the D.C. Health Care Benefits Expansion Act. The measure also ensures that health care facilities permit domestic-partner visitation, creates a domestic partner registry with the mayor's office and allows city employees to take sick leave to care for domestic partners or bereavement leave in the event of a partner's death.

2nd Circuit Court Upholds Employer Action Against State Employees Who Proselytize. Deciding a case brought by a Connecticut state employee, the 2nd Circuit Court of Appeals held that state employees have no right to proselytize on the job. The plaintiff was a nurse caring for end-stage AIDS patients. During the course of her work, she promoted her religious beliefs to patients. The court found such a practice by state employees with public contact providing public services raised serious Establishment Clause concerns. As to the plaintiffs' demand for reasonable accommodation under Title VII, the court held the plaintiffs failed to put their employers on notice and that, even if they had, the accommodation sought was not reasonable. *Knight v. Connecticut Department of Public Health*, 2001 U.S. App. LEXIS 26430 (2d. Cir.).

Same-Sex Harassment Case Denied Under Title VII. The U.S. District Court for the Eastern District of Pennsylvania has held that a decorated, heterosexual Philadelphia firefighter who experienced severe anti-gay harassment on the job had no cause of action for redress under Title VII. The firefighter presented evidence of harassment, including threats to his physical safety and the safety of his brother — a fellow fireman — and the placement of feces and used condoms on his desk and on his clothes. The court, distinguishing the case from others in which same-sex harassment has been held actionable under Title VII, found the plaintiff failed to prove the harassment he suffered was inflicted "because of sex," as required under Title VII. *Bianchi v. City of Philadelphia*, 2002 U.S. Dist. LEXIS 103.

U.S. District Court Denies Summary Judgment in Title VII Sex-Stereotyping Case. A federal district court judge in Massachusetts denied a motion for summary judgment by the defendant U.S. Postal Service in a mixed-motive sex-stereotyping case brought under Title VII. Fellow postal workers and managers harassed the plaintiff, who refused to disclose his sexual orientation. Believing him to be gay, they taunted him with anti-gay epithets and taped anti-gay pictures and cartoons to his work space. While acknowledging the inapplicability of Title VII to

pure sexual orientation discrimination, Judge Nancy Gertner nonetheless found that “the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.” Acknowledging that the harassment centered on Centola’s failure to conform to strict notions of male gender roles, Gertner refused the Postal Service’s motion for summary judgment. The motion for summary judgment was granted with respect to a claim brought under the executive order prohibiting sexual orientation discrimination in the federal work force, on the basis that the order provided no private cause of action. *Centola v. Potter*, 2002 U.S. Dist. LEXIS 1504.

MARRIAGE/DOMESTIC PARTNERSHIP/CIVIL UNIONS

Vermont Supreme Court Upholds Civil Union Law. In December 2001, the Vermont Supreme Court unanimously upheld a lower court ruling that plaintiffs challenging the state’s 2000 civil union law lacked standing and failed to state a claim on which relief could be granted. The complaint was based upon an alleged betting pool among state legislators about the number of “yes” votes the bill would get, and a religious freedom claim under the Vermont Constitution by town clerks who objected to issuing civil union licenses. *Brady v. Dean*, 2001 Vt. LEXIS 427.

FAMILY LAW

Nation’s Largest Pediatric Group Supports Second-Parent Adoption Statutes. The American Academy of Pediatrics released a statement in February supporting second-parent adoption for same-sex couples and their children. Second-parent adoption is presently guaranteed by statute or high court decisions in the District of Columbia and the following seven states: California, Connecticut, Illinois, Massachusetts, New Jersey, New York and Vermont. The AAP’s statement cites a number of advantages of second-parent adoption, including guaranteeing second-parent custody standing in the event of death, illness or separation from the legal parent. In addition, it establishes the child’s legal entitlement to financial support from both parents if the couple separates and also enables a child to acquire health benefits from both parents. Further, the new policy calls on pediatricians to advocate for second-parent adoption at the state legislative level.

