Major LGBT Legal Developments of 2010

Compiled by Prof. Arthur S. Leonard, New York Law School
January 27, 2011
[based on reporting in Lesbian/Gay Law Notes]
Prepared as Course Materials for a Continuing Legal Education Program
Presented by the LGBT Law Foundation of Greater New York
in collaboration with the LGBT Affinity Group at Davis Polk

I. Most Important Constitutional LGBT Rights Cases of the Year.

1. Gill v. Office of Personnel Management, 699 F.Supp.2d 374 (D. Mass., July 8, 2010); *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d. 234 (D. Mass., July 8, 2010). U.S. District Judge Joseph Tauro ruled in *Gill* that the Defense of Marriage Act (DOMA), which precludes the federal government from recognizing validly contracted same-sex marriages for any purpose of federal law, lacks a rational justification and thus violates the 5th Amendment. In *Commonwealth of Massachusetts*, Judge Tauro ruled that DOMA violates principles of federalism and equal protection by requiring Massachusetts to discriminate against same-sex marriages in state programs that are governed by federal law requirements. The Justice Department has appealed both decisions to the U.S. Court of Appeals for the 1st Circuit. [Meanwhile, new DOMA litigation is progressing on the West Coast: *Dragovich v. U.S. Department of the Treasury*, 2011 Westlaw 175502 (N.D.Cal., Jan. 24, 2011) (Federal defendants' motion to dismiss denied, hearing set on motion for class certification).

2. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal., Aug. 3, 2010). U.S. District Judge Vaughn R. Walker ruled that Proposition 8, a California constitutional amendment enacted by public initiative providing that only the union of one man and one woman is valid or recognized as a marriage in California, violates the 14th Amendment of the United States Constitution, as there is no rational basis for a state that has extended the legal rights and responsibilities of marriage to same-sex couples in its Domestic Partnership Act to refuse to allow or recognize marriages of same-sex couples. None of the named governmental defendants participated actively in the trial, which was litigated in defense by intervenors Proponents of Proposition 8, who successfully obtained an order from the U.S. Court of Appeals for the 9th Circuit staying the ruling pending appeal. On December 6, the 9th Circuit panel heard oral arguments on whether the Proponents or Imperial County (which also sought to appeal as an intervenor) had Article III standing to appeal the district court's ruling, as well as on the merits. On January 4, 2011, the 9th Circuit panel ruled that Imperial County did not have standing to appeal, and certified the question of Proponents' standing to the California Supreme Court. See 2011 WL 17641, 17690, and 17692 (9th Cir., Jan. 4, 2011).

3. *Log Cabin Republicans v. United States of America*, 716 F.Supp.2d 884 (C.D. CA, Sept. 9, 2010; amended, Oct. 12, 2010). U.S. District Judge Virginia A. Phillips ruled that the "Don't Ask, Don't Tell" statutory policy governing military service by lesbians, gay men and bisexuals violates the 5th Amendment Due Process Clause, because the government provided insufficient

justification to meet the heightened scrutiny standard required in the 9th Circuit under *Witt v. Department of the Air Force*, 527 F.3d 806, en banc rev. denied, 548 F.3d 1264 (9th Cir. 2008). The 9th Circuit stayed the court's ruling pending the government's appeal. In December, Congress approved the "Don't Ask, Don't Tell Repeal Act of 2010," which was signed into law by President Barack Obama on December 22. The DADT policy remains in effect until the Repeal Act is implemented, which is contingent on joint written certification by the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to designated committees of Congress that necessary regulations are in place to implement service by openly gay members without compromising effectiveness of the military forces, followed by a 60-day waiting period. The Justice Department filed a motion to stay processing of the government's appeal in the 9th Circuit, and Log Cabin Republicans filed a motion encouraging the court to maintain the briefing schedule previously announced and to schedule oral argument unless the government will agree to put enforcement of DADT in abeyance. In January, the 9th Circuit temporarily suspended the briefing schedule pending a decision on the motions.

