

CLIENT ALERT

Employment & Labor

November 2006

Volume VIII No. 7

New Jersey's Same-Sex Ruling Will Affect Employee Rights

The New Jersey Supreme Court recently held that the State Constitution's guarantee of equal protection entitles same-sex couples to the same rights and benefits as heterosexual couples. The Court, in *Lewis v. Harris*, left the choice of whether to recognize same-sex marriage or same-sex civil unions to New Jersey's legislature, but employers should be prepared because either outcome will affect employee rights.

The Facts

The plaintiffs were seven same-sex couples involved in relationships lasting more than ten years. They included two pastors in a relationship for fourteen years, couples who either adopted children together or conceived through artificial insemination, and a couple who jointly owned a business. According to the Supreme Court, "[i]n terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples."

Each couple's application for a marriage license was denied on the ground that the law did not permit same-sex marriage. The plaintiffs filed a lawsuit against the State in Superior Court, alleging that the marriage laws discriminated against same-sex couples in violation of the New Jersey Constitution.

The Trial Court

The trial court granted the State's motion for summary judgment. The court held that the state Constitution does not include a fundamental right to same-sex marriage and that the prohibition on same-sex marriage does not violate the equal protection guarantee of the New Jersey Constitution because "limiting marriage to mixed-gender couples is a valid and reasonable exercise of

government authority." The court advised the plaintiffs that it was not for the courts to change the marriage laws, and recommended that they petition the legislature for a change.

The Appellate Division

The Appellate Division affirmed. The Appellate Division agreed with the trial court's conclusion that same-sex marriage is not a fundamental right protected by the New Jersey Constitution and also rejected plaintiffs' equal protection claim.

In a concurring opinion, Judge Parillo noted that the relief that plaintiffs were seeking had two separate components: "the right to marry and the rights of marriage." Judge Parillo suggested that because same-sex couples cannot marry, they are denied many of the rights and benefits that the State bestows upon heterosexual married couples. Like the trial court, Judge Parillo advised the plaintiffs that the legislature, not the courts, was the appropriate body to change the marriage laws.

The Supreme Court

The Supreme Court reversed. The Court agreed with the Appellate Division's decision that same-sex marriage is not a fundamental right protected by the New Jersey Constitution. The Court disagreed, however, with the lower courts' construction of the State Constitution's equal protection guarantee. According to the Supreme Court, denying the rights and benefits of marriage to same-sex couples violates the equal protection guarantee of the New Jersey Constitution.

In reaching its decision, the Court first discussed plaintiffs' contention that same-sex marriage is a fundamental right under the New Jersey Constitution. The Court explained that to determine if a right is fundamental, "[f]irst, the asserted fundamental liberty interest must be clearly

identified,” and “[s]econd, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State.” The Court noted that despite recent changes in the country’s attitudes toward gays and lesbians, the drafters of the New Jersey Constitution could not have meant “marriage” to include same-sex marriage.

The Court also stated that the plaintiffs’ reliance on landmark United States Supreme Court cases such as *Romer v. Evans* (holding that Colorado’s Constitutional amendment prohibiting all state action aimed at combating sexual orientation discrimination violated the federal Constitution), *Lawrence v. Texas* (holding that a Texas law forbidding sodomy violated the federal Constitution), and *Loving v. Virginia* (holding that a Virginia law prohibiting interracial marriage violated the federal Constitution) was misplaced. According to the New Jersey Supreme Court, *Romer* and *Lawrence* did not establish a fundamental right to same-sex marriage, while *Loving* involved heterosexual couples and, therefore, was not directly applicable to the plaintiffs’ case.

Finally, the Court explained that the U.S. Supreme Court has recommended caution in the creation of fundamental rights. As a result, New Jersey courts “must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State.” In light of all of these considerations, the Court held that there is no fundamental right to same-sex marriage under the New Jersey Constitution.

The Court then considered plaintiffs’ equal protection claim. The Court explained that the State Constitution does not expressly provide that every

person is entitled to the equal protection of the laws, but that guarantee has been inferred from the Constitution’s reference to every person’s “unalienable rights” to enjoy life, liberty, property and happiness.

The Court indicated that equal protection analysis involves two issues. First, the Court considered whether same-sex couples enjoy the same rights and benefits that heterosexual couples receive upon marriage. Second, the Court considered whether, assuming that same-sex couples are entitled to such rights and benefits, same-sex couples have a constitutional right to define their relationship as marriage.

The Court began by describing New Jersey’s changing attitude toward gays and lesbians over the past thirty-five years. The Court considered areas in which New Jersey law grants homosexuals the same rights and benefits as heterosexuals, as well as areas in which it does not. The Court concluded that committed same-sex couples are not given the same rights, benefits and protections as married heterosexual couples, and noted that the State was unable to articulate a legitimate public need for this disparity.

The Court considered the laws of Vermont, Massachusetts, and Connecticut – the only states that provide for same-sex marriage or civil unions – and noted that New Jersey’s “current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states.” The Court concluded that “under the equal protection guarantee ... of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.”

The Court then turned to the question of whether same-sex couples must be allowed to marry or whether the State may provide for same-sex civil

unions. The Court deferred to the legislature on this issue, giving the State 180 days to amend the marriage laws to allow for same-sex marriage or to enact laws allowing for same-sex civil unions that confer the same rights and benefits of heterosexual marriage on same-sex couples.

Conclusion

Employers should monitor the legislature’s response to the *Lewis* decision, which should occur during the next six months. Whether the legislature enacts a law allowing for same-sex marriage or same-sex civil unions, employers will need to update their insurance plans to ensure that coverage for homosexual couples is the same as that for heterosexual couples. Employers should also be aware that employees will be entitled to take leave under New Jersey’s Family Leave Act to care for an ill same-sex spouse or partner. In every area, employers will be required to provide the same rights and benefits to same-sex couples who are married or are joined through civil union as employers provide to heterosexual married couples.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973-643-6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973-643-5795
laron@sillscummis.com