

Marriage Law Digest

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APRIL 2008 CASE SUMMARIES

William C. Duncan, Editor

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MARUKO V. VERSORGUNGSANSTALT DER DEUTSCHEN BUHNEN

Case C-267/06

European Court of Justice

April 1, 2008

[http://curia.europa.eu/jurisp/cgi-bin/
gettext.pl?where=&lang=en&num=79919
598C19060267&doc=T&ouvert=
T&seance=ARRET](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919598C19060267&doc=T&ouvert=T&seance=ARRET)

The German Theatre Pension Institution refused to recognize a same-sex partner's "entitlement to a widower's pension as part of the survivor's benefits" offered as part of theatre worker's pensions. The court first held that the European Community's anti-discrimination directive applies to this pension plan. The court then said the Institution's pension regulations treat "life partners" "less favourably than surviving spouses as regards entitlement to that survivor's benefits" even though partners "are in a comparable situation so far as regards entitlement to that survivor's benefit." The court said Community law precludes legislation where "the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit." The court concluded that the trial court must "determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme" managed by the Institute.

LOPEZ V. RIVER OAKS IMAGING
2008 WL 902937

**U.S. District Court, Southern District of
Texas**
April 3, 2008

A man who “suffers from Gender Identity Disorder,” “lives her life as a woman,” and “plans to undergo sex reassignment surgery” sued for sex discrimination when she claims an employment offer was withdrawn when the employer learned he was not a woman. The argument is that the job offer was rescinded because of a failure “to conform with traditional gender stereotypes.”

The court relied on the U.S. Supreme Court’s decision, *Price-Waterhouse v. Hopkins*, which held that a company’s failure to promote a woman who acted “masculine” was sex discrimination. The court said there was evidence that the company had refused plaintiff employment “because she failed to comport with certain River Oaks employees’ notions of how a male should look.” The court thus refused to rule for either party until there was more fact-finding about the reason the company had withdrawn the job offer.

WILLOCK V. ELANE PHOTOGRAPHY
HRD No. 06-12-20-0685

New Mexico Human Rights Commission
April 9, 2008

<http://www.telladf.org/UserDocs/ElaneRuling.pdf>

A photographer refused to photograph a same-sex commitment ceremony for a woman

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who then filed a complaint with the New Mexico Human Rights Commission.

The Commission issued a terse order that the photographer discriminated against the woman and awarded attorney’s fees and costs to the complainant.

COMMONWEALTH V. ORA
SJC-10019

Supreme Judicial Court of Massachusetts
April 10, 2008

<http://www.masslaw.com/signup/opinion.cfm?page=ma/opin/sup/1007008.htm>

Defendant, charged with “open and gross lewdness . . . for dancing nude at an ‘anti-Christmas’ protest” in Harvard Square alleged the charging statute was unconstitutional.

The court said that its previous decisions meant the statute did not apply to nudity before a “willing audience” but that its application in this case was constitutional because it “furthers the important State interest in preventing fright or intimidation from intentional lewd and lascivious conduct imposed on unsuspecting or unwilling persons, particularly children.”

O’HAIRE V. NAPA STATE HOSPITAL
2008 WL 906363

**U.S. District Court, Northern District of
California**
March 31, 2008

An inmate of an state mental hospital alleged the hospital denied him and other patients “the opportunity to engage in consensual sexual relations without regard to sexual orientation,” specifically that opposite-sex intimacy was allowed while same-sex intimacy was not.

The court responded that homosexual persons are protected by the U.S. Constitution’s equal protection clause so the hospital must show a legitimate government

interest to justify any differential treatment. So, the court allowed the case to go forward towards the fact-finding stage.

**MIKEN V. HIND
FM-08-947-07**

**New Jersey Superior Court, Family Division
Gloucester County
January 10, 2008**

A same-sex couple sought dissolution of their domestic partnership “on the grounds of irreconcilable differences.”

The court ordered the dissolution and divided the couple’s property. The court said it was applying “old principles to new situations” and suggested “the terminology needs to be redefined, or if not redefined, then perhaps defined in the old sense, and applied to these parties. And perhaps, to that extent, both the Courts and the legislature will catch up to us at some point.”