4. *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S. Ct. 2971 (June 28, 2010). The U.S. Supreme Court rejected a 1st Amendment challenge by the Christian Legal Society at Hastings Law School to the law school's refusal to extend official recognition to CLS due to the organization's membership policy, which effectively excludes "unrepentant homosexuals" and those not willing to subscribe to the particular Christian credo embraced by the national CLS organization. The Court sustained the right of the public law school to maintain a facially neutral policy under which recognized student organizations must be open to "all comers," and remanded the case for consideration whether CLS can maintain an argument raised before the Supreme Court that the law school's "all comers" policy was a pretext for discrimination on the basis of religious viewpoints. On November 17, the 9th Circuit ruled, *sub nom Christian Legal Society v. Wu*, 626 F.3d 483, that the plaintiffs had not properly preserved the question of pretext for appeal, and ordered dismissal of the case.

II. Other Significant Developments of 2010

A. United States Supreme Court Decisions

In *Hollingsworth v. Perry*, 130 S.Ct. 705 (Jan. 13, 2010), the Supreme Court blocked an order by the 9th Circuit allowing the *Perry v. Schwarzenegger* trial on the constitutionality of California Proposition 8 to be broadcast live by closed circuit transmission to several federal court houses for remote viewing of the proceedings.

In *Doe #1 v. Reed*, 130 S. Ct. 2811 (US Supreme Court, June 24, 2010), the Supreme Court held that generally signers of petitions to put initiatives on the ballot are not entitled to block a state government from allowing public access to the petitions, rejecting the argument that such disclosure would unconstitutionally burden the 1st Amendment rights of the petition signers. However, the Court recognized that upon a showing that signers were likely to be threatened with harm if their identities were revealed, there might be a justification for preserving confidentiality, and remanded for such an inquiry. The dispute arose from a ballot initiative to

repeal Washington State's recently enacted law expanding its domestic partnership provisions to embrace virtually all the state law rights and responsibilities of marriage. The ballot initiative failed at the polls.

B. Marriage Equality and Related Legislative and Executive Actions (United States)

In the United States, Illinois enacted a Civil Union Act affording state law rights of marriage to same-sex and different-sex couples, the first state to make such a legal status available without regard to the sex of the couple. It will be signed into law on January 31, 2011. The Hawaii legislature passed a same-sex civil union bill that was vetoed by Republican Governor Linda Lingle. The New Jersey Senate rejected a same-sex marriage bill. New York enacted a Family Health Care Decisions Act and a Funeral and Bereavement Leave Act that were inclusive of same-sex partners. The Minnesota legislature approved a bill that would allow surviving same-sex partners to make funeral arrangements, but Republican Governor Tim Pawlenty vetoed it as "unnecessary."

Shortly before the District of Columbia's statute authorizing same-sex marriage was to go into effect in March, Maryland Attorney General Douglas F. Gansler (Democrat), issued a formal Opinion finding that Maryland would recognize same-sex marriages contracted in other states on February 23.

The Internal Revenue Service issued a ruling that legally recognized same-sex domestic partners in states with community property laws would be subject to the same tax rules for community property that are applied to married couples. Community property states are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Of those states, California, Nevada and Washington provide legal domestic partnerships for same-sex couples, who would be affected by the ruling.

The cities of Buffalo, New York, and South Miami, Florida, extended benefits entitlements to same-sex partners of their employees, and Virginia amended its state insurance law to allow insurance companies to sell health insurance policies that cover the domestic partners of insured employees.

The American Bar Association House of Delegates approved a resolution supporting marriage for same-sex couples.

C. Marriage Equality & Couples Recognition Litigation Developments (United States)

In New Jersey, Lambda Legal asked the Supreme Court to reopen the case of *Lewis v. Harris*, arguing that the Civil Union Review Commission report finding that civil unions did not provide an equal status to marriage required the court to order the state to allow same-sex couples to marry. Ruling in *Lewis v. Harris*, 202 N.J. 340, 997 A.2d 227 (N.J. Supreme Ct. July 26, 2010), the court found that a new trial would be needed to compile a record before such a conclusion could be reached, and remanded the case for trial.

In litigation concerning state anti-marriage constitutional amendments, the Wisconsin Supreme Court ruled in *McConkey v. Van Hollen*, 783 N.W.2d 855, 2010 WI 57 (June 30, 2010), that an initiative amendment that banned same-sex marriages or any other similar status did not violate the "single subject" rule for ballot questions, and the Ohio 8th District Court of Appeals ruled in *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, 2010-Ohio-4685, 2010 WL 3816393 (Sept. 30, 2010), that the state's amendment did not prevent the city of Cleveland from establishing a domestic partnership registry open to same-sex couples.