Pennsylvania Supreme Court Holds Former Same-Sex Partner Has Standing to Seek Custody and Visitation. In an important decision on child custody and visitation, the Pennsylvania Supreme Court held in a 5-2 decision that same-sex partners have the same rights as opposite-sex partners in seeking visitation and custody rights upon dissolution of their relationships. The child at issue in the case was conceived through alternative insemination and was carried by one of the women, L.R.M., who argued that she was the biological mother and that her former partner, T.B., had no standing to seek visitation or custody with the child conceived during their relationship. The court first and foremost considered the best interest of the child in determining that T.B. could seek visitation. The court also found the fact that the state bars same-sex marriage and that T.B. was legally unable to adopt the child irrelevant to the issue of visitation. Lambda represented T.B. in the case. *T.B. v. L.R.M.*, 2001 Pa. LEXIS 2753.

California High Court to Review Second-Parent Adoptions Ruling. The California Supreme Court has agreed to review a ruling from the Fourth Appellate District in San Diego on second-parent adoption. Plaintiff Sharon Silverstein successfully challenged the validity of second-parent adoptions in an effort to prevent her former partner from finalizing an adoption proceeding that began before the couple’s separation. The appellate court’s October 2001 ruling caused great concern as it cast into doubt the legal status of thousands of adoptions which occurred in the last 15 years under this procedure. Lambda and NCLR filed briefs urging the California Supreme

Court to review the case. *Sharon S. v. The Superior Court of California*, 93 Cal. App. 4th 218 (2001); modified at 2001 Cal. App. LEXIS 2199.

Supreme Court of Alabama Denies Custody to Lesbian. The Supreme Court of Alabama denied custody in February to a lesbian mother of her three children. It held that the Court of Civil appeals did not properly defer to the trial court's earlier determination favoring continued custody by the father. In a defamatory concurrence to the state Supreme Court holding, Chief Justice Roy Moore noted that the sexual orientation of a gay parent alone is sufficient to deny custody. "Homosexual behavior is ... an inherent evil, and an act so heinous that it defies one's ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child," Moore wrote. *Ex Parte H.H.*, No. 1002045 (Ala. Sup. Ct. 2002).

Washington Appeals Court Declines to Recognize Nonbiological, Nonadoptive Parent for Child Support Purposes. The Washington State Court of Appeals rejected the state's attempt to collect child support from Tracy Wood on behalf of a child conceived by artificial insemination during a relationship with her former partner, Kelly McDonald. The court held that, based on the facts of this case, there was no support obligation on the part of the defendant in the absence of biological or adoptive ties. If the existing statutes are dated or inadequate, the court declared, it is the role of the Legislature to remedy the deficiency. Nonetheless, the court left open the possibility that it could find a support obligation for a former same-sex partner of a parent on different facts. *State of Washington on Behalf of D.R.M.*, 2001 Wash. App. LEXIS 2550.

Nonbiological Mother May be Obligated to Support Child, Delaware Court Holds. In a Feb. 5 decision, a Delaware Family Court Commissioner held that the former partner of a lesbian mother may be compelled to pay child support. The child, a four-year-old boy, was conceived through in vitro fertilization during the couple's relationship. The judge noted that the nonbiological mother "was an integral, if not essential, factor" in the boy's conception, noting that "parentage is more than an act of biology." *Chambers v. Chambers*, No. CN00-09493 (2002).

New York Court Strikes Down Co-Parenting Contract, Acknowledges Rights of Alternative Families. The New York Supreme Court's Appellate Division granted expanded visitation rights to the gay biological father of a child conceived through artificial insemination with a lesbian mother. But the court refused to recognize the two parents' parenting agreement as controlling in the case. The parenting agreement into which the parties entered at the time of conception offered only limited visitation to the father. When the child's mother and her partner separated, the father sought expanded visitation, which the court granted because it found such expanded visitation to be in the best interests of the child. The court found that parenting agreements are only enforceable to the extent that they represent the best interests of the child. *Tripp v. Hinckley*, 2002 N.Y. App. Div. LEXIS 435.

