9TH CIRCUIT FINDS "ESTABLISHED CONSTITUTIONAL RIGHTS" AGAINST DISCRIMINATION FOR GAYS

Holding that the "right to be free from intentional discrimination on the basis of sexual orientation was clearly established," the U.S. Court of Appeals for the 9th Circuit has ruled that school officials who deliberately ignore harassment targeting students because of their real or perceived sexual orientation are not entitled to qualified immunity from suit. *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (April 8, 2003). Just a week earlier, a California federal district court rejected the attempts of school officials to dismiss the claims of a lesbian middle school student who was prevented from attending her physical education class solely because of her sexual orientation, similarly finding gay equal protection rights to be "well-established." *Massey v. Banning Unified School District*, 2003 WL 1877841 (C.D. Cal., March 28, 2003).

In their complaint, the *Flores* plaintiffs alleged that they suffered anti-gay harassment by their classmates during their time as students within the Morgan Hill Unified School District. Between 1991 and 1998, the plaintiffs were harassed either because they were lesbian, gay or bisexual, or were perceived to be gay by their classmates.

For example, lead plaintiff Alana Flores found pornography and notes to the effect of "Die, dyke bitch" inside her locker. When she brought these incidents to the attention of the assistant principal and asked to be assigned a new locker, the assistance principal allegedly responded by asking Flores whether she was in fact gay, and if not, why she was crying. Even though this pattern of harassment continued, the school refused to assign Flores a new locker and took no other action. Another student, FF, who was attending Martin Murphy Middle School, was beaten by six other students who said, "Faggot, you don't belong here." Although the brutal attack put FF in the hospital, the principal and assistant principal only punished one of the six students involved, and transferred FF to another school. A group of boys at Live Oak High School verbally harassed two female students who were known to be dating. In addition, the boys made crude hand gestures towards the girls and pelted them with plastic cups. When the girls informed school administrators about the attack, the assistant principal simply told the girls to report the incident to a campus police officer. The assistant principal neither followed up with the students after the attack nor conducted her own investigation of the incident.

Another female student, JD, was repeatedly subjected to name-calling and food throwing because of her sexual orientation. She complained to the campus monitor, but the monitor refused to take any action, even when this harassment occurred in her presence. When students in JD's physical education class called her "dyke" and "queer" and commented that they did not want JD looking at them in the locker room, rather than addressing the students' homophobic conduct, the teacher instead suggested that JD change clothes away from the locker room so that her classmates would not feel uncomfortable. [Physical education classes have emerged as a frequent site of discriminatory treatment against LGBT students, as can be seen in *Massey*, discussed below.]

The plaintiffs filed suit in federal court, bringing claims under 42 U.S.C. 1983 and Title IX of the Secondary Education Act (forbidding sex discrimination in educational institutions that receive federal funding), as well as state claims under the California constitution and state anti-discrimination statutes. The defendants, who included the various school officials named in the complaint, first moved for summary judgment on the merits of the equal protection claim. The district court granted the motion with regard to the members of the school board named in the complaint on the ground that there was insufficient evidence to support an allegation of sexual orientation discrimination by the school board. The court denied the motion, however, with regard to the various school administrators, after finding that there was sufficient evidence to create a triable issue of fact.

The remaining defendants then filed a motion for summary judgment on the basis of qualified immunity. Concluding that the law was clearly established with regard to the unconstitutionality of sexual orientation discrimination, the district court denied the motion. Considering the case on appeal, the 9th Circuit postponed a decision on the merits, and remanded the case for additional consideration in light of the Supreme Court's recent decision in *Saucier v. Katz*, 533 U.S. 194 (2001), which requires lower courts to determine first whether the alleged facts establish a constitutional violation before considering whether the law was clearly established. On remand, the district court held that the plaintiffs presented evidence upon which a jury could find that the defendants failed to take action to stop the harassment and that their actions were motivated by the plaintiffs' actual or perceived sexual orientation. The district court then reaffirmed that the right to be free from discrimination on the basis of sexual orientation was clearly established.

This time around, the 9th Circuit affirmed the district court's decision on the merits. Writing for the court, Chief Judge Schroeder first examined whether the facts alleged by the plaintiffs could establish a constitutional violation, noting that, to succeed on their section 1983 claim, the plaintiffs were required to demonstrate that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional. The court reiterated that, under the law of the circuit, those alleging discrimination on the basis of sexual orientation satisfy the "identifiable class" prong, and moved on to the question of whether the discrimination was intentional.

Viewing the record in the light most favorable to the plaintiffs, the court found that the defendants apparently treated complaints of harassment based on sexual orientation differently from other types of harassment. Although school district policies prohibited harassment of any kind, the school official defendants apparently failed to enforce these policies to protect students who either were or were perceived to be gay. Therefore, plaintiffs had adequately demonstrated differential treatment. The court then ruled that the evidence was sufficient to support a finding that the defendants acted either intentionally or with deliberate indifference, either of which would be sufficient to satisfy the "intent" element.

Judge Schroeder reviewed the allegations with regard to each of the defendant school officials and determined that, in each case, the officials either took no action or made patently inadequate responses to the students' complaints of harassment. With regard to the incidents at Live Oak High School, the court noted that, even though the students were encouraged to report the incident to campus police, the assistant principal took no action to locate or discipline the harassing students. The failure of school officials to respond to the homophobic epithets and pornography left in Alana Flores' locker likewise rose to the level of a constitutional violation of equal protection. Finally, the court emphasized that only one of the six students responsible for the attack that placed FF in the hospital had been disciplined. These minimal and inadequate actions, in the court's view, reflected the deliberate indifference of the defendant school officials to the sexual orientation harassment occurring in their institutions.

The court also found merit in the plaintiffs' claim of failure to train. Even though sexual orien-

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tation harassment was specifically prohibited in the school district, the defendants inadequately communicated anti-harassment policies to students despite defendants' awareness of hostility toward homosexual students. Likewise, the school provided no training for teachers, students and campus monitors about how to deal with sexual orientation harassment. The numerous incidents of harassment put school officials on notice that there was an obvious need for training. Therefore, the discrimination suffered by the plaintiffs was "a highly predictable consequence of the defendants not providing that training."

Turning next to the question of whether the right to be free from discrimination on the basis of sexual orientation was "clearly established," the court determined that the case law existing at the time of the events in question provided the defendants with "fair warning" that their conduct was unlawful. Emphasizing that the court need not find a prior case with identical or even "materially similar" facts in order to rule that the law was "clearly established," the court noted that "[a]s early as 1990, we established the underlying proposition that such conduct violates constitutional rights," and cited its ruling in *High Tech Gays v. DISCO*, 895 F.2d 563 (9th Cir. 1990), that "state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection." The court rejected the defendants' alternative argument that the law was not clearly established because no statute or federal regulation spelled out any such constitutional duty. While acknowledging that its analysis drew heavily from the Seventh Circuit's decision in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), the court noted the *Nabozny* court "went out of its way to point out that the unconstitutionality of the defendants' conduct did not turn on the existence of the state statute" explicitly prohibiting schools from discriminating on the basis of sexual orientation. Therefore, "the absence of a state statute [in this case] does not point us to a conclusion that differs from that of the Seventh Circuit."

Defending their actions, the school officials insisted that, even if the right was clearly established, no prior case had defined the scope of a school administrator's duty to investigate or remedy peer sexual orientation harassment. Therefore, according to their argument, they should not be held liable simply because they fell short of the ideal response. In rejecting this argument, the court noted that the violation at issue in this case did not stem from the fact that the harassment occurred, but rather from the school officials' discriminatory enforcement of the anti-harassment policies. Specifically, "[t]he guarantee of equal protection … requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students."

The court was also not persuaded by the defendants' argument that, while their actions may have been ineffective, the fact that they took any action at all should preclude a finding of deliberate indifference. Without dwelling on the point, the court simply noted that plaintiffs' evidence could convince a jury that "defendants took no more than the minimal amount of action in response to the complaints of harassment," which would demonstrate deliberate indifference.

As the defendants could offer the court no "rational basis for permitting one student to assault another based on the victim's sexual orientation," the court affirmed the district court's finding that qualified immunity was inappropriate in this case, and remanded the matter for further proceedings.

In *Massey*, which stemmed from incidents occurring just last year, the plaintiff, an eighth grade student at Coombs Middle School, sued various school officials after her physical education teacher refused to let her attend gym class. Apparently having learned that Massey told a friend that she was a lesbian in response to the friend's question, Massey's gym teacher called her mother and stated that the other girls in the class were uncomfortable with her presence in the locker room because of her sexual orientation. The teacher acknowledged that Massey had never made any inappropriate sexual comments, had never engaged in inappropriate sexual conduct or acted in an inappropriate manner, and was otherwise meeting the requirements of the class.

The day after making this call, the gym teacher informed Massey that she was no longer allowed to attend class and instructed her to report to the principal's office. For the next week and a half, Plaintiff was required to sit in the principal's office every day during the time scheduled for physical education. No school official met with Massey or contacted her mother to discuss the fact that such action had been taken. Furthermore, other students observing Massey in the principal's office assumed that she was there for disciplinary reasons. Massey's mother only learned that her daughter had been barred from attending physical education classes while at the school for an unrelated meeting.

Soon thereafter, Plaintiff filed a lawsuit, bringing claims under sec. 1983, the California Education Code and the Unruh Civil Rights Act. She alleged that the defendants' conduct caused her significant emotional damage, as the officials' decision to force her to sit in the principal's office "humiliated her and made her feel that she was being punished because of her sexual orientation."

Faced with defendants' motion to dismiss on grounds of immunity, the district court rejected arguments that the Eleventh Amendment or other qualified immunity principles stood as a barrier to Plaintiff's lawsuit. With regard to the Eleventh Amendment, the court noted that the Plaintiff was suing the school officials in their personal capacity, and therefore was not attempting to collect money damages from the state by bringing claims in federal court. Furthermore, to the extent that the Plaintiff was seeking injunctive and declaratory relief to prevent such action from happening in the future, the Eleventh Amendment posed no bar.

Presaging the 9th Circuit's analysis in the ruling described above, the court then found that Massey had alleged facts sufficient to make out a violation of her constitutional rights and that her constitutional right to be free from unequal treatment on the basis of sexual orientation was clearly established law in the 9th Circuit. The court also rejected defendants' claim that they were entitled to "discretionary acts" immunity under the California Government Code, and defendants' suggestion that Massey lacked standing to pursue her claims.

James Emery and Jill Ginstling represented the *Flores* plaintiffs, and Martha Matthews of the ACLU of Southern California served as lead counsel for Massey. The National Center for Lesbian Rights has provided significant assistance in both cases, and both the ACLU of Northern California and the ACLU's Lesbian & Gay Rights Project have played an active role in the *Flores* litigation. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

New Mexico Legislative/Executive Trifecta: Simultaneous Measures on Discrimination, Hate Crimes, and Partner Benefits; State High Court Recognizeds Consortium Claim

With three strokes of his pen, New Mexico Governor Bill Richardson transformed his state from a gay rights backwater to one of the nation's leaders. Early in April, Richardson signed into law S.B. 38, titled the "Hate Crimes Act," under which courts are authorized to impose an enhanced sentence if the jury finds that a defendant's noncapital felony was motivated by hate on the basis of the victim's actual or perceived race, religion, color, national origin, ancestry, gender, sexual orientation or gender identity. On the same date, the governor signed into law S.B. 28, which amends the state's civil rights laws to add sexual orientation and gender identity to the list of forbidden grounds for discrimination in employment, housing or real estate transactions, public accommodations and credit. Then Richardson signed an executive order, No. 2003–0010, extending employee benefits to the committed same-sex partners of state employees. In order to qualify for benefits, partners must have lived together for 12 or more consecutive months and execute an affi-

davit indicating that they share responsibility for each other's welfare and financial obligations. *The New Mexican*, Santa Fe, April 10.

The enactment makes New Mexico only the third state to outlaw discrimination on the basis of gender identity, and the fourteenth to outlaw discrimination on the basis of sexual orientation, in addition to the District of Columbia. Actually, New Mexico is the thirteenth to adopt wide-ranging protection against sexual orientation, as Hawaii's law relates solely to employment. In addition to the fourteen states generally enumerated, Oregon is sometimes counted as having a sexual orientation discrimination ban based on an appellate court ruling construing the state's ban on sex discrimination. New Mexico is, apparently, the only state to ban both sexual orientation and gender identity discrimination while providing enhanced penalties for hate crimes directed at gay or transgendered persons.

Among the other states, measures to ban sexual orientation discrimination pending in Illinois and Delaware are given the best chances of success this year. A measure passed the lower house in Washington State, but is stalled in the Republican-controlled state senate.

Based on 2000 U.S. census figures, with the addition of New Mexico and counting the District of Columbia, approximately 95 million Americans live in states that ban sexual orientation discrimination in employment (and, because Hawaii has such a small population, the number of Americans who live in states that ban sexual orientation discrimination in housing and public accommodations is also above 94 million). This accounts for about one-third of the nation's population. If one adds population for cities and counties that ban such discrimination in states that lack such laws, it is likely that a majority of the population is governed by sexual orientation non-discrimination principles. (Among the large cities in such states are Chicago, Atlanta, Detroit, Austin, Dallas, Denver, New Orleans, St. Louis, Kansas City, Cleveland, Philadelphia, Pittsburgh, Seattle, and Miami.)

To top off the interesting developments from New Mexico, on March 24 the state Supreme Court expanded the scope of permissible claims for loss of consortium to unmarried cohabitants. In *Lozoya v. Sanchez*, 2003 WL 1873573, Mrs. Lozoya was suing for loss of consortium as a result of two auto accidents in which her husband was involved as a victim. Each of the accidents involved a different defendant who rear-ended Mr. Lozoya's car. The Lozoyas had been living together for decades without benefit of legal marriage until after the first accident. Then they married. Then he had the second accident. — The jury determined that the first driver was negligent but the second driver was not. The trial court ruled that Mrs. Lozoya could not assert a loss of consortium claim against the first driver, because she was not married to Mr. Lozoya when the accident took place. Reversing the district court, Justice Pamela Minzner wrote that the justifications underlying the common law rule limiting loss of consortium to close legal family members were no longer valid, in light of the large number of unmarried cohabitants. She rejected the argument that such a ruling would be inconsistent with New Mexico's prior abolition of common law marriage, asserting that the ability to sue for loss of consortium is not a "benefit of marriage" but rather a legal recognition that a compensable loss has occurred to the plaintiff for which the defendant should be responsible. Although the case involved an opposite-sex couple, much of the court's discussion uses gender-neutral language. Having abandoned the bright-line test of marriage for determining eligibility to assert such a claim, the court described various factors that a fact-finder could examine in determining on a case-by-case basis whether a particular cohabiting relationship was sufficient close to justify allowing a loss of consortium claim. Many of these factors would be relevant to a same-sex couple, especially if they had an opportunity to register their partnership or conclude a Vermont civil union! A.S.L.

Federal Court Grants TRO to Gay Straight Alliance in Kentucky High School Case

U.S. District Judge David L. Bunning (E.D.Ky.) ruled on April 18 that a Gay Straight Alliance formed by students at Boyd County High School in Cannonsburg, Kentucky, is entitled to hold meetings at the school on the same basis as other student organizations, pending a full trial on the merits of their case. *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 2003 WL 1919323. — Bunning, a recent appointee to the federal court by George W. Bush, made his ruling in the face of angry protests by local religious leaders and parents against the school's initial decision to allow the club to meet.

Early in 2002, several students at the school circulated petitions to form a student club, and secured the agreement of a faculty member to be an advisor. When the circulation of petitions stirred up significant protest from anti-gay students, the school's principal asked the gay students to delay submitting their petitions until later in the semester. They agreed, and didn't submit the petitions until March. The petitions had to go to the Site-Based Decision Making Council, which consisted of the school principal, three teachers and two parents. The Council decided that the petition had been submitted too late in the semester, and instructed the students to resubmit their petition in the fall.