In *Jackson v. D.C. Board of Elections and Ethics*, 999 A.2d 89 (D.C.Ct.App., July 15, 2010), the District of Columbia Court of Appeals held that petitioners were not entitled to a referendum on the recently enacted district law authorizing same-sex marriages. Appellants' petition to the Supreme Court for review was denied on January 18, 2011.

In *Collins v. Brewer*, 727 F.Supp.2d 797 (D. Ariz., July 23, 2010), the federal district court preliminarily enjoined operation of a state law withdrawing health insurance coverage from same-sex partners of state employees who had been receiving benefits under prior law, pending a ruling on the merits of their equal protection claim.

A legislative proposal to repeal the Defense of Marriage Act and provide that the federal government recognize same-sex partners for various purposes was pending in Congress but did not advance during 2010.

D. International Developments on Marriage Equality and Legal Rights of Same-Sex Couples

Same-sex couples won the right to marry during 2010 in Argentina, Iceland, Portugal, and Mexico City. The Supreme Court of Mexico ruled that marriages contracted in Mexico City must be recognized as valid throughout the country. In Costa Rica, the Supreme Court blocked a referendum against same-sex marriage, on the ground that the rights of minorities may not be subjected to referendum vote. The Republic of Ireland enacted a civil partnership law for same-sex couples.

The European Court of Human Rights issued several decisions concerning legal rights of same-sex couples under the European Convention on Human Rights. In *Kozak v. Poland*, Application No. 13102/02 (ECHR, March 2, 2010), the Court found that Poland violated the Convention by refusing to recognize a same-sex couple for tenant succession purposes. In *P.B. and J.S. v. Austria*, Application No. 18984/02 (July 22, 2010), the Court held that Austria had violated the Convention by denying spousal insurance coverage to same-sex partners of civil servants from 1997 until 2007. However, in *Schalk and Kopf v. Austria*, Application No. 30141/04 (June 24, 2010), the Court rejected the claim that Austria must open the right to marry to same-sex partners, finding that there was not yet a European consensus on the topic and that Austria had satisfied whatever equality claims might be made under the Convention when its recent registered partnership law went into effect.

Italy's highest constitutional court rejected a claimed right of same-sex couples to marry in *G.M. & S.G.*, Italian Corte Constituzionale, Sentenza No. 138/29010 (April 14).

E. Divorce

With Canada and several U.S. states allowing same-sex marriages, domestic partnerships and civil unions, the issue of whether and where legally-united same-sex couples who live in other states can obtain divorces or legal dissolution of their status has taken on increased significance, and prompted litigation during 2010.

In New York, the Appellate Division, 3rd Department, ruled in *Dickerson v. Thompson*, 897 N.Y.S.2d 298 (March 18, 2010), that the New York Supreme Court has jurisdiction to dissolve a Vermont civil union. Later in the year, New York became virtually the last state to enact a No-Fault Divorce Law. The legislative history incident to passage of the law indicates in a committee memorandum that divorce is to be available to same-sex couples married in other jurisdictions.

In Oklahoma, however, the Court of Civil Appeals ruled in *O'Darling v. O'Darling*, Case No. 106,732 (March 11, 2010), that Oklahoma courts did not have jurisdiction to grant a divorce to a same-sex couple married in Canada, and a Texas Court of Appeals panel in *Marriage of J.B. and H.B. in re State of Texas*, 2010 WL 3399074 (August 31, 2010), reached a similar conclusion, opining that failure to afford a divorce to a same-sex couple did not violate the 14th Amendment of the U.S. Constitution. However, in *Naylor v. Daly*, 2011 WL 56060 (Jan. 7, 2011), a case arising in a different district in which an Austin trial judge granted a divorce to a lesbian couple who had married in Massachusetts, a different panel of the Texas Court of Appeals dismissed the state's attempt to appeal the ruling as untimely and found that it would be possible, hypothetically, to construe Texas's Defense of Marriage Act to allow Texas courts to grant divorces in such cases.