EDUCATION

'Straight Pride' Sweatshirt Ban Unconstitutional. A federal court judge ruled in January that a Minnesota high school's prohibition against a student's wearing of a sweatshirt proclaiming "straight pride" restricts his constitutional right to freedom of expression. The ruling on constitutionality follows a preliminary injunction issued by the court last May requiring the school to allow the plaintiff to wear the sweatshirt. *Chambers v. Babbitt*.

Same-Sex Sexual Harassment Actionable Under Title IX of Educational Amendments of 1972. Citing the Supreme Court's holding in *Oncale v. Sundowner Offshore Servs. Inc.*, the 1st

Circuit Court of Appeals held that same-sex sexual harassment is actionable under Title IX of the Educational Amendments of 1972. The plaintiff, a learning-disabled female, alleged the “discipline matron” of her high school sexually harassed her. *Frazier v. Fairhaven School Committee*, 2002 U.S. App. LEXIS 282 (1st Cir.)

Pennsylvania School District Settles Suit Alleging Gay Harassment. An Erie, Pa., school district will pay \$312,000 as part of an out-of-court settlement for a claim brought by student Timothy Dahl against the district for failing to intercede in years of anti-gay abuse and harassment. The abuse, which Dahl reported to school officials, included name calling, physical abuse and an incident during which he was pushed down a flight of stairs.

HIV/AIDS

Supreme Court Restricts Scope of Americans with Disabilities Act. In a unanimous decision, the Supreme Court held that the Americans with Disabilities Act only serves to protect people who have disabilities that “substantially limit” their ability to perform “major life activities” (as opposed to the tasks of their particular job) and have “permanent or long-term impact.” The plaintiff in this case, an assembly-line worker with carpal tunnel syndrome, was found not to be entitled to accommodation under the statute. *Ella Williams v. Toyota Motor Manufacturing, Kentucky Inc.* 122 S.Ct. 681 (2002).

Helms Expresses Regret for Inaction on AIDS Front. Retiring Sen. Jesse Helms, R-N.C., expressed regret and shame for failing to be more active “in doing something really significant” to halt the spread of AIDS. And he pledged “not ... to lay it aside on my agenda for the remaining months” he has left in office. Helms’ comments came during an address in February to a group of Christian AIDS activists attending the Prescription for Hope Conference. It was coordinated by Samaritan’s Purse, an agency headed up by Franklin Graham, son of the Rev. Billy Graham. “Sermons about how to avoid AIDS are good but provide no solace to those 40 million already infected with the virus. ... As the church of Christ, we must reach out with open arms in love, encouragement and compassion rather than condemnation,” says Franklin Graham on the conference website.

Former U.S. Congressman to Lead Presidential AIDS Advisory Council. President Bush plans to nominate former Rep. Tom Coburn, R-Okla., to co-chair the Presidential Advisory Council on HIV/AIDS, according to news reports published in January. Coburn repeatedly voted against gay-friendly legislation while in Congress, and has been an advocate of teaching abstinence rather than condom usage. He has also opposed needle exchange programs. However, Coburn was the main sponsor of the legislation that renewed the Ryan White Comprehensive AIDS Resources Emergency Act and an early supporter of a patients’ bill of rights.

HMO Ordered to Pay for Liver Transplant for HIV-Positive Hepatitis C Patient. In Massachusetts, the state Medicaid agency ordered that HMO Neighborhood Health Plan pay for a liver transplant for a patient with HIV and liver disease who needed the transplant due to Hepatitis C. The Division of Medical Assistance Board of Hearings rejected the HMO’s argument that liver transplants are experimental in people with HIV. Gay & Lesbian Advocates & Defenders, a Boston-based civil rights organization, brought the suit.

IN THE STATES

Anti-Gay Ballot Effort in Maine Falls Short. Maine Secretary of State Dan Gwadosky announced Jan. 29, 2002, that conservative groups were unable to obtain a sufficient number of signatures to force a September 2002 vote on a measure that would deprive same-sex couples of health insurance. Maine recently passed a law requiring health insurers to offer domestic partner benefits to companies requesting such coverage. The failed initiative would have repealed the law. The measure would have also prohibited the state from recognizing same-sex marriages or unions.