The GSA proponents resubmitted their petition, but encountered stonewalling from the Council in the fall, and although all the other timely petitions from student groups were approved at the first Council meeting in the fall term, it took several meetings before the GSA petition was approved on October 28, 2002. Council meetings are held in the school auditorium and are open to anybody who wanted to attend. When the vote was announced in favor of approving the GSA, the large number of opponents (including parents, local religious leaders and students) present in the audience reacted with anger, shouting, and threatening gestures at the small band of GSA proponents present in the crowd.

The school principal later testified that "it took some effort just to calm the meeting down and get through it and get out of there. That was the first time that I stared into the face of someone that I thought would hurt someone involved in this issue if given the opportunity. That was alarming to me and frightening and disheartening."

A member of the county school board who was present at the meeting testified that she "was appalled at the reaction of the group, the audience. There was nothing but hatred in that room and ignorance showed by moms and dads and grandparents. When I left that meeting, I honestly thought that, you know, yes, a GSA is very much needed in our community, and these people right here needed to be mandated to go to it. It was horrible. And I literally left that meeting with a fear of what was going to happen in our school the next few days."

The fear was not misplaced. Local Christian ministers whipped up community protest and stimulated students to picket the school two days later, urging other students not to enter the building, although the principal was able to defuse the demonstration and get most of the students back to classes before the first scheduled class period. However, just a few days later, an organized boycott resulted in about half of the school's students being absent.

Reacting to the situation, the school board held several emergency meetings, and on December 20 voted unanimously to suspend all student clubs, both curricular and noncurricular, for the remainder of the school year through July 1, 2003. However, it turned out that this official ban was something of a subterfuge, since several student clubs continued to meet, some with official approval and some without, although the GSA was not allowed to meet. (Several GSA members did congregate once a week during homeroom period in the classroom of their faculty advisor, but did not conduct a formal meeting.)

The ACLU filed a lawsuit on behalf of the GSA and several of its members, asserting that the school was violating the federal Equal Access Act, 20 U.S.C. 4071 et seq., which provides that any high school that receives federal funds and that allows noncurricular student clubs to meet must not discriminate against particular clubs based on such factors as religion, politics or the substantive subject matter of the club. The statute was passed by huge majorities in Congress in response to incidents in which schools refused to allow student Bible and prayer clubs to meet for fear of violating the Establishment of Religion clause of the First Amendment of the Bill of Rights, and

its proponents were mainly concerned with allowing religious students to hold such meetings at school, but concerns about the government's obligations under the Equal Protection Clause led them to structure the law in such a way that it has proven useful to students attempting to form Gay Straight Alliances at their high schools. The lawsuit also asserts violations of the First Amendment and the Kentucky Education Reform Act.

In recent years, federal district courts in California and Utah have ruled that public school refusals to allow GSA organizations to meet on campus violate the Equal Access Act. The response of school administrators to demands for GSA recognition has in some cases been to ban all student clubs in order to keep GSAs out of their schools, but such attempts have fallen down when students insisted on holding other club meetings.

At Boyd County High School, the groups that persisted in meeting after the school board's December 20 resolution included the Drama Club, the Bible Club, the class Executive Councils (which were primarily concerned with planning student dances), and the Beta Club, which organized student public service activities. Although school officials claimed that these were not officially sanctioned meetings and that the groups had some sort of curricular connection, nonetheless they were taking place at the school, faculty advisors were meeting with students in some instances, and posters and public address announcements about their activities were taking place. And similar clubs at other schools that experienced Equal Access Act litigation had been determined to be non-curricular clubs.

The first step in this kind of litigation is for the plaintiffs to seek a temporary order from the court to allow them to meet pending the final outcome of the lawsuit. In order to grant such an order, the judge has to find that the plaintiffs have a strong probability of winning the case on the merits, that they will suffer irreparable injury if they don't receive temporary relief, and that the public interest will be served.

In this case, Judge Bunning easily found that all the requirements were met. It was clear, based on the rulings in earlier cases, that the Bible Club, the Drama Club, the Executive Councils and the Beta Club would all be considered noncurricular clubs, and the school's willingness to let them meet on campus, even informally, brought the Equal Access Act into play. The biggest potential sticking point was the provision in the Act that allows schools to ban student activities that would "materially and substantially interfere with the orderly conduct of educational opportunities within the school," or would limit the school's ability "to maintain order and discipline on school premises, to protect the well-being of students and faculty."

Opposing the proposed court order, the school argued that the response by the community and other students to the approval of GSA during the fall term, the picketing and boycotting and threats, were sufficient to meet the Act's conditions for allowing the school to ban a club, but Judge Bunning decisively disagreed. Looking back at an important Supreme Court decision that had upheld the rights of high school students to wear armbands in protest of the Vietnam War, Tinker v. Des Moines Independent Community School District (1969), Bunning found it well-established that the issue was not whether the presence of GSA would cause other people to disrupt the school, but rather whether the GSA's own activities would disrupt the school.

On this score, there was no question that GSA was a totally non-disruptive group. Its members merely wished to hold meetings in a classroom during the time designated for student club meetings, and they had not reacted in a disruptive manner to the provocations of other students. Apart from one isolated incident, Bunning found that there was no evidence that any GSA member had been less than exemplary in their conduct during this whole situation. — Bunning found that the constitutional concerns identified in the Tinker case had been incorporated into the Equal Access Act, such that "a school may not deny equal access to a student group because student and community opposition to the group substantially interferes with the school's ability to maintain order and discipline, even though equal access is not required if the student group itself substantially interferes with the school's ability to maintain order and discipline."

"While Defendants argue that these protests and the public uproar surrounding the GSA Club have materially and substantially interfered with the orderly conduct of educational activities at BCHS, limited their authority to maintain order and discipline, and limited their ability to protect the well-being of students and faculty," wrote Bunning, "the facts simply do not support such a conclusion." He pointed out that "there was no evidence presented during the hearing that either GSA members or GSA Club meetings were disruptive." Furthermore, even though outside agitators had fomented picketing and boycotts, Bunning found that "school officials did an excellent job maintaining the educational environment at BCHS," and that classes went on as scheduled, albeit with fewer students present during the picketing and boycotts.

Concluding that GSA had met all the requirements, Bunning issued the requested temporary restraining order, noting that several GSA members were seniors who would never get a chance to attend an officially sanctioned GSA meeting if the relief was denied.

According to reports on April 19 and 23 in the *Louisville Courier-Journal*, the school board has been deadlocked about whether to attempt to appeal Bunning's order to the U.S. Court of Appeals for the 6th Circuit in Cincinnati, but in the meantime officials at the high school indicated that the GSA would be allowed to meet. The school board realizes that they could block GSA meetings without violating Judge Bunning's order by cracking down on the other student clubs and forcibly preventing them from meeting, but there is strong opposition to doing that. — A.S.L.

Utah Courts Reject Suit Seeking Discharge of Lesbian Teacher

In 1998, Wendy Weaver prevailed in a discrimination suit against the Nebo School District in Utah, winning her reinstatement as a high school volleyball coach and thwarting an attempt by the district to impose a ban on her public discussion of her sexual orientation. *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279 (D. Utah 1998), discussed in *Lesbian/Gay Law Notes*, Dec. 1998. While that case was being litigated, a group of disgruntled local residents filed a state court lawsuit against the state education department, claiming that it should be seeking Wendy Weaver's discharge. *Lesbian/Gay Law Notes*, Sept. 1998. The plaintiffs alleged that the teacher violated the state's sodomy law and the certification requirement that teachers and psychologists possess good moral character. The suit alleged that the education department and other state agencies acted illegally by failing to suspend her certification and require the school district to discharge her. The actions by the plaintiffs sought declaratory judgments that Weaver had violated statutes and the Utah Constitution.

The Utah Supreme Court threw the case out of court because the plaintiffs raised no justiciable controversy. *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003). In addition to Weaver's being openly lesbian, the plaintiffs objected to her administering personality tests to her students (she teaches psychology), scoring and discussing the results of those tests in class, and requiring students to keep dream journals and interpret their dreams in class. Weaver had also allegedly criticized and disparaged the Mormon Church during class and pressured a student to express his religious and moral beliefs in a hostile class environment. According to the plaintiffs, Weaver encouraged students to question traditional sources of authority and determine for themselves whether "alternative lifestyles" are right or wrong.

Weaver moved to dismiss the suit, and, for the most part, the Utah district court went along, letting just two counts stand. The plaintiffs agreed to drop these two counts so that the Utah Supreme Court could hear an appeal of a final order disposing of all claims. Writing for the court, Justice Wilkins framed the questions as: (1) whether the plaintiffs presented legally sufficient claims for a declaratory judgment action, and (2) whether the complaints plead sufficient facts to establish a prima facie violation of the statutes and regulations at issue that would serve as a basis for declaratory judgment.

The state's Declaratory Judgments Act grants a district court jurisdiction to determine any question of construction or validity of a statute that af-

fects the rights, status, or other legal relations of any person and to declare that person's rights, status, or legal relations under a statute. The Supreme Court further requires that there be a justiciable controversy in which the plaintiff has a protectible interest at law or in equity and the right to a judgment, and the judgment, when pronounced, must be one that would give specific relief.

The Supreme Court concluded that the case against Weaver was not justiciable because (1) it lacked a plaintiff with a protectible legal interest, and (2) it would fail to produce a judgment that would serve a useful purpose or grant specific relief. — There is no protectible legal interest because no private right of action exists in Utah against a school district employee; actions against school district employees are the responsibility of the Professional Practices Advisory Commission, established by Utah statute. Disciplinary actions against a teacher must be taken before the bodies authorized to act: the local school district, the Commission, and the State Board of Education. The Supreme Court ruled there was no justiciable controversy because entering a decree would not end the dispute that led to the proceeding. The courts may not issue mere advisory opinions or judgments on non-justiciable controversies. Even if the court were to issue a decree, Weaver would remain a teacher, students would continue to take her classes, and the school board would remain free to refuse action on the plaintiffs' complaints.

If the plaintiffs feel that the State Board of Education is failing to comply with its own procedures, the plaintiffs must ask the court to compel the Board to act. The court may not act in the Board's stead. The plaintiffs' requests are "for advisory opinions on multifaceted matters, answers to which could scarcely fail to proliferate rather than resolve controversy." Although Utah allows taxpayer standing to challenge illegal expenditures by political subdivisions of the state, there is no standing to bring an action against an individual.

The Supreme Court awarded Weaver her costs on appeal, but refused to award punitive relief, which Weaver requested on the basis of the plaintiffs' complete failure to address the rulings of the lower court. *Alan J. Jacobs*

The First Lesbian Divorce?

Two West Virginia women obtained what is believed to be the first dissolution of a Vermont Civil Union outside Vermont. *In Re The Marriage of Misty Gorman, Petitioner, and Sherry Gump, Respondent*, In the Family Court of Marion County, West Virginia, No. 02–D–292, December 19, 2002.

According to Judge David P. Born, Misty Gorman and Sherry Gump entered into a civil union on July 3, 2000, in Bennington, Vermont. Two years later, Gorman asked the court to dissolve the union, citing irreconcilable differences. Gump did not contest. Judge Born noted that no children were born to or adopted by either party during the relationship; that neither was requesting alimony; and that financial terms had been resolved. He then observed, "The parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state." That simple statement may be the first instance in which a court outside Vermont has recognized a same-sex union created in Vermont.

It follows at least two failed efforts to obtain dissolutions outside Vermont. The first such case was brought by Glenn Rosengarten of Greenwich, Connecticut. The Superior Court held that since Connecticut doesn't recognize civil unions, there was nothing for it to dissolve. The Appellate Court upheld the lower court's decision, stating: "The Vermont Legislature cannot legislate for the people of Connecticut." Mr. Rosengarten died before he could appeal to the state Supreme Court. *See Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002).

Last year, Russell Smith of Beaumont, Texas, asked a court there to dissolve his civil union with John Anthony. In December, Jefferson County District Court Judge Tom Mulvaney issued an order dissolving the union. But Mr. Smith went on television to talk about the case, and news of the "gay divorce" reached Texas's conservative attorney general, Greg Abbott. The attorney general demanded to be heard in the case, and Judge Mulvaney ordered a rehearing, with the attorney general as an intervenor. Smith then withdrew his petition, explaining that he couldn't afford to fight the attorney general. That left a number of important questions — including whether the attorney general has standing to intervene in a divorce or dissolution case — unresolved by the Texas courts. *Fred A. Bernstein*

Surviving Vermont Civil Union Partner Can Sue for Wrongful Death in New York

In what appears to be the first case in which a court outside of Vermont has decided to treat the members of a civil union as spouses for purposes of another state's law, New York Supreme Court Justice John P. Dunne ruled on April 14 that John Langan may sue St. Vincent's Hospital for the wrongful death of his late partner, Neil Conrad Spicehandler. *Langan v. St. Vincent's Hospital of New York*, NYLJ, 4/18/2003, p. 23, col. 3 (N.Y.Sup.Ct., Nassau Co.). Lambda Legal Defense & Education Fund represents Langan on his wrongful death claim.

A recent unpublished West Virginia Family Court ruling, discussed below, authorizing the uncontested dissolution of the civil union of a lesbian couple, implicitly recognized that the civil union created some kind of status that needed to be dissolved in order to disencumber the parties from legal obligations, if any, to each other, but did not contain a full analysis of the legal issues involved, and did not purport to affirmatively confer any sort of spousal status on the parties.

Langan and Spicehandler, met in 1986 and began living together as domestic partners in 1987. When Vermont enacted its Civil Union Act in 2000, they went to Vermont with about forty family members and friends and had a civil union ceremony with a Justice of the Peace. They were planning to adopt a child, and had purchased a house in Massapequa, Long Island. Just hours after the closing on their house, Spicehandler was struck by an automobile while walking in Manhattan. He was treated at St. Vincent's Hospital, where he died after undergoing two surgeries for injuries to his leg. Langan and Spicehandler's mother have filed suit against St. Vincent's, claiming medical malpractice.

Langan presented many witnesses to attest to the close family relationship that the two men had, and Justice Dunne had no problem finding that they were indeed members of each other's family who had "lived together as spouses." Langan, as executor of Spicehandler's estate, could sue to assert any claims the estate might have, but could only maintain an action for his personal economic losses stemming from the death of his partner under the state's Wrongful Death Act, which provides that an individual's "distributees" can sue for wrongful death for economic losses. "Distributees" are those who are "entitled to take or share in the property of a decedent under the statutes governing descent and distribution." In other words, a "distributee" is somebody who inherits by virtue of their legal relationship to somebody in the event that a person dies without leaving a valid will.

In the Intestate Succession Act of New York, such persons are identified as a "spouse, issue, parents, grandparents or their issue." ("Issue" are the legal children of an individual.) Thus, to be able to sue under the Wrongful Death Act, Langan would have to be a spouse within the meaning of the Intestate Succession Act. Here, he came up against the problem that in 1993 the Appellate Division in Brooklyn, whose rulings are binding on trial judges in Nassau County, where this case was brought, rejected a claim that a surviving gay life partner is entitled to inherit as a surviving spouse. Also, the Appellate Division in Manhattan had specifically ruled that a surviving same-sex partner was not entitled to bring a wrongful death action, in a 1998 decision. St. Vincent's confidently filed a motion with Justice Dunne to reject Langan's personal wrongful death claim on the ground that he cannot, as a matter of New York law, bring an action under the statute.

But Justice Dunne found that there was a significant difference between Langan's case and those older cases. Langan and Spicehandler were joined together legally by a civil union in Vermont, unlike the surviving partners in those earlier cases, and the question was whether that legal status in Vermont should be recognized in New York. And, noted Dunne, the question was not whether a Vermont civil union is a marriage, but rather whether Langan and Spicehandler should

be considered spouses for purposes of the Wrongful Death Act, which is a much narrower and more specific question.

Here, Dunne found it significant that the Vermont statute actually refers to the parties in a civil union as spouses, even though it also specifically says that a civil union is not a marriage. The Vermont law also provides that civilly-united couples have all the same rights under state law as married couples, and thus their status as spouses is not just equivalent but actually, for purposes of state law, the same. This means that Langan could sue for wrongful death if the medical malpractice had taken place in Vermont. "Under principles of full faith and credit and comity," wrote Dunne, "and following authority which advances the concept that citizens ought to be able to move from one state to another without concern for the validity or recognition of their marital status, New York will recognize a marriage sanctioned and contracted in a sister state and there appears to be no valid legal basis to distinguish one between a same-sex couple."