Late in the year, the Washington State Appellate Division ruled in *In re the Meretricious Relationship of Long and Fregeau*, 2010 WL 5071860 (Dec. 14, 2010), that equitable distribution principles could be applied by the court to address property division issues of terminated same-sex unregistered domestic partnership.

F. Adoption of Children

In 1977, Florida adopted a ban on adoption of children by "practicing homosexuals" in response to the Anita Bryant "Save Our Children" campaign. That statute survived several rounds of constitutional challenges in federal and state courts over the ensuing decades, but was declared to violate the equal protection requirements of the Florida Constitution in *Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G.*, 45 So.3d 79 (Fla.Ct.App., 3rd Dist., Sept. 22, 2010). The 3rd District Court of Appeal panel concluded that no rational basis for the categorical exclusion of gay people from eligibility to adopt children had been demonstrated, the Department of Children and Families announced its willingness to

comply with the order, and the Attorney General and Governor did not initiate any appeal. Although technically the ruling is only binding within the 3rd Judicial District, it seemed likely that it would have statewide effect, ending the only state statutory categorical ban on a gay adult adopting a child. Some other states ban adoptions by same-sex couples, or express various preferences that disadvantage gay single adults who seek to adopt, but no other state categorically banned adoptions based on the parent's sexual orientation. In one such state, Arkansas, a trial judge ruled in *Cole v. Arkansas Department of Human Services*, No. 60CV-08-14284 (Pulaski County Circuit Court, April 16, 2010), that the "Arkansas Adoption and Foster Care Act of 2008," enacted by initiative to prevent gay people from adopting children, violates the Arkansas Constitution.

The U.S. Court of Appeals ruled in *Adar v Smith*, 597 F.3d 697 (5th Cir. Feb. 18, 2010), that Louisiana was required to extend full faith and credit to a New York court adoption decree as a "judgment" in a case involving a gay male couple who had adopted a child who was born in Louisiana. The men applied for a new Louisiana birth certificate for the child listing them as the parents, which is normally a routine procedure after an adoption. The Louisiana official charged with providing such documents refused on the ground that Louisiana does not perform such adoptions. The state petitioned for en banc review, which was granted, and argument was held in January.

During 2010, New York enacted the Intimate Partners Adoption Act, allowing joint adoptions by unmarried intimate same-sex and different-sex couples. Second-parent adoptions were already allowed in New York pursuant to a decision by the Court of Appeals, but the question of joint adoptions was unsettled prior to passage of the new law. Although several states allow joint adoptions or second-parent adoptions for same-sex couples, some state courts have refused to construe their adoption laws to permit such "unconventional adoptions" without express legislative authorization. In *Boseman v. Jarrell*, 2010 WL 5246132 (Dec. 20, 2010), the North Carolina Supreme Court ordered that a second-parent adoption that had been granted by a lower court be voided, finding that state law does not allow such proceedings, but affirmed a visitation order on behalf of the "non-biological" mother that had been granted by the lower court. In *Adoption of T.A.M. and E.J.M. v. L.A.M.*., 791 N.W.2d 573 (Dec. 14, 2010), the Minnesota Court of Appeals held that an attempt by a birth mother to get an order voiding an eight-year-old second-parent adoption decree was untimely, but reversed sanctions ordered by the trial court against plaintiff and her counsel, finding that the question whether second-parent adoptions can be ordered by Minnesota courts was not yet resolved at the Appellate level, so arguing in litigation that such an adoption decree was void was not sanctionable conduct.

G. Child Custody, Visitation & Support & Parental Rights and Obligations

The New York Court of Appeals ruled in two important cases on May 4, 2010. In *Debra H. v Janice R.*, 14 N.Y.3d 576 (May 4, 2010), the court refused to overrule *Alison D. v. Virginia H.*, under which a same-sex partner who has not adopted a child has not standing to seek custody or visitation upon termination of her relationship with the child's legal parent, but held that New York courts would recognize parental rights established under a Vermont civil union under

comity principles and thus allow the parent's civil union partner to seek the same custody and visitation rights that Vermont law would authorize in such a case. In *H.M. v. E.T.*, 14 N.Y.3d 521 (May 4, 2010), the court held that a New York trial court would have jurisdiction of a child support suit against a same-sex co-parent under the Uniform Interstate Family Support Act. In this case, the Appellate Division affirmed the trial court's support order on remand, 906 N.Y.S.2d 85 (N.Y.App.Div., 2nd Dept., Aug. 3, 2010).