St. Petersburg, Fla., Council Preliminarily Approves Non-Discrimination Bill. In December 2001, the City Council of St. Petersburg, Fla., preliminarily approved a bill prohibiting sexual orientation discrimination. The measure covers actual or perceived sexual orientation, and applies to employment, public accommodation and housing.

Anti-Gay Marriage Referendum Effort in Massachusetts Sparks Controversy. The outcome of a petition drive for a Massachusetts ballot referendum to ban gay marriage has been hotly disputed. Participants in the drive collected more than enough signatures to ask the state Legislature to put the issue before the voters. But a less controversial measure to ban shipping horses to out-of-state slaughterhouses for use as meat failed to garner a sufficient number of signatures. Both gay rights and animal rights activists are challenging the outcomes on the grounds that persons were led to believe they were supporting the horse-meat ban although they were supporting the gay-marriage ban. Attorney General Thomas Reilly acknowledged he had received voter complaints alleging fraud and confirmed that irregularities had been found in the petition drive process.

Massachusetts Court Finds Sodomy Law Inapplicable to Consensual, Private Conduct. In a case brought by GLAD, the Supreme Judicial Court of Massachusetts found that two statutes prohibiting oral and anal sex and providing for imprisonment for up to 20 years for such conduct were inapplicable to private, consensual conduct because they criminalize common acts of intimacy. The case was dismissed due to the lack of a pending prosecution of any of the plaintiffs; however, the holding that the law may not be enforced against consenting individuals engaging in private conduct is considered a major victory for gay, lesbian, bisexual and transgender Massachusetts residents. *GLAD v. Reilly*, 436 Mass. 132 (2002).

INTERNATIONAL

U.K. to OK Transsexual Marriage. A day after the United Kingdom's High Court decided to hear a case on the validity of transsexual marriage, the government announced that transsexuals will now have the right to change their birth certificates in order to reflect their new sex, and thereby removing the legal barrier for them to marry.

Bush Appoints Gay Ambassador to Romania. President Bush appointed openly gay Michael Guest to serve as ambassador to Romania. Secretary of State Colin Powell also recognized Guest's domestic partner at the swearing-in ceremony. Guest is the second openly gay ambassador and the first to win confirmation in the Senate.

Legal Rights Should Extend to Same-Sex Couples in Province, says Alberta Report. An Alberta, Canada, government report issued in January by the province's Justice Minister Dave

Hancock recommends that the jurisdiction extend the same legal benefits to same-sex couples as currently enjoyed by married couples. The report was part of a larger family law reform package.

GENDER IDENTITY & EXPRESSION

Estate of Transgender Widow Appealed to Kansas Supreme Court. An appeal from a ruling by the Kansas Court of Appeals has been filed with the Kansas Supreme Court. The case involves disposition of the \$2.5 million estate of a man who had been married to a transsexual woman, J'Noel Gardiner. The challenge by the deceased man's son was based on the argument that the widow was still male, thus invalidating the marriage. The widow's counsel argued that if the Supreme Court fails to uphold the lower court verdict, it will in effect be supporting same-sex marriage, in that Gardiner would then be regarded as male. Lambda and GenderPAC continue to participate in this case in an *amicus curiae* capacity. *In the Matter of the Estate of Marshall G. Gardiner*, 2001 Kan. LEXIS 620.

Minnesota Supreme Court Finds Transgender Female Has No Right to Use Women's Restroom. The Minnesota Supreme Court held that a transgender worker was not entitled to use the women's restroom and denied the plaintiff's claim of a hostile work environment. Plaintiff Julianne Goins is a transgender person who has taken female hormones and presents as female. She used the women's restroom on the premises of her former employer, defendant West Group. Following complaints by female coworkers, the company instructed Goins to discontinue this practice and to use one of the single-occupancy bathrooms on the premises. She refused to comply and eventually resigned. Goins claimed this discrimination led to a hostile work environment. The court held that "the MHRA [Minnesota Human Rights Act] neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender" and that the statute could not be read so broadly as to infer such a requirement. On the plaintiff's hostile work environment claim, the court held that "the alleged conduct of coworkers, however inappropriate, was not of the type of severe or pervasive harassment required to sustain an actionable hostile work environment claim." *Goins v. West Group*, 635 N.W.2d 717 (2001). A subsequent motion for rehearing by the state Supreme Court was denied.