While Dunne noted that the Vermont law specifically states that "marriage" as a status is reserved for opposite-sex couples, he concluded that the difference between a marriage and a civil union appears, for purposes of Vermont state law, to be one of terminology rather than legal status. He concluded that "the Vermont Civil Union, which is subject to legislative control conforms in all respects to the requirements for a marriage. Although it explicitly reserves the title 'marriage' for a union between a man and a woman, it does not so reserve the title 'spouse,' as a civil union partner, like a husband or a wife, is a spouse for all purposes under Vermont law, and the meaning of the term spouse is the only issue here."

Dunne also found that there is a valid argument under the Equal Protection clause for construing New York's Wrongful Death Act in a way that would allow Langan's claim. That is, although New York does not recognize common law marriages, the state's Court of Appeals has approved recognition of the marriages of heterosexual couples who became common law spouses while living in a state that recognizes that status, including for purposes of the N.Y. Estates Powers and Trusts Law (the section of New York's published statutes that includes both the Wrongful Death Act and the Intestate Succession Act). If New York would recognize an out-of-state common law marriage between a heterosexual couple but not an out-of-state civil union between a same-sex couple, Justice Dunne opined, there could be a legitimate claim that the same-sex couple was being denied equal protection of the laws.

When interpreting a statute, a court is supposed to try to adopt an interpretation that avoids raising constitutional problems, and to adopt an interpretation that would be consistent with the purpose of the statute. Justice Dunne found that the purpose of the Wrongful Death Act is to protect the economic interest of somebody who has lost a close family member, and that in the case of Spicehandler, the person who would need that protection would be Langan. The men had created an economically interdependent household, and had just closed on a jointly-purchased house in Massapequa. "The person most likely to have expected support and to have suffered pecuniary injury here is plaintiff, Spicehandler's immediate family and spouse under the Vermont statute, and the only legatee under his will."

Dunne rejected the argument that interpretation of the statute would necessarily depend on what spouse meant when the statute was written, long before the concept of domestic partners and civil unions was ever dreamt of. — He asserted that "as the concepts of marriage evolve over time, leaving behind the common law doctrine that 'a woman was the property of her husband' and her 'legal existence' was 'incorporated and consolidated into that of the husband,' so too public opinion regarding same-sex unions is evolving." He noted the large number of private employers that now provide domestic partnership benefits to support this assertion.

One of the issues in deciding whether to give effect to an out-of-state legal status is determining whether New York's own public policies would be offended by extending such recognition. In this regard, Dunne found that in fact New York State has gone a long way towards recognizing same-sex partners. New York State and New York City employees can obtain employee benefits for their same-sex domestic partners, and the city (where St. Vincent's is located) has adopted a comprehensive Domestic Partnership Ordinance. Under New York court decisions and regulations, same-sex partners can exercise succession rights as tenants in rent-regulated apartments, and can jointly adopt children. New York City recently passed an ordinance providing that Vermont civil unions are recognized in the city for purposes of city law. And, of course, the state recently enacted laws banning sexual orientation discrimination and enhancing penalties for hate crimes targeting gay people.

In light of this extensive legislative record, and noting that unlike 37 other states, New York has not enacted a mini-DOMA (a law specifically providing that it is against the public policy of the state to recognize same-sex marriages conducted in other states), Justice Dunne concluded that allowing Langan to bring this lawsuit would not offend New York public policy. — St. Vincent's also argued that the federal Defense of Marriage Act would shelter it from this lawsuit. After expressing some doubts about the constitutionality of that statute, which purports to relieve the states of any obligation to recognize same-sex marriages performed in other states, Dunne observed that federal DOMA does not order or require states to refuse to recognize same-sex marriages from other states, but merely purports to excuse them from doing so if they don't want to.

Dunne also noted that what he would be doing in allowing Langan to sue was not entirely unprecedented. Not only does Vermont specifically authorize surviving civil union partners to bring wrongful death suits, but California allows registered domestic partners to bring such suits, having codified the San Francisco Superior Court's decision in *Smith v. Knoller*, No. 319532 (Cal., San Francisco Superior Ct., Robertson, J., 2001), and the District of Columbia Court of Appeals also approved a wrongful death suit by a surviving same-sex partner in *Solomon v. District of Columbia*, 21 Fam. L. Rep.(BNA) 1316 (D.C. Super. Ct. 1995). Dunne was careful to state that he was only ruling, in the context of this case, on the right of a surviving civil union partner to bring a wrongful death action, and was not purporting to rule on any other spousal rights, such as inheritance rights or the right to file joint tax returns. "The court will not determine whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute," he wrote. But the logic of much of his decision would apply to other instances in which New York extends rights or privileges (and imposes responsibilities) on spouses. As such, although this is just a trial court ruling and not binding on any other court, it marks an important breakthrough as the first case to accord significant legal status to a Vermont Civil Union outside of Vermont.

Dunne's extraordinarily wide-ranging opinion undoubtedly reflects comprehensive briefing of the legal issues by Lambda Legal, since he cites an array of facts and authorities far beyond the usual scope of a state trial court decision. Adam L. Aronson is the Lambda staff attorney principally responsible for briefing the case.

Langan's legal journey has just begun, however, for now he will need to prove medical malpractice by St. Vincent's as well as the amount of damages to which he is entitled by virtue of the loss of his partner. And St. Vincent's could attempt to appeal Justice Dunne's ruling, which appeal would go to the Appellate Division in Brooklyn, not the most gay-friendly appellate bench in the state, which decided the case of *Matter of Cooper,187 App.Div.2d 128 (N.Y. App. Div., 2nd Dept.), app. dismissed, 82 N.Y.2d 801 (1993), rejecting an attempt by a surviving same-sex partner to claim a spousal share against an estate. Dunne had distinguished Cooper* on the ground that the claimant there had not entered into a legally-recognized relationship with the deceased. A.S.L.

Arkansas Changes Its Tune on Lesbian Mother Custody

On April 9, 2003, the Arkansas Court of Appeals affirmed a judgment awarding custody of Tara and Tianna Ratliff to their lesbian mother. The Court of Appeals seems to be questioning their prior precedents which were not favorable to lesbian

mothers. *Ratliff v. Ratliff*, 2003 WL 1856408 (Ark. App.).

More recently, the court has emphasized that in custody cases involving a parent's sexual activities, the focus should be on the parent's conduct, not on her sexual preference. The court in this case awarded custody to the mother because she conducted herself properly with respect to her relationships. There was no proof she shared a bedroom with her lover or that they slept together while the children were residing in the abode. On the other hand, Mr. Ratliff had his sexual partner in the home while his younger daughter was there for an overnight visit. Mr. Ratliff also tried to interfere with the relationship between the older daughter and her mother. The court noted that the heart of all child custody cases is to do what is in the best interest of the child(ren). In this case both girls are very close with their mother and want to stay with her.

Both the mother and father in this case dispute the awarded money amount of alimony, the calculation of child support and asset distribution. The court however affirmed all issues and left the amounts and distributions as determined by the trial court.

The court specifically noted that when the Arkansas Supreme Court declared the state's sodomy law unconstitutional in *Jegley v. Picado*, 80 S.W.3d 332 (2002), it had noted with apparent disapproval a prior decision of the court of appeals that had rejected a custody claim by a lesbian mother in reliance on the criminality of her sex life. The court of appeals apparently believes that its prior decision, *Thigpen v. Carpenter*, 730 S.W.2d 510 (1987), is no longer a binding precedent as a result.

The Arkansas Court of Appeals in this case is taking a more favorable position towards lesbian mothers than it has in the past. By granting custody to a lesbian mother of her two daughters, the court is making a statement that being a lesbian does not automatically mean a person will lose custody of their child. The court is more concerned with action and conduct than it is with sexual preference and status. Hopefully, more custody cases will result this way and not punish parents for their sexual preference by taking away their children. *Tara Scavo*

New Jersey Supreme Court Rejects Reconsideration of Co-Parent Visitation Ruling

In a unanimous April 1 decision, the New Jersey Supreme Court refused to allow a lesbian co-parent to reopen an adverse decision on her request for visitation, even though a more recent case has established that co-parents who have bonded with the children they were helping to raise have a presumptive right to such visitation. *A.B. and S.B.W. v. S.E.W.*, 818 A.2d 1270. The parties in the case are referred to in Justice Peter Verniero's opinion for the court by their initials.

A.B. and S.E.W. were domestic partners beginning in 1988. They decided to have children together, with each woman undergoing donor insemination with sperm from the same donor. S.E.W. gave birth to K.W., a girl, in April 1993, and A.B. was a full participant in planning the pregnancy, assisting and taking care of the child. — Published birth announcements and private announcements to friends identified both women as parents of the child. The following year, A.B. gave birth to S.B.W., and again both women identified fully as parents of the newborn son.

The relationship between A.B. and S.E.W. deteriorated after S.B.W.'s birth, and the women terminated their domestic partnership in 1996. After they stopped living together, S.E.W. rejected A.B.'s attempts to maintain contact with K.W., and a lawsuit ensued. The trial court determined that it would not be in K.W.'s best interest to allow A.B. to have visitation. The ruling was based largely on the court's determination that K.W. was being alienated from her birth mother by A.B., as evidenced by K.W. acting out against S.E.W. in a variety of ways reflecting A.B.'s own disaffection from S.E.W. The court issued an order rejecting A.B.'s petition for visitation rights on this ground, not on the ground that lesbian co-parents are not entitled to seek visitation. A.B. did not appeal this ruling within the time provided by New Jersey law.

Two years later, the New Jersey Supreme Court issued its historic decision in *V.C. v. M.J.B.*, 163 N.J. 200 (2000), in which it ruled that a same-sex co-parent has a presumptive right to visitation if the co-parent has bonded as a psychological parent of the child. Seeing an opportunity to re-establish contact with K.W., A.B. filed this new lawsuit, arguing that under the changed law she had a presumptive right to visitation, and further that K.W. and S.B.W., who are half-siblings, should establish some relationship with each other.

Under New Jersey law, a final ruling by a trial court that is not appealed can only be reopened under very limited circumstances. A court rule authorizes reopening an old case "only when truly exceptional circumstances are present." In a 1975 decision, the New Jersey Supreme Court took the position that "new developments in case law generally do not qualify as an 'extraordinary circumstance' as to justify relief from a final judgment." *Hartford Ins. Co. V. Allstate Ins. Co.*, 68 N.J. 430 (1975). In a case decided last year involving a child custody dispute, the court emphasized that reopening old decisions affecting children raised a special concern, the problem of interfering with the stability of a child's existing life; the notion that stability and permanency for the child are paramount.

Responding to A.B.'s new lawsuit, the Superior Court declined to reopen the old visitation case, and the N.J. Appellate Division upheld that decision without issuing a written opinion. Due to the important issues involved, the New Jersey Supreme Court agreed to consider an appeal. "In keeping with the traditional manner in which we treat new case law," wrote Verniero, "*V.C.* is not an exceptional circumstance. Absent such a circumstance, we are constrained to uphold the trial court's original visitation decree."

The court could have decided the case without saying more, but Verniero provided arguments in support of this disposition, noting the testimony from the original trial about how the falling out between the women had affected K.W. "Allowing plaintiff to re-enter K.W.'s life, six and a half years after plaintiff's relationship with defendant had ceased, would risk harm to the child," wrote Verniero. "Additionally, one expert testified that parent-child bonding and attachment diminish over time. In view of those facts, K.W.'s paramount interest in stability and permanency appears to outweigh significantly the asserted benefits of plaintiff's requested relief."

The court also rejected the argument that the visitation issue should be reopened to consider facilitating a relationship between K.W. and her half-brother, S.B.W. It seems that S.B.W. was diagnosed with autism after his birth, had little interaction with K.W. while they were living together, and due to his limitations would not be able to visit with his sister without the assistance of A.B. or another adult. "The disruption and sudden instability that would result from K.W.'s perspective if such visits were to occur are greater than the uncertain benefits that might result," Verniero asserted.

Finally, the court rejected A.B.'s argument that the *V.C.* decision should be applied retroactively to her case. While the court acknowledged that retroactive application of cases that establish new legal principles may sometimes be appropriate, Verniero asserted that it would not be appropriate for this kind of case, when the issue is raised long after the time to appeal the earlier ruling has run out and the stability of a child's life is at stake. "Such retroactivity would expose children and their caregivers to a serious disruption of their family life," he wrote. "As this matter well demonstrates, courts should avoid interfering with well-settled home environments unless the equities of a given case clearly compel that result."

LeGal member William Singer argued the case for appellants, while Barbara A. Ulrichsen argued for respondent, and the ACLU of N.J. filed an amicus brief. A.S.L.

No Vicarious Liability for Off Site Same-Sex Harassment of Gay Employee

On April 2, the U.S. District Court for the Southern District of New York illuminated the gap between being sexually accosted by a co-worker, and having a prima facie sexual harassment claim against an employer. *Devlin v. Teachers' Insurance and Annuity Association of America*, 2003 WL 1738969.

Christopher Devlin, an employee of Teachers' Insurance and Annuity Association of America (TIAA), alleged that TIAA team leader Joseph Ryan, with penis exposed, grabbed Devlin's testicles and tried to kiss him in the men's room of a hotel bar. Devlin and his co-workers were at the bar celebrating a fellow TIAA worker's promotion. TIAA did not pay for the event and attendance was voluntary. After Devlin rebuffed Ryan, Ryan allegedly told him that another team leader monitored one of Devlin's personal phone calls, learning that Devlin was gay, drank a lot, and was having personal problems. Devlin, through his lawyer, complained to TIAA about the restroom incident. Pursuant to its published sexual harassment policy, TIAA investigated and then demoted Ryan, cut his pay, and prohibited him from entering the floor where Devlin worked.

Judge Rakoff's summary judgement ruling notes first that, as a TIAA team leader, Ryan lacked the authority to be considered a supervisor for Title VII or New York City or State Human Rights Law hostile work environment claims. Assuming arguendo that the restroom incident was severe enough to create a hostile work environment, TIAA could be liable only if it was negligent. Given that Devlin "felt more relaxed and safe" after TIAA disciplined Ryan and removed him from Devlin's floor, and that Ryan had never previously been accused of sexual harassment, no reasonable juror could find that TIAA was negligent. The party at the hotel bar was itself an off-premises social event, not under TIAA's supervision. A footnote mentions that Devlin refused to participate in TIAA's investigation of his complaint, which he characterized as an "invasion."

Devlin claimed that TIAA retaliated against him for lodging a sexual harassment complaint by reprimanding him about tardiness, thereby rendering him ineligible for an annual bonus, and changing his shift schedule. The court rejected the claim. While the schedule change and reprimand occurred six months after Devlin's complaint, TIAA proffered his habitual tardiness (85 occurrences in 15 months, amid warnings) as an independent, non-retaliatory basis for the discipline. Evidence of the treatment of other employees supported this interpretation. The schedule change apparently resulted from a standard shift selection process, and Devlin failed to adduce any evidence suggesting discriminatory animus on TIAA's part. A possible Federal Wiretap Act violation, based on the monitored personal phone call, is the sole triable issue surviving summary judgement. *Mark Major*

Appeals Court Rejects Sexual Orientation Discrimination Claim, But Revives Other Tort Claims by "Straight" TV Stage Manager

"The Young and the Restless," a TV soap opera famous for the sexual complications of its characters, has generated its own real life soap opera involving a stage manager, an actor, a director, and charges of same-sex sexual harassment. On April 28, the California Court of Appeal, 2nd District, ruled in *Hill v. Columbia Tristar Television, Inc.*, 2003 WL 1958881, that the superior court correctly granted summary judgment against Randall Hill, a former stage manager at CBS, on his claim that he was the victim of discrimination on the basis of "perceived sexual orientation,70 but revived Hill's claims of defamation and negligent and intentional infliction of emotional distress. In the same decision, the court upheld summary judgment against Randall's wife, Heather Hill, a former director on the program, on her claims of sex and age discrimination and infliction of emotional distress.