Since 1985, Pennsylvania courts have applied a presumption against custody for gay parents in disputes with their non-gay former spouses, but the presumption was finally overturned by the Superior Court (an intermediate appellate court) in *M.A.T. v. G.S.T.*, 989 A.2d 11, 2010 PA Super. 8 (Jan. 21, 2010).

In *In re Richard P.*, 2010 WL 2723185 (July 9, 2010), the West Virginia Supreme Court rejected an attempt to use the device of a guardianship appointment to provide a legal relationship between a same-sex co-parent and the children of her partner in a jurisdiction that does not have second-parent adoption or any legal recognition for same-sex partners. The court held that the couple could use powers of attorney and other legal documents to achieve most of the ends they sought, and that it was up to the legislature whether to provide a legal status in such situations.

In *In re LaPiana*, 2010-Ohio-3606, 2010 WL 3042394 (Ohio Ct App., 8th Dist., Aug. 5, 2010), the appellate court affirmed a visitation order for a lesbian co-parent over the protest of her former same-sex partner, who is the biological mother of their children. In *Miller-Jenkins v. Miller-Jenkins*, 2010 VT 98 (Vermont Supreme Ct., Oct. 29, 2010), a long-running dispute between former Vermont civil union partners, the court affirmed transfer of custody from the birth mother to the lesbian co-parent, in the face of the birth mother's contemptuous refusal to comply with prior visitation orders and disappearance with the child. The child was born while the parents were civilly-united. The birth mother moved with the child to Virginia and initiated a Vermont proceeding to dissolve the civil union, in which the court granted visitation rights to the former partner. The birth mother, who had become a "born again Christian" and wanted her child to have no contact with her former partner, litigated in both Virginia and Vermont and sought U.S. Supreme Court review, but eventually disappeared with the child when it became obvious that the courts were not going to rule in her favor. The Virginia courts had ruled that under the federal Parental Kidnapping Prevention Act, 28 USC 1738A, they did not have jurisdiction over the case since it had been initiated in the Vermont courts, which had proper jurisdiction. In *Ex parte N.B. (In re A.K. v. N.B.)*, 2010 WL 2629064 (June 30, 2010), the Alabama Supreme Court came to essentially the same conclusion when a birth mother sought a ruling excluding her former domestic partner from contact with their child when an action on this subject was already pending in California.

In the strange case of *Curtis v. Prince*, 2010-Ohio-5999, 2010 Westlaw 5071195 (Ohio Ct. App., 9th Dist., Dec. 8, 2010), the court held that a gay sperm donor who had obtained a paternity declaration from court after the child conceived with his sperm was born, must pay child support to the lesbian couple raising the child, even though their original agreement did not impose any support obligation on him, as the best interest of the child prevails over any such agreement.

H. Student Rights

In a case that drew international media attention, *McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (U.S. Dist. Ct., N.D. Miss., March 23, 2010), the court ruled that a public school district violated the 1st Amendment rights of a lesbian high school student who wanted to attend her senior prom with a same-sex date wearing a tuxedo when the school cancelled the prom rather than accommodate the student. Upon the school's assurance that a group of parents was organizing an alternative prom to which the plaintiff and her date would be invited, the court declined to order the school district to hold the prom. The "alternate prom" turned out to be a sham, and ultimately the court awarded damages to the plaintiff, who has become an LGBT rights spokesperson on the national circuit.

Federal courts in cases involving two different universities have held that counseling students may not insist upon being excused from training to counsel gay people due to their religious beliefs. *Ward v. Wilbanks*, 2010 WL 3026428 (E.D.Mich. July 26, 2010) (Eastern Michigan University); *Keeton v. Anderson-Wiley*, 2010 WL 3321873 (S.D.Ga., Aug. 20, 2010) (Augusta State University). In both cases, the court ruled that the schools did not violate the 1st Amendment when they insisted on a curriculum reflecting the counseling profession's ethics code concerning non-discrimination in serving clients, and required students to fulfill the curricular requirements.

Illinois, New York and Massachusetts enacted anti-bullying laws that included sexual orientation and gender identity. In New York, the law is called the Dignity for All Students Act.