HATE CRIMES

Reported Hate Crimes Increase 3.5 Percent. The FBI released a report in November 2001 indicating a 3.5 percent rise in the number of reported hate crimes in 2000 from the previous year. Hate crimes against persons based on sexual orientation increased by nearly one percent. This figure stands in contrast to the broader statistical pattern indicating an overall downward trend in crime. Hate crimes against members of the gay and lesbian communities are the third largest category of hate crimes reported, following race and religion.

Lesbian Couple and Infant Narrowly Escape Disaster in Montana. Carla Grayson, Adrienne Neff and their infant son narrowly escaped their burning home alive when their home was set ablaze in February. The lesbian couple is a named party in a lawsuit challenging the University of Montana, Grayson's employer, for not providing benefits to same-sex partners. The couple began receiving threatening letters two days after filing the suit. ACLU representatives have stated their belief that the family was targeted due to the lawsuit and their participation in the suit.

New York Governor Calls for Expansion of Hate Crimes Law. New York Gov. George Pataki has called for an expansion of existing hate crimes law to include sexual orientation. The

Republican governor urged for the move during his hour-long State of the State address on Jan. 10.

Charleston, W.Va., Adds Sexual Orientation and Disability to Hate Crimes Measure. Huntington to Ponder Similar Legislation. In February, the Charleston, W.Va., City Council voted 23-3 in favor of a measure adding sexual orientation and disability to the existing list of protected classes. Three reported hate crimes based on the victim's sexual orientation occurred in the city in 2000. Huntington, W.Va., Mayor Dave Felinton plans to introduce similar legislation in the coming weeks.

MILITARY

Army Refuses to Accept Bisexual Serviceman's Resignation. The Army has refused to accept the resignation of 17-year career officer Capt. Casey Donovan, in spite of his admitted bisexuality. He has offered his resignation four times. Donovan is seeking to resign due to the fact that, as a military policeman, he feels he cannot enforce the present military policy pertaining to gays and bisexuals, and he fears personally being punished under the policy, according to published news reports. Donovan's attorney calls his request "a matter of principle."

Coast Guard Court of Criminal Appeals Holds Heterosexual Sodomy As "Indecent." The U.S. Coast Guard Court of Criminal Appeals affirmed the decision and 11-month sentence of a general court martial proceeding against a heterosexual man and his fiancée for engaging in sodomy on video in violation of the Uniform Code of Military Justice. In its November 2001 decision, the court held that "unless otherwise in violation of the law, consensual acts of sexual intercourse between unmarried participants are not indecent, if conducted in private. Sodomy is another matter, however. Private consensual sodomy, whether heterosexual or homosexual, is an offense under [the code] ... It would indeed be a tortured exercise in semantics to conclude that oral sodomy is not an indecent act." The prosecution and court holding are unusual in that the military's anti-sodomy laws are frequently applied to same-sex sexual relations, but seldom used with regard to opposite-sex relations. *United States v. Allison*, 56 M.J. 606 (2001).

South Africa Extends Benefits to Same-Sex Partners of Military Personnel. South Africa announced recently in January that same-sex partners of members of the military will receive the same benefits as legal spouses of military personnel. The move brings the country's military spouse-benefits policy into conformity with its Constitution, which prohibits sexual orientation discrimination.

Acknowledgments/Sources. In addition to primary court and legislative materials, sources for the above summaries include Prof. Arthur S. Leonard's invaluable *Lesbian/Gay Law Notes*, and materials from the American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, GenderPAC, Lambda Legal Defense & Education Fund and the National Center for Lesbian Rights. We thank these valued allies for their helpful review of, and contributions to, *LAWbriefs*.

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