The soap opera at the soap opera began in December 1999 when Bryce Littlejohns, an actor who had worked as an extra on the show, reported to the casting director (in the words of the court) that "Randall Hill had groped his genitals on several occasions in Hill's dressing room, that he was tired of such 'sexual harassment,' and that he had submitted to Hill's advances because he thought Hill would have him fired if he did not." At the time, Hill was a freelance employee of CBS, and Littlejohns was an employee of SONY. (The two corporations collaborate on producing the soap opera.) The two employers decide to retain an outside attorney to investigate Littlejohn's accusations.

James Adler, a partner at the prominent L.A. firm of Irell & Manella, was hired to conduct the investigation. — After interviewing more than twenty individuals, including Littlejohns and Hill, Adler presented his preliminary conclusions orally to a handful of management officials and Hill's attorney on January 24, 2000. He found Littlejohns to be a more credible witness than Hill, not least because his interviews with others led him to conclude that Hill "used his position to 'troll' for receptivity to sexual advances not only with regard to Bryce Littlejohns but also from other young, male extras." Adler also found that Hill paid "special attention" to the male extras on the show, "often requesting them to pull up their shirts or pull down their pants to show their abdominal area," and finally that the sexual advances to Littlejohns were not welcome by him, but he had acted as if they were and never told Hill directly that they were unwelcome. Because of this last finding, it was unlikely that the employer would be held liable for sexual harassment with respect to Littlejohns.

After the meeting, Hill's attorney reported back to him about Adler's conclusions, and within days Hill had decided to resign voluntarily in exchange for a confidentiality agreement on the investigation. There was no indication that his employer had asked him to resign at that point, but he was under suspension pending the outcome of the investigation. It had been suggested by Adler that if Hill resigned there would be no reason to conclude the investigation and prepare a final written report.

On the same day this meeting was taking place, another employee happened to tell the senior coordinating producer on the show about rumors that Hill had sexually propositioned a male coworker years earlier while employed in New York. The employee, who had only met Hill once and had no personal opinion of him, said he passed this information along only because he knew that the producer was involved in the investigation of Littlejohn's charges. Hill alleges that the producer, in addition to passing this information on to those charged with the investigation, also spread the story to other actors on the show. Hill also maintained that the producer was out to get him because he had rebuffed her sexual interest in the past.

Mrs. Hill, an at-will employee, was subsequently discharged when she expressed unhappiness about having to work with Mr. Littlejohns after he made the charges against her husband. She was 60 at the time, and she alleged that she was replaced by a man who was under 40 years old. (Forty is the magic number for coverage under the federal Age Discrimination in Employment Act.)

The Hills subsequently brought charges against their employers. In Mr. Hill's case, he claimed that he was not gay and the charges against him were not true, but that he was fired because he was perceived as being gay. He asserted that lots of heterosexual activity went on in the dressing rooms without attracting any disciplinary response from the employers. He also claimed defamation from the spreading of the story of his alleged New York activities and intentional and negligent infliction of emotional distress. Mrs. Hill alleged age and sex discrimination, as well as emotional distress.

On the defendants' motions, L.A. County Superior Court Judge Richard Neidorf granted summary judgment against both Mr. and Mrs. Hill. The appeals court, in an opinion by Appeals Judge Dennis M. Perluss, agreed that all Mrs. Hill's claims should be dismissed, since there was no evidence that she was fired due to her sex or age. Because she was an at-will employee, her employer did not need a good reason to fire her, just a non-discriminatory one, and her reluctance to work with one of the actors on the show was good enough for this purpose.

The appeals court also agreed that Mr. Hill's sexual orientation discrimination charges should be dismissed. Hill had claimed that his resignation was not really voluntary, but actually a constructive discharge, but under the circumstances the appeals court agreed with the trial court that even if this was a constructive discharge (a resignation under circumstances where he was being forced out), the reason was non-discriminatory. Hill was trying to claim that the company took action only against incidents of gay harassment, not straight harassment, but he was unable to make any factual allegations supporting that claim. Judge Perluss pointed out that there was no indication that the heterosexual activity mentioned by

Hill was non-consensual, unwelcome, or harassing in any way.

On the other hand, there was evidence that in other past cases involving allegations of unwanted sexual pressures against employees, the employers had taken action, including a discharge of one person. And the employer's potential liability for sexual harassment provided a non-discriminatory justification for discharging somebody who was found by the company's investigator to have engaged in this activity with several actors.

However, the court found that Mr. Hill should be allowed to proceed with his defamation, and accompanying emotional distress, claims. The defamation claim was focused on the employee who had told the coordinating producer about Mr. Hill's rumored sexual harassment activity on a prior job, and the coordinating producer's subsequently repeating that story to higher management and to other employees. The court found that while some of those communications may be considered "privileged" as part of in-house management communications, some of it might not be privileged, especially statements to other employees, and it was premature to cut off Hill's lawsuit without further evidence. The court also found that since the emotional distress was alleged to have arisen from the spreading of the rumors, to the extent that was not privileged and work-related, it would not be preempted by the state's Workers Compensation Law, which generally voids an employee's ability to sue for emotional distress as a result of what happens in the workplace. A.S.L.

Civil Litigation Notes

U.S. Supreme Court — Ever since the Hawaii Supreme Court suggested in 1993 that same-sex couples in that state might have a right to marry, the question whether same-sex marriages contracted in one state would need to be recognized by other states to comply with the federal Constitution's Full Faith and Credit Clause has been of consuming interest, to the extent that same-sex-marriage-phobic state legislatures in two-thirds of the states have enacted laws designed to prevent such forced recognition by declaring same-sex marriages to be contrary to state public policy, and the federal government mounted the barricades to "defend" marriage by purporting to excuse the states from any FFC requirements with respect to same-sex marriages. Much of this furious debate and legislating has gone on in a vacuum due to the paucity of instructive Supreme Court precedents construing the Full Faith and Credit Clause. On April 23, the Court issued its decision in *Franchise Tax Board of California v. Hyatt*, 2003 WL 1916238, and the signs were not good for pro-same-sex-marriage-recognition tea-leaf readers (to coin a new phrase). The case raised the question whether a Nevada court was required by FFC to dismiss a suit filed against a California tax agency, on the ground that a California statute granted total immunity to the tax agency from the kinds of claims covered in the suit. The Nevada Supreme Court had ruled that FFC did not require dismissal of the suit. The unanimous Court, in an opinion attributed to Justice O'Connor, managed to leave the subject as murky as before, in this writer's opinion, but did confirm earlier conclusions that FFC is at its strongest where a court is being asked to honor a judicial ruling in a particular case from another state, and much weaker when the demand is apply another state's statute where the forum state's choice of law principles would not find that statute to govern the controversy. In such cases, the discretionary doctrine of comity is more applicable, and a state may protect its legitimate policy interests and those of its citizens by refusing to apply the contradictory statute of another state. Is that clear, tea-leaf readers?

Federal — Missouri — Can it be that the U.S. Postal Service discriminates in favor of gay people in making promotion decisions? The answer will not be uncovered in *Manlove v. United States Postal Service*, 2003 WL 1860554 (W.D. Mo., March 26, 2003), in which the aptly named plaintiff, the allegedly heterosexual Tina Manlove, complained, inter alia, that she was denied a promotion based on sexual orientation, thus implying that the other woman who received the promotion is a lesbian (although that is not expressly stated in District Judge Smith's opinion). Manlove claimed a Title VII violation based on race, gender and sexual orientation, and suffered summary judgment on all grounds. As to sexual orientation, Smith simply noted that federal courts have repeatedly rejected the argument that Title VII bans sexual orientation discrimination in employment.

Federal — Nebraska — Lambda Legal and the ACLU have joined together to file a federal lawsuit challenging a state constitutional amendment banning any kind of legal recognition of same-sex partnerships, which was enacted by the voters in November 2000. The measure was promoted to voters as a simple protection for traditional marriage, but the law goes beyond limiting the right to marry, as it affirmatively voids civil unions, domestic partnerships or any "other similar same-sex relationship," thus effectively disempowering government at all levels from taking any action that would recognize same-sex partners for any purpose of the law. The lawsuit claims that the amendment unconstitutionally disempowers gay people from using the normal political channels of the state to seek even the most basic protection for their families. The complaint in *Citizens for Equal Protection, Inc. v. Johanns* names the governor as lead defendant, and was filed on April 30 in the U.S. District Court in Lincoln, Nebraska. Local counsel is Robert Bartle of Bartle & Geier; other counsel on the case are David Buckel and Brian Chase of Lambda Legal, Tamara Lange of the ACLU Lesbian & Gay Rights Project, and Amy Miller of the ACLU of Nebraska.

Federal — New York — Once again, a federal court has found that Congress's obsession with sexually-related material on the Internet may run afoul of constitutional free speech protection. In *Nitke v. Ashcroft*, 2003 WL 1536117 (S.D.N.Y., March 24, 2003), a specially-constituted three-judge district court consisting of Circuit Judge Robert D. Sack and District Judges Richard M. Berman and Gerard E. Lynch refused to grant a preliminary injunction against enforcement of the Communications Decency Act's obscenity provisions, but also refused to grant in full the government's motion to dismiss the case. — The CDA makes it a federal crime to place obscene material on the Internet that might be accessed by minors. The lead plaintiff, Barbara Nitke, is a photographer who specializes in sexually-explicit photographs that she puts on her own website and that show up in other places as well, including the websites of organizations affiliated with co-plaintiff National Coalition for Sexual Freedom. Nitke and the Coalition (relying mainly on allegations by its member, the Eulenspiegel Society, an S&M group with its own website) alleged that their expressive activities had been chilled improperly by the broad and ambiguous statutory definition of obscenity. — The court found that since the plaintiffs had waited six years after the enactment of the CDA to bring their suit, they could not credibly allege irreparable injury if enforcement were not preliminarily enjoined pending trial on the merits of their claims, but that the statutory definition did raise serious constitutional concerns. Since an Internet website is accessible from just about anywhere, a definition that relies on the "community standards" of a particular place to determine obscenity presents the possibility that plaintiffs could be prosecuted for posting material that would not be deemed obscene in some places. More to follow when this saga resumes....

Federal — New York — U.S. Magistrate Treece (N.D.N.Y.) has ruled that some letters signed by the boss's daughter as witness to the plaintiff's sexual harassment complaints may be used to impeach her testimony at a deposition but not as substantive evidence that such complaints were made, because they were not disclosed by the plaintiff in response to the defendant's pre-deposition discovery requests. *Lomascolo v. Otto Oldsmobile-Cadillac, Inc.*, 2003 WL 1678783 (March 17, 2003). Stephen Lomascolo is suing on a hostile environment theory, claiming he was subjected to name-calling, including that he was "gay" and "effeminate." At deposition, Heidi Otto, daughter of the owner of the business, testified lack of recollection of Lomascolo ever bringing such complaints to the attention of management. Lomascolo's attorney whipped out the letters, countersigned by Ms. Otto, describing conversations with management officials in which Lomascolo specified his complaints. The deposition fell apart in arguing between counsel, and then defendants moved for a protective order ex-

cluding the letters from further use in the case on the ground that they had not been disclosed in discovery and were used to "ambush" Ms. Otto in her deposition. Magistrate Treece, after canvassing federal precedents, found disagreement over whether a protective order (or sanctions against plaintiff and his attorney) were appropriate here, where plaintiff argued the letters were being used solely for impeachment purposes. Treece concluded against a protective order or sanctions, but ruled that Lomascolo may use the letters only for impeachment, not for the purpose of proving that he made these specific complaints about workplace harassment.

Florida — The National Center for Lesbian Rights has filed suit against Westminster Oaks Retirement Community in Tallahassee (Leon County), alleging that the home's refusal of a housing request by a Vermont civilly-united lesbian couple, Joy Lewis and Sheila Ortiz-Taylor, violates the county fair housing code. The complaint, filed on March 31, notes that the couple had first applied in 1999 and were put off while their application was being considered, in light of the Community's ban against unrelated persons living together. They reapplied after their civil union ceremony held in Vermont in 2002. According to Lewis, she was told that the women could have had the housing if they claimed to be cousins or sisters, but, she said, "We haven't lived our lives with tiny lies or big lies." — The local law bans discrimination on the basis of sexual orientation, gender or marital status. *Gay.com*, April 1, 2003.

Illinois — In a case bearing some factual similarity to the *Kantaras* case from Florida, recently reported in *Law Notes*, Cook County (Illinois) Judge Gerald Bender ruled against a petition for custody by a tansgendered father seeking to maintain contact with his son upon the dissolution of his relationship with his wife. According to an April 9 report in the *Chicago Tribune*, the couple agreed to marry at a time when the women was unaware that her proposed spouse was a female-to-male transsexual. Indeed, he had been taking hormones but had not had gender reassignment surgery. She did not seek a divorce after learning the truth, and he did have some surgery about 6 years into the marriage. Subsequently, she became pregnant by donor insemination and they raised the child together from his birth on July 20, 1992. With the recent dissolution of the parents' relationship, the father sued to maintain contact with the son he had been raising for eleven years, who had bonded with him as a parent. Judge Bender held that Illinois would not recognize the marriage as valid, and therefore the "father" had not basis for seeking custody or visitation over the protests of the boy's biological mother. An appeal is likely.

Michigan — In *Greggs v. Andrews University*, 2003 WL 1680619 (Mich. Ct. App., March 27, 2003), Cheyenne Greggs, who was dismissed as a student from Andrews University after an investigative committee concluded that he had participated in an incident in which another male student claimed to have been sexually assaulted by Greggs and another male student, claimed that his dismissal was unlawful and that he was entitled to damages for defamation and intentional infliction of emotional distress. (In separate litigation, which he lost, Greggs sued over his eviction from the dormitory coincident with his dismissal from the school.) The appellate court affirmed the trial court's grant of summary judgment on the defamation and emotional distress claims, finding based on affidavits in support and opposition to the motion that the university had not acted sufficiently outrageously to justify an intentional infliction of emotional distress claim, and that Greggs' defamation claims failed on the ground that he did not sufficiently allege actual "publication" of the alleged defamation, or that the instances in which the statements were made about him were privileged. Greggs, who stoutly denied playing the role in the incident as described by the investigative committee, insisted that he was not gay and had been wrongly described as such by university officials.

New Jersey — The *Washington Blade* (April 11) reported that the InterVarsity Christian Fellowship/USA, a student organization, and Rutgers University, have settled a lawsuit provoked by the University's insistence that the organization abide by the University's non-discrimination policy in order to maintain its position as a chartered student organization. Under the settlement, the organization can impose a religious test on those who seek to be officers of the group. The University's non-discrimination policy prohibits student organizations from discriminating on the basis of, inter alia, religion and sexual orientation.

New Jersey — In *Rubin v. Chilton*, 2003 WL 1698891 (April 1, 2003), the New Jersey Appellate Division held that the state's Law Against Discrimination forbids discrimination against independent contractors, but not under the section forbidding employment discrimination. In many jurisdictions, independent contractors who encounter discrimination are out of luck once a court determines that they were not employees. But in New Jersey, they may sue alternatively under N.J.S.A. 10:5–12a, which makes it unlawful for a person to refuse to contract with another person on the basis of the various categories contained in the statute. In this case, some doctors claimed their contracts were terminated due to age. "If they can show this was so, it would seem to be a refusal to contract with, or perhaps, continue to contract with them on the basis of age, in contravention of this statute," wrote Justice Bilder for the court. The court found that several prior cases had at least intimated that the statute could be used for this purpose, and that the only case relied upon by the defendant was not really on point. Given the amount of work done be independent contractors in modern American workplaces, this construction of the statute could be seen as a major expansion of protection against discrimination.