I. Criminal Law

New York repealed provisions of its Penal Code prohibiting loitering for the purpose of soliciting deviate intercourse. The provisions in question had been declared unconstitutional by the New York Court of Appeals in the 1980s, but that police officers around the state were continuing to enforce them. In one recent case, *Amore v Novarro*, 610 F.3d 155 (2nd Cir., June 22, 2010) the 2nd Circuit ruled that a local upstate police officer was immune from personal liability for arresting somebody under the unconstitutional law, because the statute was still on the books and in training materials distributed by his employer. However, in another case, *Casale v Kelly*, 710 F.Supp.2d 347 (S.D.N.Y., April 26, 2010), a federal district court held New York City in contempt for continued enforcement of the law, and imposed a continuing fine so long as unconstitutional arrests continued to be made. This finally spurred the legislature to action.

In *Ochoa v. Texas*, 2010 WL 4910900 (Tex. App. Ct., Dec. 2, 2010), the Texas Court of Appeals ruled that the state's domestic violence law, which applies to couples in "dating relationships," includes same-sex dating relationships. The court rejected the defendant's argument that the legislature that enacted the statute could not have intended that result because at the time Texas had a criminal ban on homosexual sodomy. The court reasoned that domestic violence victims

who were engaged in then-illicit relationships might have special need for protection against violence by their partners.

In the continuing sex-toys wars, the Alabama Supreme Court rejected a constitutional challenge to a state law criminalizing the sale of sex toys in *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So.3d 319 (March 5, 2010). The federal circuit courts are divided over whether such laws remain constitutional in light of the U.S. Supreme Court's due process ruling in *Lawrence v. Texas* (2003). The 11th Circuit, in which Alabama is situated, has upheld such laws, but the 5th Circuit struck down a similar law from Texas.

United States v. Little, 365 Fed.Appx. 159 (11th Cir., Feb. 2, 2010), is one of several 2010 rulings by courts rejecting the argument that federal obscenity laws are unconstitutional under the holding of *Lawrence v. Texas*.

J. Anti-Discrimination Law

Several jurisdictions legislated on sexual orientation (and in many cases gender identity) discrimination during 2010. In Florida, Leon and Orlando counties adopted anti-discrimination ordinances including sexual orientation and gender identity, and the City of Miami Beach amended its ordinance to add gender identity. In Indiana, Monroe County legislated against discrimination on the basis of sexual orientation and gender identity. In Michigan, Traverse City adopted a sexual orientation discrimination ban. In Missouri, Governor Jay Nixon issued Executive Order 10-24 banning sexual orientation discrimination by state agencies. Missoula, Montana, adopted a city ordinance banning sexual orientation and gender identity discrimination. In Tulsa, Oklahoma, and Bellevue and Lower Merion, Pennsylvania, discrimination based on sexual orientation and gender identity in public employment was banned. Oak Ridge, Tennessee, adopted a city charter amendment banning employment discrimination on the basis of sexual orientation by the city government. Many jurisdictions in Utah – including the cities of Logan, Moab and Murray and Summit and Grand counties - have adopted ordinances banning sexual orientation and gender identity discrimination. The developments in Utah can be traced by a change in the position of the Mormon Church, which has dropped its formal opposition to anti-discrimination bans, leading to widespread local government activity in the face of continued opposition by the Republican-dominated state legislature. In an instance of backsliding, however, Republican Governor Robert McDonnell of Virginia did not continue the ban on sexual orientation adopted by his Democratic predecessors, issuing an executive order that banned discrimination generally without specifying prohibited grounds. The resultant uproar when the vitriolically anti-gay Republican Attorney General, Kenneth Cuccinelli, advised various public universities that they must end their sexual orientation discrimination policies, led Governor McDonnell to issue a "directive" against sexual orientation discrimination in state agencies.

The Employment Non-Discrimination Act (ENDA), a bill that would adopt a federal ban on employment discrimination based on sexual orientation and gender identity, picked up additional sponsorship during the 111th Congress, but did not come to a vote in either house. A measure to

amend federal fair housing law to add sexual orientation and gender identity as prohibited grounds for discrimination was introduced in Congress but did not advance.