**MILLIGAN-HITT V. BOARD OF
TRUSTEES OF SHERIDAN COUNTY
SCHOOL DISTRICT NUMBER 2**

Nos. 06-8086 & 06-8087

**U.S. Court of Appeals, Tenth Circuit
April 22, 2008**

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=32233>

Same-sex partners sued a school superintendent and school district after the school district refused to hire them (they had previously worked in the district at other jobs but had to apply for new jobs when the old ones were eliminated). The suit against the superintendent was dismissed based on the principle of qualified immunity. A jury subsequently found that the district had violated the constitutional rights of the plaintiffs based on the actions of the superintendent.

The appeals court reversed because it held the district could not be held liable for the

actions of its employee since he was not the final decisionmaker. The court also held that at the time of the relevant conduct, the legal standard was that “municipal officials may sometimes defer to community standards when discriminating on non-suspect grounds” and *Romer v. Evans* had not clearly invalidated this standard. Thus, since the superintendent did not violate a “clearly established” constitutional rule when he acted, he could not be personally liable for the results of those actions.

**NUXOLL V. INDIAN PRAIRIE SCHOOL
DISTRICT #204**

No. 08-1050

**U.S. Court of Appeals, Seventh Circuit
April 23, 2008**

<http://www.ca7.uscourts.gov/tmp/CR1FG6TG.pdf>

A high school sophomore sought to compel his high school to allow him to wear a shirt with the slogan “Be Happy, Not Gay.” The court approved the school’s policy of preventing speech that would disrupt the school’s learning environment but found that the proposed slogan was “only tepidly negative” and that “it is highly speculative that allowing the plaintiff to wear a T-shirt” with the slogan could provoke harassment of homosexual students or “poison the educational atmosphere” so the school could not justify its ban on this slogan.

One judge concurred but felt that the U.S. Supreme Court’s decision in *Tinker v. Des Moines* allowing a student to wear an armband to protest the Vietnam War made the decision easier than the majority believed. This judge said “there is no doubt that the slogan is disparaging” but “it is not the kind of speech that would materially and substantially interfere with school activities.”

RECENT LAW REVIEW ARTICLES

Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage* 17 UCLA WOMEN'S LAW JOURNAL 53 (2008). Argues that marriage transmits the virtue of autonomy in a "modern, liberal, tolerant democracy" and that redefining marriage to include same-sex couples would advance this transmission.

Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage* 51 HOWARD LAW JOURNAL 117 (2007). Argues that the proposed analogy between same-sex marriage and interracial marriage is fundamentally flawed on many levels.

Libby Adler, *The Dignity of Sex* 17 UCLA WOMEN'S LAW JOURNAL 1 (2008). Argues that courts in many jurisdictions have given constitutional protection to sex occurring in the context of certain "normatively privileged relationships," thus "degrading" other kinds and leading to "injurious consequences for sex generally."

Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy* COLUMBIA JOURNAL OF GENDER & LAW at SSRN. Argues that "traditionalist" opposition to same-sex marriage is a "cultural property" claim and concludes that marriage should be "disestablished" so as to allow a multicultural solution to the controversy over marriage.

Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event* TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW at SSRN. Argues that concerns about federalism and localism in the same-sex marriage debate are tactical issues and the main issue is disagreement over gender and sexual identity in individuals.

Jessica L. Roberts, *To Have and to Uphold: Marriage Regulation, Traditional Family Values Rhetoric, and the Politics of Preservation* at SSRN. Argues that the arguments used in anti-same-

sex marriage movements are the same as those used in favor of anti-miscegenation laws.

Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents* 9 JOURNAL OF LAW & FAMILY STUDIES 209 (2007). Argues that parenthood should be redefined so as to allow more than two people to have relative parenting roles in a child's life.

Nicholas A. Mirkay III, *Losing Our Religion: Reevaluating the 501(c)(3) Exemption of Religious Organizations that Discriminate* WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER No. 08-35 (2008). Argues for a nondiscrimination requirement (primarily for sexual orientation and marital status) on which tax exempt status would be contingent.

Luke A. Boso, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool* 110 WEST VIRGINIA LAW REVIEW 843 (2008). Suggests tactics and legal arguments for suing sperm banks and clinics that have adopted the FDA recommended guideline preventing donation of sperm by men who have had sex with other men.

Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees* VILLANOVA LAW/PUBLIC POLICY RESEARCH PAPER No. 2008-14 at SSRN (April 2008). Argues that while domestic partner benefits for public employees may run afoul of state marriage amendments prohibition of the creation of legal statuses for same-sex couples, these amendments are not similar enough to marriage to be invalidated by the amendments.

Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling* 96 CALIFORNIA LAW REVIEW 123 (2008). Argues that state and federal constitutions require the government to closely regulate homes schooling.