New York — What hath *Braschi* wrought? In *Fernbach v. Cash*, NYLJ, 4/17/2003, p. 20, col. 4 (N.Y.App.Div., 1st Dep't), a unanimous appellate panel ruled *per curiam* that adultery would not necessarily stand in the way of a tenant succession claim. After the rent-controlled male tenant died, the landlord sought to dispossess the woman and two children who had been living with him in the apartment. The deceased was still married to his estranged wife, and the woman was only recently divorced from her husband, although the deceased and the woman had been living together in the apartment with their children for four years. The landlord argued that because the relationship between the deceased tenant and the woman was adulterous, it could not provide the basis for a claim to succeed to the tenancy. Invoking *Braschi v. Stahl Associates* 74 N.Y.2d 201 (1989), in which the Court of Appeals held that a surviving gay life partner could claim tenant succession rights, the court said: "Protection against sudden eviction has been extended to a broad spectrum of individuals who reside in nontraditional family units," and indicated that here, where both residents were estranged from their respective spouses, the issue for the trial court would be whether they had an emotionally and financially interdependent relationship, not whether they might be in violation of laws against adultery. "Landlord's suggestion that recognition of respondent's right to continued occupancy would have 'enormous ramifications' is a makeweight, and its reference to alleged violations of the Penal Law is not germane to this proceeding," insisted the court.

New York — Ruling on a request for attorney fees and disbursements in *Bell v. Helmsley*, the celebrated employment discrimination case involving the gay manager of a Helmsley hotel, New York State Supreme Court Justice Walter Tolub sharply reduced the amount requested ($1,553,907.50 fee and $136,748.43 disbursements). *Bell v. Helmsley*, NYLJ, April 2, 2003 (New York County). Finding that the case had been severely overstaffed and that the disbursement request incorporate compensation for overhead costs not properly allocable to such an award, Justice Tolub settled on $568,340 for fees and $70,350.75 for disbursements, pointedly noting that the fee amount exceeded the damages awarded in the case (after Justice Tolub count down the jury's award of about $11 million to about $500,000).

Texas — When is a divorce not a divorce? When it involves a same-sex couple civilly united in Vermont seeking the assistance of a Texas court in dissolving its relationship. Russell Smith and John Anthony were civilly united in Vermont in 2002, but lived in Texas and decided to part ways some time after returning home. Smith filed a petition for legal dissolution of the civil union before Texas District Judge Tom Mulvaney, who granted

the petition and issued an order of dissolution. When the story appeared in the press, all hell broke lose in Texas, especially in the Attorney General's office, which threatened to appeal Mulvaney's order if he did not vacate it, in light of Texas law against recognition of same-sex unions. On April 1, after Smith requested that his petition for dissolution be discharged, Mulvaney issued a new order, vacating his earlier order of dissolution, and ordered a new hearing to consider how to proceed. *Associated Press*, April 2. A.S.L.

Criminal Litigation Notes

Federal — First Circuit — In *United States v. Rodriguez*, 2003 WL 1968699 (April 30), the U.S. Court of Appeals for the 1st Circuit vacated a drug conviction and sentencing decision by U.S. District Judge Joseph L Tauro solely on the ground that Tauro's refusal to grant a downward departure from sentencing guidelines may have been based on a misunderstanding about whether he had the discretion to do so. The defendant sought a downward departure on three grounds, one of which was "that he was especially vulnerable to prison abuse as an 'effeminate gay man.'" At the sentencing hearing, Tauro commented that defense counsel had made a "compelling argument" but went on to comment, somewhat ambiguously, that he was constrained by law in making a downward departure. It was unclear from the judge's remarks whether he meant that he lacked discretion to grant a downward departure or that under the facts he felt that a downward departure was not warranted as a matter of law. Since the guidelines do preserve that degree of discretion, the circuit court remanded for further consideration of the sentence.

Puerto Rico — The Supreme Court of Puerto Rico has ruled by a vote of 4–3 that the local domestic violence statute does not apply to same-sex couples. According to a report in the *Orlando Sentinel* on April 20, the court set aside criminal charges that were filed against Leondro Ruiz Martinez for beating his boyfriend, Juan J. Del Valle, two years ago. This had been the first such case the government had prosecuted under the domestic violence laws since deciding that it would give a broad interpretation to the statute to cover all families. The court majority stated that the legislative intent of the law was to "strengthen the institution of the family," and that for this purpose the "family" was defined as a "sentimental and legal union between a man and a woman." The government has filed a motion for reconsideration, arguing that the court's resort to "legislative intent" was unnecessary because the statutory language is consistent with a broad interpretation. "Law 54 is neutral," argues the government's motion papers, as summarized in an Associated Press report on April 28. "In reality, the law has nothing to do with homosexuals, lesbians or heterosexuals, but with the physical and emotional pain suffered when they are subjected to abuse by people with whom they are having an intimate consensual relation." The government also argued that restricting the law's application to opposite-sex couples only may be establishing a "sex classification" that would be subject to constitutional challenge. *Commonwealth of Puerto Rico v. Martinez*. A.S.L.

Legislative Notes

California — The Assembly Judiciary Committee has approved AB 205, a bill introduced by openly-lesbian Assemblywoman Jackie Goldberg of Los Angeles, which would grant to same-sex couples the right to file joint state tax returns, have joint ownership of property and joint obligation for debts, and would authorize co-parents to authorize medical treatment for children they are raising. The bill passed 9–4, over arguments by opponents that it was in conflict with Proposition 22, a ballot initiative passed by voters that outlaws same-sex marriage in California. *Los Angeles Times*, April 2. On April 21, the State Assembly approved a measure to prohibit discrimination based on gender stereotyping in housing and employment. The vote was 42–34, with all the Republicans voting against and most of the Democrats voting for. *Los Angeles Times*, April 22; *California Alliance for Pride and Equalty* Press Release, April 21.

California — The California State Board of Equalization has tentatively approved and published for comment a regulation that would exempt for reappraisal of property values when a domestic partner dies. Under existing California law, the death of a spouse does not generate reappraisal of the real estate that they jointly owned with a surviving spouse for state tax purposes, but does generate such reappraisal for surviving unmarried partners, with the predictable result that surviving partners get hit with an increase in property taxes as the immediate result of their partner's death. Carole Migden, the openly-lesbian chair of the State Board, proposed the measure, which passed with the votes of 3 Democratic members of the Board, over the dissent of 2 Republican members of the Board. Migden described this as a method of implementing A.B. 2216, which passed last year, granting domestic partners registered with the California Secretary of State the right to intestate inheritance of property owned by a domestic partner. — Critics of the proposal claimed it would tear a big loophole in the property tax system by giving people incentives to form property-ownership partnerships. The regulation will receive a final vote after a comment period, not before July at the earliest. *Los Angeles Times*, April 24.

Colorado — Colorado Springs — Making good on a campaign promise, recently-elected Mayor Lionel Rivera got the Colorado Springs City Council to repeal the domestic partner benefits program that had been passed last year. The Council voted 8–1 to rescind the measure. Six employees had signed up for the benefits, which they will enjoy until the end of 2003, when the measure will expire. The vote on the benefits last year had been 5–4. *The Gazette*, April 23.

Connecticut — The state Senate's Judiciary Committee voted 26–16 to reject a bill that would have established a state domestic-partnership registry and established certain specific spousal rights for registered same-sex partners. The state had passed a law last year allowing unmarried couples, regardless of gender, to designate each other as medical decisionmakers, but evidently the new bill bundled too many spousal rights in one measure, for opponents were able to charge credibly that the measure was an approach towards gay marriage. *Associated Press*, April 9.

District of Columbia — The D.C. Council gave unanimous approval on April 1 to a measure that provides legal authority for the domestic partner of an incapacitated person to make medical decisions on that person's behalf. The bill covers both same-sex and opposite-sex partners. *Washington Blade* April 4.

Florida — Florida State Rep. Dennis Baxley, a Republican from Ocala, suggested amending a pending civil rights bill to provide that no state or local authority could add additional classifications to those contained in the state's civil rights statute: race, color, religion, sex, national origin, age, handicap, or marital status. Somewhat disengenuously, he suggested that this was a "fairness" measure to avoid creating "special classifications across the state." Rep. Bob Henriquez, a Tampa Democrat, immediately called his bluff, pointing out that the amendment "is aimed at sexual orientation," and would have invalidated local gay rights measures in several Florida cities, some recently enacted. The committee then rejected the amendment on a voice vote, and approved H.B. 215, which broadens the powers of the attorney general to enforce the existing state law. *Miami Herald*, *St. Petersburg Times*, April 25.

Florida — Largo — The City Commission of Largo, Florida, has agreed in principle to adopt a human rights ordinance and internal anti-discrimination policy that would include sexual orientation and gender identity. City staffers are drafting up formal resolutions that will be subject to a formal vote, but a majority of the commissioners voted on April 22 in favor of the proposal to do this. The city was prompted to review its personnel policies as a result of an incident involving a racial slur in the Fire Department. *St. Petersburg Times*, April 23.

Hawaii — The state senate's Judiciary Committee has approved a measure to amend the state's hate crimes law to add "gender identity or expression" to the categories listed in the law. The law, which provides for enhanced penalties for crimes motivated by bias, already includes "sexual orientation." *Washington Blade*, April 11.

Illinois — Peoria — Peoria is the newest municipality in Illinois to pass a law protecting gay people within its borders from discrimination in

employment, housing, and public accommodations. The City Council voted 8–3 on April 23 to amend its human rights ordinance to add sexual orientation. *Chicago Tribune*, April 24.

Maryland — The state's House of Delegates approved two gay rights measures in March, one an amendment to add "sexual orientation" to the state's Hate Crimes Law, the other adding "sexual orientation" to non-discrimination provisions of the state's law on Anti-Discrimination in Procurement Contracts. The latter measure would also require religious institutions not to discriminate in activities funded by the state. However, the Senate rejected the Hate Crimes measure and the governor announced his opposition to the procurement amendment. *Washington Blade*, March 28, April 4.

Massachusetts — After a contentious set of hearings, the Massachusetts legislature's House Judiciary Committee tabled a proposed constitutional amendment to ban same-sex marriages on April 30. Legislators are consumed in a contentious budget debate and no further action on the measure is likely until that debate is resolved. Last year the proposal was kept from a vote by parliamentary maneuvering. The Massachusetts Supreme Judicial Court is expected to issue its ruling on a lawsuit seeking licenses for same-sex marriages sometime this summer. *Boston Globe*, May 1.

Minnesota — One of the most contentious issues in collective bargaining covering state workers was an agreement between the union and the executive branch leadership to include domestic partnership benefits for same-sex partners of state employees. The legislature, whose assent was required, balked at this, holding up ratification of the contracts that had been negotiated last year. Early in April a compromise was worked out under which the contracts would be ratified but the provisions for domestic partnership benefits would be removed. According to one opponent of the benefits, Republican Senator Michele Bachmann, the benefits would be too costly because "the homosexual lifestyle makes them more likely to be disproportionate consumers of health-care services." A source for this assertion was not cited in news reports. *Minneapolis Star Tribune*, April 4; *Washington Blade*, April 11.

Minnesota — The House Ethics Committee deadlocked in a 2–2 vote along party lines in considering an ethics complaint against Rep. Arlon Lindner, who was charged with making remarks on the House floor and in newspaper interviews denying that gay people were persecuted by the Nazis during the Holocaust. A Republican member explained his negative vote as being intended to protect freedom of speech, even though he disagreed with the substance of Lindner's remarks. *Duluth News-Tribune*, April 25.

Missouri, Jackson County — Jackson County, Missouri, which include Kansas City, Missouri, has established a county registry for unmarried partners, including both same and opposite-sex couples. Although no rights are conferred on registrants, they do receive a certificate that might be useful in dealing with private businesses, landlords, etc. *The Advocate*, April 3. On April 24, the Kansas City Council voted unanimously to direct the City Manager to implement a domestic-partner benefits program by May 1, 2004. The resolution calls for establishment of a partner registry system. Details of the benefits program are yet to be worked out, but the registration will carry some rights that marital couples automatically enjoy, according to an April 27 report in the *St. Louis Post-Dispatch*.

Montana — Missoula County — Would you believe that the Missoula County Commissioners have voted to extend insurance coverage to domestic partners of county employees? The commissioners voted to do so at a meeting on April 3, and the benefits eligibility will commence on July 1. Commissioner Jean Curtiss stated: "There is no substantiation to the claim that domestic partners are of higher risk. And while the law does not require us to insure domestic partners, I believe it is the right thing to do. We are not required to provide coverage for dental care, eye exams or prescriptions either, but we do so because we believe it is good for our employees and important to offer as part of our benefits package to retain quality employees." *Missoulian*, April 4.

New York — On April 14, New York State Senator Tom Duane and Assemblyman Richard Gottfried announced the introduction of a bill titled "Gender Expression Non-Discrimination Act," intended to amend the state's human rights law to add "gender identity or expression" the list of forbidden grounds for discrimination in the state. Senator Duane had attempted to secure an amendment to the Sexual Orientation Discrimination Bill that was passed in December 2002 to add this category, but fell short of securing the necessary votes in the State Senate. (The Assembly has not previously considered the issue.) At the time, the gay political groups in the state were split over the strategy of seeking such an amendment, as it was argued that an amended Senate bill might not pass in the Assembly, and the governor had not yet signified receptivity to approving a bill that included protection for transsexuals. Four local jurisdictions in New York forbid such discrimination, and three other states, as noted above in our report on the recent enactment in New Mexico. *Press Release — Transgender Law & Policy Institute (www.transgenderlaw.org)*.

North Carolina — Charlotte — City Council members seeking legal advice about a pending measure to establish domestic partnership benefits eligibility for the municipal work force were advised by City Attorney Mac McCarley that the council has no authority to adopt such a program without specific state legislative approval — despite the fact that three other North Carolina cities have adopted such benefits plans, and that in two cases the plans have withstood court challenges. *Charlotte Observer*, April 25.

North Dakota — To the amusement of national news media, the state Senate voted against a proposal to repeal the state's anti-cohabitation law, which bans unmarried opposite-sex couples from living together "openly and notoriously" as if they were married. The law is listed in the state statute books among the sex crimes, with violations carrying a maximum penalty of 30 days in jail and a $1,000 fine. Proponents of keeping the law insisted it was necessary in order to remind people "that there is right, and there is wrong," in the immortal words of Republican Senator John Andrist. Of course, nobody was offering to undergo polygraph testing in an attempt to determine which state legislators really know the difference. *Associated Press*, April 3; *Washington Blade*, April 11.

Ohio — A Defense of Marriage Act bill was introduced on April 1 in the Ohio Senate. If enacted, it would provide that only opposite-sex marriages are recognized in Ohio, and would disempower cities from enacting local laws recognizing same-sex partners or providing "specific statutory benefits" to them. The apparent intent of the measure is to forbid any legal recognition of gay families, such that custody and visitation disputes, benefits disputes, and any other kind of legal proceeding would have to be decided without any reference to the domestic partnership or civil union relationship of the parties. The Ohio House passed an identical bill in 2001, but it died in the Senate at that time. This will be the fourth attempt to pass such a bill in Ohio, the first having been tried in 1997. *Gay People's Chronicle*, Cleveland, April 4, 2003.

Tennessee, Nashville — The Metro Council defeated a measure that would have extended protection against discrimination on the basis of sexual orientation to city workers. A tie vote in the council was broken by Vice Mayor Howard Gentry, who said he had not seen evidence that there was anti-gay discrimination in city government such as to warrant enactment of an official ban. *Washington Blade*, April 4.

Texas — Texas is the newest state to legislate against same-sex marriages and civil unions. On April 30, the state House of Representatives voted 118–9 in support of adopting a new section of the Texas Family Code, titled "Recognition of Same-Sex Marriages or Civil Union," which, despite its title, does the opposite: that is, provides that Texas will recognize neither same-sex marriages nor civil unions. A civil union is defined as a status that "is intended as an alternative to marriage or applies primarily to cohabiting couples" and grants "legal protections, benefits, or responsibilities granted to the spouses of a marriage." The same bill had been passed by the Senate on April 15, and Governor Rick Perry, who has stated support for the measure, is expected to sign it. Responding to objections that the bill might invalidate attempts by gay people to structure their relationships through contracts, estate planning, powers of attorney and the like, the bill contains a savings clause providing that "unmarried couples

can use private contracts and other legal arrangements to govern their interests," according to a description of the legislation posted to Gay.com on April 30.