In *Rohn Padmore, Inc. v. LC Play Inc*., 679 F.Supp.2d 454 (S.D.N.Y., Jan. 11, 2010), the U.S. district court held that a person employed outside New York state by a company headquartered in New York can have benefit of New York state's ban on sexual orientation discrimination, where a contested discriminatory personnel decision was made in the New York headquarters office, but this holding was effectively rejected by the New York Court of Appeals in *Hoffman v. Parade Publications*, 15 N.Y.3d 285, 933 N.E.2d 744 (July 1, 2010), holding that New York's Human Rights Law did not have such extra-territorial application.

Among the many employment discrimination cases litigated around the country during 2010, there were a few noteworthy rulings. In *Glenn v. Bumbry*, 724 F.Supp.2d 1284 (N.D. Ga., July 2, 2010), the district court ruled that heightened scrutiny applies to an equal protection claim brought by a transgender public employee suing for wrongful discharge, and in *Michaels v. Akal Security, Inc.*, 2010 WL 2573988 (D.Colo., June 24, 2010), the district court refused to grant summary judgment against the plaintiff in sex discrimination case brought by a transgender federal employee under Title VII and 5th Amendment.

In *Witt v. U.S. Department of the Air Force*, 2010 WL 3732189 (W.D.Wash., Sept. 24, 2010), the district court ruled on remand from the 9th Circuit that the government had failed to justify the discharge of lesbian Air Force Reserve Nurse Major Margaret Witt, and ordered her reinstatement. The Justice Department appealed the case to the 9th Circuit, but it may eventually be mooted when the "Don't Ask, Don't Tell Repeal Act of 2010" takes effect.

In a rather far-fetched ruling, the California 4th District Court of Appeal found that some non-gay firefighters had stated a cause of action for hostile environment harassment under the California Fair Employment and Housing Act when they were required to operate fire-fighting equipment in the San Diego Gay Pride March and were subjected to cat-calls and verbal sexual propositions from on-lookers. *Ghiotto v. City of San Diego*, 2010 WL 4018644 (Cal.Ct.App., 4th Dist., Oct. 14, 2010). Considering the high bar set by federal courts in hostile environment cases under Title VII, this ruling appears to be "quite a stretch." The Fire Department changed its policy after this case was initiated to assign parade duty on a voluntary basis.

During 2010, Albania and the United Kingdom enacted statutes banning sexual orientation discrimination.

K. Asylum, Withholding of Removal, and Convention Against Torture Cases.

As in the past, gay people seeking asylum or other protection in the United States who sought to appeal adverse rulings by Immigration Judges and the Board of Immigration Appeals achieved little success in the Courts of Appeals. In some cases, this was because improving conditions for gay people in some countries – most notably in parts of Central and South America, such as Mexico, El Salvador, and Colombia – undermined their arguments that they would be subjected

to persecution or torture if returned to their homelands, but in most cases the denials were due to credibility problems, as applicants were sometimes closeted in the process until relatively late, and then were caught in the disparities between their statements on arrival and their assertions at hearings. However, in a few cases, the circuit courts vacated rulings and returned petitioners to the administrative process upon finding significant flaws in the way their cases were handled. In *Ayala v. U.S. Attorney General*, 605 F.3d 941 (11th Cir., May 7, 2010), a case involving a gay, HIV-positive man from Venezuela, the court found the BIA decision to be "riddled with error," and in *Todorovic v. U.S. Attorney General*, 621 F.3d 1318 (11th Cir., Sept. 27, 2010), court found that the Immigration Judge had engaged in stereotyping of homosexuals, refusing to credit the applicant's testimony because he did not appear to be gay to the judge, an error compounded by the BIA.

In a significant ruling from the United Kingdom, *H.J. (Iran) & H.T. (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31 (July 7, 2010), that country's brand-new Supreme Court rejected the Home Office's argument that gay people from Iran or Cameroon should be denied asylum because they could escape persecution in their home countries by concealing their identity and refraining from associating with other gay people. U.S. courts have long since gotten past this point.

Although proposals to extend immigration rights to same-sex partners of United States citizens and legal residents picked up additional sponsorship and attention in Congress during 2010, and won incorporation in some versions of overall immigration reform bills, no legislative action was taken.

L. Transgender Law

In addition to developments noted above, there were some positive developments during 2010 regarding financing for medical treatment for gender transition. In *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. No. 4, Docket No. 6402-06 (U.S. Tax Court Feb 2, 2010), the United States Tax Court finally held that costs of gender transition procedures are deductible medical expenses under the Internal Revenue Code, rejecting the Internal Revenue Service's long-time position that such expenses are non-deductible as cosmetic treatment.

In *Fields v. Smith*, 712 F.Supp.2d 830 (E.D.Wis., May 13, 2010), the district court ruled that a state law forbidding payment for medical treatment for transgender prison inmates violates the 8th Amendment), and the same court, in another case involving a transgender inmate, ruled in *Konitzer v. Frank*, 711 F.Supp.2d 874 (E.D.Wis., May 10, 2010), that the prison may not forbid a transgender inmate to live as a woman.

M. Executive and Administrative Policy Changes by the Obama Administration

Among the many adjustments to executive branch policy noted during 2010:
– The Office of Personnel Management (OPM) added "gender identity" as a forbidden ground of

discrimination listed on the federal jobs website in January
– OPM published a final regulation extending access to federal long-term disability insurance for same-sex partners of federal employees and expanded the definition of "family member" to include same-sex families for leave policies
– OPM's 24-hour "leave without pay" policy was extended to federal employees with same-sex partners
– A June 2, 2010, Presidential Memo directed extension of some non-statutory benefits to same-sex partners of federal employees
– The State Department dropped a requirement that transgender individuals provide medical evidence of surgical alteration as a prerequisite to change of gender status on passports
– The Department of Housing and Urban Development modified non-discrimination requirements attached to federal housing money to require compliance with all state and local anti-discrimination laws, thus bringing into play state and local laws banning sexual orientation discrimination (and in many place, gender identity discrimination)
– The Department of Labor expanded the definition of "in loco parentis" to bring care for a same-sex partner's child within the ambit of the Family and Medical Leave Act, affording unpaid leave to employees in companies with 50 or more employees
– The Department of Health and Human Services issued final regulations requiring health care institutions to have written visitation policies that include same-sex partners of patients
– The General Services Administration adopted definitions of domestic partners and immediate family members that will include same-sex partners for purposes of federal employee travel and relocation policies
– The Defense Department, anticipating the repeal of the DADT policy, required that decisions to discharge uniformed personal for violation of that policy must be approved by high level officers in the Pentagon. The result was a near-halt in discharges during the last few months of the year, although the Department insisted that the policy would remain in effect until the repeal statute was implemented, and opposed lifting the stay in the 9th Circuit in the government's appeal of *Log Cabin Republicans v. United States*.
– Early in January 2011, the State Department announced a modification in forms used to generate birth certificates for children born overseas to American citizens. At first, the parental designations were to be gender neutral, but responding to political concerns, the Department indicated that parents would have the option of being listed as mother and father or alternatively as first and second parents.

N. Miscellaneous Cases on Political Rights - International

In *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582 (April 8, 2010), the Supreme Court of the Philippines ordered that a gay rights party be included in national election balloting for the new Parliament.

In *The Jerusalem Open House for Pride and Tolerance vs. The Municipality and the Mayor of Jerusalem*, Administrative Petition Appeal 343/09 (Sept. 14, 2010), the Supreme Court ruled that Jerusalem's gay community center was entitled to municipal financing on the same basis as other similar programs received funding. In Israel, municipalities provide substantial financial support

for community organizations and institutions. The municipality of Jerusalem is one of the few cities in Israel where religious conservatives, who are concentrated in the city, hold major sway over municipal purse-strings and have been opposed to distributing public funds to a gay organization. Funding from the municipality will enable Jerusalem Open House to place its administration on a more secure footing and expand its active social service programs

In *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09 (Oct. 21, 2010), the European Court of Human Rights ruled that gay activists in Moscow had been wrongly denied permits to hold peaceful gay rights demonstrations. Shortly after the court's ruling, the Moscow municipality issued its first permit for such an event, and the president of Russia removed from office the major of Moscow whose outspoken opposition to allowing gay rights advocates to congregate publicly had been the focus of the litigation (although it would be overstating things to claim that this was the only issue motivating the removal of the mayor, who was seen as an oppositional force to the political interests of the president and prime minister in upcoming national elections.