Texas — State Rep. Robert Talton, a Pasadena Republican, testified in support of his proposed House Bill 1911, which would ban gay Texans from serving as foster parents, that children are better off in an orphanage than being placed in the homes of gay, lesbian or bisexual adults acting as foster parents. Talton insisted that homosexuality is "learned behavior" and gay foster parents would "teach" their foster children to be gay. Talton also testified that gay foster parents are likely to be pedophiles and thus shouldn't be allowed to have children in their homes. A huge crowd attended the hearing to testify against the bill. Shortly thereafter, Rep. Kenny Marchant, chair of the State Affairs Committee, stated that the proposal did not have sufficient support for passage and would not be put to a committee vote. *Austin American-Statesman*, April 29.

Texas — El Paso — The City Council voted on April 8 to revise the local anti-discrimination ordinance to include "sexual orientation" and "gender identity" as forbidden grounds for discrimination by any place of public accommodation. — It was unclear from the news report about this legislation that appeared April 9 in the *El Paso Times* about whether this legislation also forbids discrimination in employment and housing, the other activities traditionally covered by general civil rights laws.

Washington State — Seattle — The Seattle Port Commissioners rejected by a vote of 3–1 on April 8 a proposal to develop rules to require agency contractors to provide domestic partnership benefits to their employees. The agency already provides such benefits to its own workforce, but a majority of the commissioners sided with chairwoman Pat David, who argued that it was not a proper function for the Commissioners to dictate employee benefits policies for their contractors. *Seattle Times* April 9. A.S.L.

Law & Society Notes

Washington, D.C. — Marc Racicot, chairman of the Republican National Committee, met with several hundred members of Human Rights Campaign, a national gay-rights political group, during March, speaking about the Bush Administration agenda and listening to concerns raised by the group. It was reportedly the first time that any Republican Party chairperson has met with a gay organization. The meeting roused the usual right-wing critical comment, this time from Robert Knight, identified in a news report as director of the Culture and Family Institute, which is associated with Concerned Women for America, a right-wing group that files amicus briefs against gay rights whenever possible. Knight described the meeting as an insult to the Republican Party's political base. *Seattle Times*, April 12.

Washington, D.C. — Senator Rick Santorum (Rep. — Pennsylvania), one of the Republican's Party's most socially-conservative members, set off a mini-firestorm in the media in an interview he taped with the Associated Press on April 7, which was made public on April 21. In it, Santorum, commenting on the Supreme Court case of *Lawrence v. Texas* that was argued late in March with an opinion expected shortly, made comments about homosexuality that many in the press and leading political positions deemed to be offensive enough to warrant his removal from the Republican leadership in the Senate. Santorum, who is chair of the Senate Republican Conference, said, "If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." Seeing an opportunity to make hay with gay voters, Democrats piled on in a chorus calling for the G.O.P. to remove Santorum from his leadership post. U.S. Rep. Barney Frank, ever pragmatic, observed that this was just another example of Republicans playing to their right-wing political base. When Santorum was pressed for clarification, he spouted the standard line that he had nothing against homosexuals, but just opposed any Supreme Court recognition of a right of privacy for consensual sex. There was some editorial comment pointing out that his statements were pretty much in line with the official position on homosexuality of the Catholic Church, of which he is a devout member. Few thought he would actually resign or lose his position, since what he was saying was also in the mainstream of Republican Party positions, although few articulate them as crudely as he did. • • • In the midst of the Santorum firestorm, gay rights advocates had a bill introduced in the Pennsylvania legislature to add "sexual orientation" and "gender identity or expression" to the categories contained in the state's civil rights law. Senator Vincent Hughes, a Philadelphia Democratic who introduced the bill, stated: "No matter what your sexual orientation is, injustice is wrong, intolerance is wrong." *Harrisburg Patriot*, Pittsburgh Post-Gazette; April 30;

Washington, D.C. — Although Congress implicitly authorized the federal Office of Personnel Management to include domestic partners of federal employees in a new benefits program under the Long Term Care Security Act, the proposed regulations issued by OPM do not do so. Little surprise, since President Bush appointed Kay Coles James, a former senior vice president of the Family Research Council, to be Director of the Agency. Family Research Council is a spokesperson for the extreme anti-gay family right-wing. — Federal Globe, an organization of gay federal employees, has submitted comments on the proposed regulation, urging that the federal government maintain its competitive edge with private industry in recruiting new talent by adopting the expanded eligibility definition for which the statute leaves room. (Alternatively, it is expected that Rep. Barney Frank and Sen. Joe Lieberman will introduce bills providing domestic partnership eligibility for the federal workforce, although chances of passage are uncertain.) *Washington Blade*, April 11.

New Zealand — An Otago University study of 1,000 persons born in Dunedin in 1972 and 1973 revealed that 25 per cent of women and elevent percent of men reported having been sexually attracted to a person of the same sex at some time, but only about 2 percent of men and women stated that they were only or more often attracted to members of the same sex. *New Zealand Herald*, April 16.

California — The state Department of Health Services has ordered Health Net of California, a leading HMO, to pay for a MediCal patient's sex-reassignment surgery, and the insurer is balking, according to a suit filed in Los Angeles Superior Court, seeking judicial review of the department's order. *Los Angeles Daily News*, April 29.

North Carolina — The *Raleigh News & Observer* reported on April 27 about an unusual case involving a 7–year-old boy who lives with a foster father, a gay schoolteacher in Wake County, and whose biological father, a Honduran man who fathered the boy in the U.S. but has since been deported back to Honduras, sued for his return. Keene Carrasco's unmarried parents were caught in a government sting operation; his mother disappeared, and his father pled guilty and was deported. The boy was made a ward of the state, and placed in foster care with Kevin Martin, who also has another foster child living with him. From Honduras, Jorge Carrasco enlisted the assistance of the Honduran consulate in seeking to have his son returned to him. Keene, unlike his father, is a native-born U.S. citizen and speaks only English. The case is described as having become a "cause celebre" in Honduras, with much being made of Martin being gay as an objection to the foster placement. Wake County District Judge Michael Morgan recently ruled that Keene should move back to Honduras to be with his father, after he completes the first grade in May, but Keene has been objecting to going to Honduras. The judge has given Martin permission to accompany Keene when he travels to Honduras in May or June, after school ends.

North Carolina — The *Charlotte Observer* reported on April 29 that the McGill Baptist Church has been ejected from the Cabarrus Baptist Association for the grievous error of welcoming a gay male couple into membership in the church through baptism. The Association's missions director read a statement asserted that "the homosexual lifestyle is contrary to God's will and plan for mankind."

Ohio — Presbyterian Church (USA) officials convicted Rev. Stephen Van Kuiken of violating church law for performing union ceremonies for same-sex couples. However, Kuiken was acquitted on charges of ordaining gays who did not agree

to the requirement of chastity. Van Kuiken, unrepentant, said he would appeal the verdict within the church. *Chicago Tribune*, April 22.

Oregon — After years of contortions over its non-discrimination policy and the Boy Scouts, the United Way of Columbia Willamette's board voted on April 22 to adopt a non-discrimination policy that makes clear, in no uncertain terms, that effective in 2004 it will not pass on charitable money to organizations that discriminate based on sexual orientation. So the Boy Scouts, which are set to receive $110,000 this year, stand to be cut off next year if they persist in their anti-gay policies. *Portland Oregonian*, April 23.

Oregon — Michael Mosman, the U.S. Attorney for Oregon, who is being considered for appointment as a federal district judge, was a law clerk for Justice Lewis Powell during the term when *Bowers v. Hardwick* was decided by the Supreme Court. According to several accounts, Mosman was the conservative clerk who wrote the memorandum to Powell arguing against overturning the Georgia sodomy law on due process grounds. Gay rights groups in Oregon, as well as one of the state's senators, has stated objections to Mosman, arguing that he could not be unbiased in cases involving gay issues. Seeking to "clear his name" on gay issues, Mosman met privately with representatives from Basic Rights Oregon and Human Rights Campaign. On April 28, he sat down with the editorial board of the *Portland Oregonian* to put his views on the record, to the extent that a judicial candidate can do so without violating ethical precepts. He stated that the views expressed in that memo from 1986 are "not my personal views. They're not an attempt to lead Justice Powell by the nose… that's somebody's dream, it just doesn't work that way." Mosman insisted that he is not personally biased against gay people, and that in any event he has had plenty of experience since then in working with gay people and so his views on gay issues have evolved from what they were when he was a young law clerk.

Virginia — The governing board of Virginia Technical University, under sharp criticism for its recent action of ending all affirmative action and repealing discrimination protections for gay people, has reversed course. In an April 6 meeting that was open to the public (as opposed to the closed meeting in which those controversial votes were taken), the board voted 8–5 to reinstate the school's affirmative action policy, and also voted to reinstate the non-discrimination policy. *Roanoke Times & World News*, April 7, 2003. A.S.L.

House of Lords Voids Transsexual Woman's Marriage

Since the July 11, 2002, judgment of the European Court of Human Rights (Strasbourg Court) in *Goodwin v. United Kingdom* (Sept. 2002 Law Notes), the UK has been in ongoing violation of Articles 8 (respect for private life) and 12 (right to marry) of the European Convention on Human Rights, by failing to permit transsexual men and women to change the sex on their birth certificates and to contract a different-sex marriage in their reassigned sex. The only question has been when the UK will remedy this violation, and whether the remedy will be provided by the judiciary, or by a combination of executive and legislative action. On April 10, in *Bellinger v. Bellinger*, a panel of five Law Lords of the House of Lords (the United Kingdom's highest appellate court) unanimously declined to provide an immediate remedy and left compliance with the Strasbourg Court's judgment in Goodwin to the executive and legislature (for the full text of Bellinger, google "House of Lords Judgments").

Elizabeth Bellinger is a transsexual woman who married Michael Bellinger, a non-transsexual man, in a civil ceremony in 1981. If she is considered legally male, like her husband, their marriage is void under sec. 1(c) of the Matrimonial Causes Act 1973, which provides that the parties must be "respectively male and female." She sought a declaration that her marriage was valid at its inception in 1981 and is subsisting in 2003, which would mean that she is legally female.

The House of Lords had three options. First, it could overrule *Corbett v. Corbett* (1970), [1971] P. 83, in which a trial judge held that, under UK law, chromosomal sex determines legal sex. As the House of Lords is not bound by lower court decisions, and is entitled to state what an Act of Parliament has always meant from its enactment, it could say that a post-operative transsexual woman is "female" for the purposes of the 1973 Act and the right to marry.

Second, if the House of Lords did not wish to overrule *Corbett*, which had been relied on by UK courts since 1970, it could hold that, since Oct. 2, 2000, when the Human Rights Act 1998 came into force, it is obliged under sec. 3(1) of the 1998 Act to interpret the 1973 Act in a way which is compatible with the European Convention "so far as it is possible to do so." Because there was a clear violation of Articles 8 and 12 (the House of Lords could not easily disagree with the Strasbourg Court), and because "female" is not defined in the 1973 Act, it would be "possible" for the House of Lords to interpret "female" as including a post-operative transsexual woman. This might require a decision that the Bellingers' 1981 marriage is void, but would permit them to marry immediately.

Third, if it was not "possible" to interpret the 1973 Act in this way, the House of Lords could make a non-binding "declaration of incompatibility" under sec. 4 of the 1998 Act, which does not give UK courts the power to strike down Acts of Parliament. This declaration would put political pressure on the executive (a minister of the UK Government) to remedy the violation in *Bellinger* by making a remedial order (subject to the approval of each House of the UK Parliament) inserting definitions of "male" and "female" into the 1973 Act, or by introducing primary legislation (a Bill) into the UK Parliament that would regulate the legal consequences of gender reassignment. Because the executive would be free to ignore a declaration of incompatibility, it would add little to the Strasbourg Court's judgments, which are binding on the UK under Article 46 of the Convention (the ultimate sanction for non-compliance being expulsion from the 44–Member-State Council of Europe). The third option would render the Bellingers' marriage void, and preclude them from marrying until the executive took remedial action.

The House of Lords chose the third option. In the lead judgment, Lord Nicholls began by noting that he was "profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim.… Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress." However, he was "firmly of the view" that accepting Mrs. Bellinger's claim "would necessitate giving the expressions 'male' and 'female' in [the 1973] Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex. This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion.… The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation [a Bill rather than a remedial order] on this difficult and sensitive subject."

Lord Nicholls went on to list reasons why the question would be better addressed by the UK Parliament. First, it is very difficult to decide what the conditions for a legal change of sex should be: "creat[ion] [of] a false vagina" or "creation of a false penis," hormonal treatment without surgery, or no medical treatment at all. "Today the case before the House concerns Mrs Bellinger. Tomorrow's case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?" — And should divorce or sterilisation be required? Objective criteria are needed for the parties entering into the marriage and for third parties relying on its existence. No such criteria could be found in the Strasbourg Court's judgments, recent Australian and New Zealand judgments, or the

legislation of other European Union Member States.

Second, the question of marriage could not be separated from the other legal consequences of gender reassignment, including the right of a transsexual person to have the sex on their birth certificate changed. Third, "there are those who urge that the special relationship of marriage should not now be confined to persons of the opposite sex. It should be possible for persons of the same sex to marry. ... It hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage. Here again, this raises a question which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people."

Lord Hope rejected the idea that a person's sex could be changed physically. "[M]edical science is unable, in its present state, to ... turn a man into a woman or turn a woman into a man. ... It is not just that the chromosomes that are present at birth are incapable of being changed. The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment. ... A complete change of sex is, strictly speaking, unachievable." Althought the words "male" and "female" in the 1973 Act "are not technical terms and ... must be given their ordinary, everyday meaning in the English language ... no evidence was placed before us to suggest that in contemporary usage in this country ... these words can be taken to include post-operative transsexual persons." — Whether ordinary rules of interpretation were applied, or sec. 3(1) of the 1998 Act, 69male" and "female" are not ambiguous terms, and it was "not a possible view of the facts" to say that "Mrs Bellinger had completely changed her sex since birth and that she was now female." The 1973 Act made the sexes of the parties relevant. "[P]roblems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament."

Lord Hobhouse added that to use sec. 3(1) of the 1998 Act to read into the 1973 Act the words "'or two people of the same sex one of whom has changed his/her sex to that of the opposite sex' ... would ... not be an exercise in interpretation however robust. It would be a legislative exercise of amendment making a legislative choice as to what precise amendment was appropriate." He also asked: "Once you make this change, how do you, in a non-discriminatory way, deal with ... homosexuals of the same gender?"

The House of Lords' unanimous decision to grant a declaration of incompatibility in *Bellinger*, combined with the Strasbourg Court's judgment in *Goodwin*, means that transsexual men and women in the UK must now wait for the Bill the UK Government promised on December 13, 2002 to introduce in the UK Parliament "as soon as possible" (http://www.lcd.gov.uk/constitution/transsex/statement.htm). The Bill will "give legal recognition in their acquired gender to transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth. That will make it possible for them (if otherwise eligible) to marry in their acquired gender." *Robert Wintemute*

Other International Notes

United Nations — The U.N.'s Human Rights Commission in Genera was considering a resolution that would express the world organization's "deep concern at the occurrence of violation of human rights in the world against persons on the grounds of their sexual orientation," which had been introduced by Brazil and was backed by many members of the European Union. But representatives from Muslim countries were determined to block its passage, and managed to tie it up in so many procedural hurdles that the Commission decided to postpone further consideration of the issue for a year. *The Guardian*, April 25; *Orlando Sentinel*, April 26.

European Union — The European Parliament approved a non-binding resolution on April 9 stating that non-EU nationals present in EU countries should have the right to bring spouses, parents, registered and unmarried partners into the EU irrespective of gender as part of an overall policy of family reunification. — *EU Observer, Belgium*, April 10. ••• On April 10, the European Parliament pass a resolution accusing the Egyptian government of unfairly persecuting gay people in that country, reacting to recent convictions of gay men rounded up in a police raid on a night club known as a gay hangout. Ahmed Fathi Sorour, speaker of the Egyptian Parliament, reacted angrily to the resolution in a letter ot Pat Cox, president of the European Union Assembly, stating "No one has the right to give lessons to the other." Although Egypt does not have a sodomy law, there has been a recent wave of arrests of gays under the rubric of "contempt of religion." *Associated Press*, April 19.

Canada — Justice David Aston of the Superior Court of Justice in London, Ontario, denied a petition to establish parental rights for three adults with the same child, in a case where the names of the parties were not revealed publicly. The petitioners were a lesbian couple who had a child with semen donated by a married man who is friendly with both of them. The women are raising the child together as a couple. They sought to establish that both women and the sperm donor are all legal parents, but Aston found that Ontario's family law does not permit a child to have three legal parents simultaneously. Aston insisted that his ruling had nothing to do with "gender, sexual orientation or the definition of marriage." *Globe and Mail*, April 16.

Netherlands — An angry audience releases boos and cat-calls on April 15 when an Amsterdam court announced a sentence of 18 years in prison for Volkert van der Graaf, the self-confessed assassin of Pim Fortuyn, the openly gay politician who had been leading his own right-wing political party in then-pending national elections a year ago in the Netherlands. Under the verdict and sentence, van der Graaf could be free in as little as eight years. *Daily Telegraph*, April 16.

South Korea — The National Human Rights Commission has recommended that the Youth Protection Committee removed from its list of Internet sites deemed harmful to minors those concerned with homosexuality. The Commission said that existing guidelines listing gay sites as harmful to minors were out of step with international trends and encroached upon peoples' rights to pursue happiness, equality and expression guaranteed by the national constitution. The ruling came in response to a complaint filed by a group of gay people late in 2002. *Korea Times*, April 3.

Thailand — The Thai government has decided to exempt gay men and transvestites from the military draft, on the ground that their presence would undermine the effectiveness of the armed forces. The commanding general of the Army was quoted in a newspaper as saying they were not doing this out of prejudice, but "because we fear that the military will collapse" if gays and transgendered people are included. *Washington Blade*, April 4. Yeah, like the British army collapsed in Basra, right? (See below, under United Kingdom.)

United Kingdom — On March 19, the British government announced that it would provide a spousal pension to surviving same-sex partners of servicemembers killed in action. Quite ironic that the U.S. and the U.K. fight side-by-side in Iraq, with openly gay people allowed in one of the forces and prohibited in the other. The Brits also reported that a study conducted six months after the ban on service by openly-gay persons went into effect showed that there had been no adverse impact on recruiting or morale. — *Washington Blade*, April 4. A.S.L.

Professional Notes

Ruth Harlow has announced that she is retiring as Legal Director at Lambda Legal Defense & Education Fund. Ruth has been employed full-time as an attorney doing lesbian and gay rights work, first at the ACLU and then at Lambda, for more than twelve years. She indicated that she is thinking of switching careers, and exploring the possibility of studying architecture. In a statement she sent out to the attorneys at the lesbian and gay public interest organizations, she stated: "I have had the opportunity to work with the best people and on the best cases I could possibly imagine as

a lawyer. One reason I'm totally shifting gears after giving all I've got for LGBT and HIV rights is that I can't imagine practicing law in some other setting." At press time, Lambda had not yet announced its procedure for finding and designating a successor to Ruth. Those interested are advised to visit Lambda's website for up-to-date details. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Court Says Inmate Has No Privacy Right Respecting His HIV Status

U.S. District Judge Ellis has ruled that, at least in the 4th Circuit, there is no constitutional privacy protection for the HIV status of a prison inmate. Granting a motion to dismiss in *Sherman v. Jones*, 2003 WL 1956317 (E.D. Va., April 22, 2003), U.S. District Judge Ellis found that although some other circuits have found constitutional violations when the HIV+ status was unnecessarily revealed to others, many have not, and neither the 4th Circuit nor the Supreme Court has recognized such a privacy right.

According to the complaint, inmate Michael Sherman approached an officer, identified only as Deputy Jones, asking for his snack bag. According to Sherman, Jones responded by loudly stating, in the presence of other inmates, "I'm not scared of you or your AIDS." Claiming that his privacy rights had been violated, Sherman sued in federal court, invoking federal constitutional privacy. In an earlier ruling, the court dismissed claims against the prison warden in connection with this case.

In evaluating whether the state's motion to dismiss should be granted, District Judge Ellis stated that the Supreme Court has never identified a general constitutional right of privacy, instead finding that privacy had been violated in particular individual cases. Ellis saw no resemblance between those cases and that of an HIV+ prison inmate. — Not only has the 4th Circuit never adopted such a privacy right with respect to HIV-related information, but Ellis found that the circuit has, in *Taylor v. Best*, 746 220 (4th Cir. 1984), specifically rejected the argument that an inmate had a federal constitutional privacy right with respect to the contents of his medical records, which Judge Ellis deemed preclusive for purposes of this case. He did note that while several other circuits had followed a similar path, at least two had not, the 2nd and the 10th, both of which found that constitutional privacy does extend to matters of personal health status, such as HIV status. Judge Ellis characterized those opinions being "based on reasoning that is neither controlling nor persuasive here."

In a final, somewhat apologetic paragraph, Ellis stated that as a matter of policy it might make sense to provide privacy protection for personal HIV-related information, but affirmed that is the role of the federal and state governments, not the court, to extend existing privacy theories onto new ground in a case like this. A.S.L.

HIV+ Man Sentenced for Failing to Warn Sex Partners

In an April 2 decision written by Judge Nancy Vaidik, the Indiana Court of Appeals affirmed Larry Johnson's convictions and sentences on two counts of Failure of Carriers of Dangerous Communicable Diseases to Warn Persons at Risk as Class D felonies. Johnson, who had five different sexual partners and two children by two different women, never disclosed that he was HIV+, until it was too late. *Johnson v. State of Indiana*, 785 N.E.2d 1134 (Ind. App.). Johnson argued that the trial court abused its discretion in admitting into evidence a letter from the Social Security Administration, testimony from three of Johnson's former sexual partners who have tested positive for HIV, and testimony that Johnson had admitted his HIV+ status. In addition, he appealed the subsequent order by the trial court that he serve two consecutive sentences.

According to the trial court, Johnson's sexual escapades began in 1993 with C.B., with whom he had a six-month sexual relationship. Then during the summer of 1994 and continuing on and off through 1998, Johnson was in a sexual relationship with Y.V. who gave birth to a child during that time. Y.V. later tested HIV+ (no specific date given). During that 4–year period, Johnson, in 1995, had a one-time sexual encounter with T.D. In 1996, both C.B. and T.D. tested HIV+. In 1998 after being confronted by T.D., Johnson denied infecting her.

In January 1999, Johnson became involved with L.W. — She performed oral sex on him and he penetrated her vagina; and at no time during this encounter, did Johnson inform L.W. that he was HIV+. In February 1999, Johnson began a sexual relationship with K.J. After K.J. heard rumors about a month later that Johnson was HIV+, she and L.W. confronted him. He once again denied that he was HIV+. K.J. continued their sexual relationship, and gave birth to Johnson's second child. Johnson eventually told C.B. that he tested HIV+ around April or May of 1999. Even after his admission to C.B., Johnson continued his sexual relationship with K.J. without warning her of his HIV status. Approximately three to four months later, Johnson admitted to K.J. that he was HIV+ but this happened only after she found a Social Security document that indicated his positive status and had confronted him. Then on October 2, 2000, K.J. tested HIV+.

Four months later, the State charged Johnson with Failure of Carriers of Dangerous Communicable Diseases to Warn Persons at Risk as Class D felonies, and was convicted on two counts. Johnson appealed both jury decisions: one count involved his sexual relationship with K.J. and the other involved his sexual encounter with L.W. The trial court sentenced Johnson to two consecutive three-year sentences with one year suspended on each count for a total executed sentence of four years and two years on probation.

Johnson raised a number of issues on appeal: the admissibility of evidence, the sufficiency of the evidence and the subsequent harsh sentencing. First, he asserted that the trial court abused its discretion in admitting a letter from the Social Security Administration that he felt constituted hearsay. The trial court held and the appeals court affirmed that the State did not offer the letter for its truth; but rather, offered it to explain what prompted K.J. to confront Johnson a second time about his HIV status. Second, he asserted that the trial court abused its discretion in admitting testimony from C.B., Y.V., and T.D. Johnson argued that his prior sexual history was inadmissible if it was introduced in order to establish the inference that he must have engaged in sexual relationships with L.W. and K.J., because he had engaged in sexual relationships with several other women in the past. However, the appeals court affirmed that this evidence was introduced to establish the inference that Johnson was HIV+ and that he knew he was HIV+ at the time he engaged in sexual relationships with L.W. and K.J.

Third, Johnson argued that his admission to C.B. and to K.J. regarding his HIV+ status was inadmissible because the State failed to establish the corpus delicti. The court stated that under Indiana case law "a crime may not be proven based solely on a confession admission of a confession requires some independent evidence including evidence of the specific kind of injury and evidence that the injury was caused by criminal conduct. However, this evidence need merely 'provide an inference that a crime was committed.'" Disagreeing with Johnson, the court held that the testimony of the women who confronted him about their HIV status before he engaged in a sexual relationship with L.W. and K.J., and the fact that L.W. and K.J. testified that Johnson engaged in sexual activity with them without telling them that he was HIV+, were independent evidence of a crime and therefore, admissible.

Finally, Johnson argued that the State's evidence was insufficient to establish that he was HIV+ or that he knew of his condition at the time of his sexual encounters with K.J. and L.W. The appeals court reviewed the sufficiency of the evidence and held that there is substantial evidence of probative value to support the conclusion of the trier of fact. The court held that under Indiana Code §35–42–1–9, "in order to convict Johnson of Failure of Carriers of Dangerous Communicable Diseases to Warn Persons at Risk as a Class D felony, the State had to establish that Johnson (1) is HIV+, (2) knew he was HIV+, (3) and knowingly or intentionally, (4) engaged with a partner in sexual contact that has been demonstrated epidemiologically to transmit HIV, (5) while failing to

warn the partner of his HIV status and the need to seek health care."

The court noted that K.J. testified that she and Johnson began a sexual relationship in February 1999 and Johnson did not reveal his positive status to her until 6 months later. LW testified that she and Johnson were involved sexually in January 1999 and that Johnson has never told her that he was HIV+. C.B. testified that Johnson told her that he was HIV+ in April or May of 1999. All of these women — C.B., K.J., Y.V., and T.D. — have tested positive after engaging in a sexual relationship with Johnson, and the court concluded that he could have been positive as early as 1993, the date of his relationship with C.B. The court held this was sufficient to prove sexual contact without warning of his status. And after reviewing all the evidence, the court held Johnson was HIV+ at the time that he engaged in sexual contact with L.W. and K.J. and the probative value exists to support Johnson's two convictions.

Johnson then argued that the trial court abused its discretion when it imposed two consecutive sentences. These sentencing decisions lie within the discretion of the trial court, including the ability to enhance a presumptive sentence or to impose consecutive sentences when it finds even a single aggravating circumstance. (Indiana Code §35–38–1–7.1.) The court supported its sentencing decision by stating that Johnson's prior criminal behavior, while not extensive, is an aggravating factor that demonstrates a propensity for criminal behavior. And secondly, Johnson's blatant disregard for the number of people he affected and the risk of infecting the children was an additional aggravating factor. The court stated that it found no mitigating factors. The Appeals Court concluded that the trial court properly identified two aggravating factors and Johnson failed to identify any mitigating factors. Therefore, the court affirmed that the trial court acted within its discretion when it ordered Johnson to serve two consecutive sentences.

Chief Judge Sanford M. Brook dissented, even though he agreed with the majority that being HIV+ was not itself a crime but that the State was required to establish beyond a reasonable doubt all the evidence. Chief Judge Brook took a textual approach and interpreted IC 16–41–7–1 to mean that if Johnson only "reasonably should have known" and did not "actually know" he was HIV+, then Johnson was under no statutory duty to warn other persons who may have been at risk. In addition, Brook argued that the State could not establish with competent evidence that Johnson actually knew he was a carrier. The one letter from the Social Security Administration, which was admitted for another purpose, does not suffice to establish independent evidence from Johnson's extrajudicial confession. Therefore, no independent proof that the specific crimes as charged were committed. Brook concluded: "A court may not read into a statute that which is not the expressed intent of the legislature… Johnson's actions might be considered extremely callous and contemptible, but absent competent evidence that he was a carrier of HIV and actually knew of his carrier status, they cannot be considered criminal under the applicable statutes as they are currently written." *Audrey Weinberger*

Federal Court Rejects Hiring Discrimination Claim by HIV+ Applicant

In *Loren v. Levy*, 2003 WL 1702004 (S.D.N.Y. March 31), U.S. District Court Judge Denny Chin granted summary judgment to the New York City Board of Education, the New York State Department of Education and various officials of each agency in a lawsuit brought by Dean Loren, an unsuccessful HIV+ applicant for the New York City Teaching Fellows Program who alleged that he was denied participation in the program in violation of the Americans With Disabilities Act, various federal and state whistleblower and civil rights statutes, breach of contract and various state and federal discrimination laws. The Court ruled that the defendants had reasonable grounds to deny Loren participation in the program.

During the late 1990's, Loren "became involved in various activities relating to Martin Luther King High School." Eventually, he began to write letters complaining of corruption, fraud and racial discrimination at the school, and coverups in response to his complaints. He sent letters to President Clinton, Vice President Gore, Mayor Giuliani, New York Public Schools Chancellor Rudy Crew (and his successor, Harold Levy), U.S. Senator Charles Schumer, Rev. Al Sharpton, The Washington Post, The New York Times, The L.A. Times, The New York Post, and The New York Daily News.

In June 1998, Loren attended a meeting of the Board of Education, where he met with one Vicki Bernstein, a Board of Education official, who found his demeanor "odd" and that he was "not particularly rational." Two years later, he applied for a position with the Teaching Fellows Program, a program which is intended to provide an alternative means of entry into teaching for professionals and other "non-traditional" candidates. Loren has degrees in chemistry and law. He was selected for the program in late July 2000. Training would begin on July 31, 2000. That very day, at another location, Bernstein learned that Loren was selected for the program. She recalled him from their meeting in 1998. She felt he was not an appropriate candidate for the program and began taking steps to have him terminated. She spent the afternoon confirming various incidents reported by others and verifying the steps needed to terminate him in the Program. It was decided to advise him that he was terminated at the end of the training day. Meanwhile, Loren approached one of the trainers at the program to advise of his HIV+ status, ask about the Board of Education's HIV policies, and ask for some medical forms. The court found that this was the first notice that anyone had of Loren's HIV+ status, and that Bernstein had no knowledge of this.

Loren was terminated at the end of the day, and sued shortly thereafter.

The claim which would be of most interest to our readers is the one under the Americans With Disabilties Act. The Act has four requirements for suit: (1) that the defendants are covered by the ADA, (2) that the plaintiff suffers from a disability within the meaning of the ADA, (3) that the plaintiff is qualified for the position he seeks or occupies, and (4) that the plaintiff suffered an adverse employment action because of his disability. Judge Chin granted summary judgment to the defendants because, he found, no reasonable jury could find that Loren's termination related to his HIV status. Chin found slim support for Loren's position and ample support for the position of the defendants in what is clearly a voluminous record. The only evidence on the record supporting Loren's claim was that the decision to terminate was close in time to the occasion when Loren advised a Board of Education employee that he had HIV. The record showed that the decision to terminate was made before Loren spoke up, based on a finding of fact that recorded key events on the critical afternoon on a minute-by-minute basis. Loren's other claims were rejected after lengthy and detailed findings and with equal lack of sympathy. *Steven Kolodny*

AIDS-Phobic Funeral Home Escapes ADA Liability

U.S. District Judge Jose Antonio Fuste in Puerto Rico ruled that a local funeral home had no liability under the public accommodations provisions of the Americans With Disabilities Act for alleged discriminatory treatment in connection with the funeral of a person who died from AIDS. *Font v. Funeraria San Francisco*, 2003 WL 1918031 (D. P.R., March 27, 2003).

When Francisco Lorenzo Font died in a New Jersey apartment in 1998, his family members decided to hold the funeral in his hometown, Aguado, Puerto Rico. His mother, who lived with one daughter in Aguado, had come to New Jersey and stayed with another daughter who lived there while Francisco was receiving medical care. The family wanted to hold an open-casket wake at the Funeraria San Francisco in Aguada.

They contacted the funeral home and made a contract with Benjamin Rosario, the owner of the home, who had them arrange with one Greg Brunwasser, a New Jersey mortician, to pick up Francisco's body, have it embalmed, and arrange for transport to Puerto Rico. None of the family members had actually seen the body after Francisco's death. Although it is not clear from the court's opinion, it appears that Rosario did not know when he made the contract that Francisco had died from AIDS.

Brunwasser collected the body, embalmed it, and sent it to Funeraria San Francisco in Aguada. The family members also went to Puerto Rico to

prepare for the wake at the funeral home, but they learned that as soon as the body arrived, Rosario ordered that it be taken directly to the cemetery for burial. Brunwasser had warned Rosario that Francisco died from AIDS, a "highly infectious disease." Rosario then concluded that Francisco had to be buried immediately for safety reasons, and that there could be no open-casket wake. Rosario also suggested to Francisco's family members that they get HIV and hepatitis testing to protect themselves.

The upset family members prevailed on Rosario to let them hold the wake, but he insisted that it be closed-casket at their home, not at the funeral home. Wanda, one of Francisco's sisters, called Francisco's physician in New Jersey to ask whether any of this was necessary, and the doctor assured her that an open-casket ceremony would be perfectly fine and that Francisco, in his embalmed state, presented no risk of infection to anybody at the funeral home. But the casket provided for the wake was apparently sealed, because the Fonts were unable to have an open-casket wake. After the burial, his family had doubts about whether he had even been in the casket, since the funeral home had insisted on sealing it and they had not seen him since his death. They prevailed on the Puerto Rico Health Department to have the body exhumed so it could be positively identified before reburial.

After this emotionally harrowing experience, the family members filed suit against the funeral home and Rosario in the U.S. District Court in Puerto Rico under Title III of the Americans With Disabilities Act, which provides that places of public accommodation (including funeral homes) may not discriminate against persons with disabilities or those associated with such persons. They also asserted claims for breach of contract in violation of state law. — They sought a judicial declaration that the funeral home had violated federal and state law, and damages for discrimination and emotional distress. The funeral home moved to dismiss the federal ADA claim, arguing that the court had no jurisdiction in this situation because Francisco, being dead, was no longer disabled, and that the plaintiffs, who are not disabled, could not assert any rights under the ADA. The home also argued that declaratory federal should not be available to these plaintiffs because there was no indication they could be subject to the same discriminatory conduct in the future.

Judge Fuste noted a prior federal court opinion holding that "a plaintiff seeking injunctive relief based on an alleged past wrong must show that there is a real or immediate threat that he will be wronged again," and "that an ADA claim for direct discrimination under Title III will not survive a plaintiff's death." — "Plaintiffs' injury was inextricably intertwined with the death of their relative," wrote Fuste. "Their need for Defendants' Funeral Home services arose at the time of the decedent's death, and they incurred any injuries at that time. They do not allege that they are suffering any ongoing discrimination on the part of Defendants, nor suggest that they intend to use Defendants' services again… As such, Plaintiffs have not met the requirements of standing."

While conceding that "this is a truly harrowing case," Fuste asserted that "nothing in the ADA or its legislative history suggests an intent to allow individuals to obtain relief without showing a present case or controversy, regardless of the factual circumstances." Although the ADA says that it is to be "broadly construed" to address unjustified discrimination against persons with disabilities, Fuste rejected the argument "that the statute should be interpreted so broadly as to give Plaintiffs a cause of action for discrimination that occurred after their disabled relative's death."

Fuste never directly addressed the plaintiffs' claim that their own rights, as persons who are 'associated with' a person with a disability, were at stake in the case, even though the ADA specifically provides that such persons are protected from discrimination attributable to their association with a person with a disability. He suggested that the lack of prospective injury to a dead person or that person's living associates meant that the equitable relief authorized under the ADA was unavailable. Although Fuste conceded that many courts have found that HIV-positive individuals have a disability within the meaning of the law, he apparently believed that the disabled person must be living for those associated with him to have a statutory claim of discrimination.

Judge Fuste was appointed to the federal bench by Ronald Reagan. His decision exemplifies the crabbed, literalistic manner in which many federal courts, from the Supreme Court on down, have interpreted the ADA to undermine its basic function of outlawing disability-based discrimination. By contrast, early in the AIDS epidemi a New York trial court held that unjustified funeral home practices in connection with the funerals of persons who died with HIV-infection violate the local anti-discrimination laws, interpreting statutory language not far different from the ADA. *Dimicelli & Sons Funeral Home v. N.Y. City Comm. on Human Rts.*, NYLJ, 1/14/87, p.7, col.3 (Sup.Ct., N.Y.Co., 1/9/87).

Of course, the Font family is not totally without recourse, as Judge Fuste pointed out that they "may still pursue their state law claims in the appropriate court." So it is possible that they may win some damages in state court for breach of contract. A.S.L.

AIDS Litigation Notes

Federal — Florida — In *Pate v. Peel*, 2003 WL 1860673 (N.D. Fla., March 31, 2003), the court rejected 1st and 8th Amendment claims by an HIV+ state prison inmate. The only defendant is a nurse-practitioner at the prison, who is charged in this litigation with deliberate indifference to the plaintiff's condition and specific relation for complaints made by the plaintiff. The Magistrate Judge found no basis for either claim.

Federal — Massachusetts — In *Ishmael v. Immigration and Naturalization Service*, 2003 WL 1790895 (D. Mass., April 1, 2003), District Judge Zobel found that the court was without jurisdiction to countermand a deportation order of an HIV+ detainee, who argued that deportation would be inhumane due to his medical situation and the separation of his family (his children are U.S. citizens not subject to deportation).

Federal — New York — In *Benner v. Becton Dickinson & Co.*, 2003 Wl 1702014 (S.D.N.Y., March 28, 2003), U.S. District Judge Pauley rejected the plaintiff's attempt to make a nationwide class action out of a lawsuit involving products liability claims against a manufacturer of injection devices, claiming that they presented an unreasonable danger of HIV transmission. The court found that the necessary risk benefit analysis for a products liability suit based on a defective design theory could not be performed in common for the entire class, because the risk analysis must be based on comparisons of the benefits to be gained by particular uses, and the products in question have a multitude of different specific, relevant uses for purposes of this litigation.

California — The 2nd District Court of Appeals has reconsidered its ruling concerning the circumstances under which a court can order HIV testing of a person charged with a crime, reacting to a recent decision by the state's supreme court. In *Humphrey v. Appellate Division of the Superior Court*, 2003 WL 1930321 (April 24, 2003) (not officially published), the court found that it was appropriate to order testing of a man charge with child molestation and sexual battery where the mother of the young girls who were allegedly molested had filed an affidavit with the court describing circumstances related to her by her daughters in which it was possible that body fluids may have been transferred in a method that theoretically result in HIV transmission. The court rejected the argument that an affidavit from the mother based on what her children had told her was not sufficient to meet the probable cause standard established by the state's HIV testing law, and also rejected the argument that as the statute only authorizes testing on the victim's request, the mother's affidavit would be insufficient to trigger the statute.

Washington State — In an unpublished opinion in *State of Washington v. Perry*, 2003 WL 1775990 (April 1, 2003), the Court of Appeals of Washington vacated an HIV testing requirement that was part of the sentence imposed where the defendant was convicted of two counts of delivery of mephamphetamine. The trial court imposed the HIV test under a statute that authorizes such an order "if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles." At trial, a detective testified that mephamphetamine may be "snorted, smoked, inhaled, or injected,"

and the trial court concluded the statutory requirement had been met. However, there was no evidence at trial that Perry had ever injected himself with the drug, and at the appellate level the state conceded error in having sought the testing.

Washington State — In *Marriage of D.K.R. and V.R.R.*, 2003 WL 1738917 (March 31, 2003) (not officially published), the Washington Court of Appeals ruled that the trial court erred in awarding lifetime maintenance to an HIV+ woman as part of a divorce decree in a four-year marriage. V.R. was diagnosed as HIV+ shortly before she was to marry D.R., and offered to call the whole thing off, but D.R. still wanted to marry her. V.R., who was employed as an administrative assistance, brought a child from a prior marriage to the marriage with D.R., although he did not adopted the child. D.R. initiated the divorce action after the parties separated. The trial court, noting the medical complications of V.R.'s condition, ordered a monthly maintenance payment for the remainder of V.R.'s life, unless she married or recovered her health sufficiently to enjoy full-time employment. The court of appeals reversal noted that there was no finding that "V.R.'s health problems have rendered her virtually unemployable," and that when a marriage is short-term, courts are not supposed to make lifetime maintenance awards. There was also a child support award, which was not contested, and the court of appeals approved the trial court's decision to award V.R. a substantial share of the community property pension accumulation. A.S.L.

AIDS Policy Notes

Following up on his state-of-the-union pledge to increase substantially the U.S. financial commitment to combating AIDS abroad, President Bush has urged Congress to pass a legislative proposal introduced by Rep. Henry Hyde, an Illinois Republican, that would set aside $15 billion over the next five years to expand AIDS treatment by targeting payment for drugs and funding preventive education. Hyde, known as a vigorous opponent of abortion, has nonetheless drafted the bill to make money available to non-governmental organizations, even though they might also offer abortion counseling or services, so long as the funding streams for the activities are kept separate. *Associated Press*, April 30. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENT

Servicemembers Legal Defense Network, a legal aid and advocacy organization assisting men and women harmed by "Don't Ask, Don't Tell," seeks a full-time staff attorney for its Washington, D.C. office. Responsible for all aspects of assigned legal cases as well as general legal, policy, education and outreach activities, including serving as liaison to the armed services and Pentagon. Req: JD from an accredited institution, member in good standing of a state bar and 1–3 years of experience. Salary based on experience, excellent benefits. Send resume, cover letter & salary history to: hr@sldn.org or fax: (202) 797–1635. SLDN maintains a strong commitment to a multicultural environment. www.sldn.org.

EVENT ANNOUNCEMENTS

Harvard Lambda, the organization for lesbian, gay, bi and trans issues at Harvard Law School, has announced dates for two fall events. On Saturday, September 20, Lambda will present a daylong program and dinner to commemorate the 25th anniversary of the formation of the first gay student group at the law school. On October 10–11, Lambda will be presenting a weekend conference on the gay military issue, with an emphasis on the Solomon Amendment and its impact on law school recruitment policies. The newly-announced president of Harvard Lambda for next year, Amanda Goad, can be contacted for information about these events. Her email is agoad@law.harvard.edu.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Berrigan, Helen G., *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 L. & Sexuality 87 (2003).

Bix, Brian H., *Choice of Law and Marriage: A Proposal*, 36 Fam. L.Q. 255 (Summer 2002).

Cappel, Andrew J., *Bringing Cultural Practice Into Law: Ritual and Social Norms Jurisprudence*, 43 Santa Clara L. Rev. 389 (2003) (includes analysis of *Boy Scouts of America v. Dale* in light of author's thesis).

Cohen, Gail E., *Estate Planning for the Unique Needs of Unmarried Partners*, 30 Estate Planning 188 (April 2003).

Dempsey, Brian, *Same-Sex Couples in Scots Law*, SCOLAG Law Journal Issue 300 (Pt. I, pages 181–192), SCOLAG Law Journal Issue 301 (Pt. 2, pages 201–204).

Donovan, James M., *Same-Sex Union Announcements: Whether Newspapers Must Publish Them and Why We Should Care*, 68 Brooklyn L. Rev. 721 (2003).

Finkelman, Paul, *Picture Perfect: The First Amendment Trumps Congress in* Ashcroft v. Free Speech Coalition, 38 Tulsa L. Rev. 243 (Winter 2002).

Friedland, Mariam Aviva, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 Georgetown J. Gender & L. 777 (Summer 2002).

Garland, James Allon, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 L. & Sexuality 159 (2003).

Grenfell, Laura, *Making Sex: Law's Narratives of Sex, Gender and Identity*, 23 Legal Studies 66 (March 2003).

Guedes, Edward, *Don't Ask, Don't Tell.... At Work or in Court — The Conflict Between the Supreme Court's Decision in* Oncale *and* Price Waterhouse, 18 The Labor Lawyer 337 (Winter/Spring 2003).

Hardy, Samantha, and Sarah Middleton, *Legal Recognition of Significant Personal Relationships in Tasmania*, 20 U. Tasmania L. Rev. 159 (2001).

Heinzelmann, Mary Beth, *The "Reasonable Lesbian" Standard: A Potential Deterrent Against Bias in Hostile Work Environment Cases*, 12 L. & Sexuality 337 (2003) (Winner of NLGLA Michael Greenberg Writing Competition).

Hinckley, Steven D., *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 Wash. U. L. Q. 1025 (Winter 2002).

Kahn, Jonathan, *Privacy as a Legal Principle of Identity Maintenance*, 33 Seton Hall L. Rev. 371 (2003).

Knauer, Nancy J., *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & Sexuality 1 (2003).

Kulow, Marianne DelPo, *Same Sex Marriage: A Scandinavian Perspective*, 24 Loyola of L.A. Int'l & Comp. L. Rev. 419 (Aug. 2002).

Laughlin, Gregory K., *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 Drake L. Rev. 213 (2003).

Mason, Mary Ann, and Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 Fam. L. Q. 227 (Summer 2002).

McGowan, Sharon, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 *Col. J. of Gender & L. 77 (2003)*

Montz, Vivien Toomey, *Shifting Parameters: An Examination of Recent Changes in the Baseline of Actionable Conduct for Hostile Work Environment Sexual Harassment*, 3 Georgetown J. Gender & L. 809 (Summer 2002).

Poirier, Marc R., *Hastening the* Kulturkampf. Boy Scouts of America v. Dale *and the Politics of American Masculinity*, 12 L. & Sexuality 271 (2003).

Sedler, Robert A., *The Settled Nature of American Constitutional Law*, 48 Wayne L. Rev. 175 (Spring 2002).

Sumner, Ian, *The Charter of Fundamental Rights of the EU and Sexual Orientation*, 2002 Int'l Fam. L. 156 (Nov. 2002).

Turner, Ronald, *Were Separate-But-Equal and Antimiscegenation Laws Constitutional? Apply-*

ing Scalian Traditionalism to Brown *and* Loving, 40 San Diego L. Rev. 285 (Feb-Mar 2003).

Wardle, Lynn D., *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 Catholic Univ. L. Rev. 81 (Fall 2002).

Yatar, Eric K. M., *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 L. & Sexuality 119 (2003).

Student Articles:

Anzuoni, Nicole, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 Georgetown J. Gender & L. 871 (Summer 2002).

Brinkman, Jeffrey P., Veney v. Wyche. *Not in My Cell — The Constitutionality of Segregating Prisoners Based on Their Sexual Orientation*, 12 L. & Sexuality 375 (2003).

Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws: City of Erie v. Pap's A.M. *Perpetuates the Confusion Created by* Barnes v. Glen Theatre, Inc., 17 BYU J. Pub. L. 89 (2002).

Jones, Heather, Apprendi v. New Jersey*: A True "Watershed" Ruling*, 81 Texas L. Rev. 1361 (April 2003).

Kapczynski, Amy, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 Yale L. J. 1257 (March 2003).

Martin, Casey, *Equal Opportunity Adoption & Declaratory Judgments: Acting in a Child's Best Interest*, 43 Santa Clara L. Rev. 569 (2003).

Massaro, Christopher, *The Role of Workplace Culture Evidence in Hostile Workplace Environment Sexual Harassment Litigation: Does Title VII Mean New Management or Just Business As Usual?*, 46 N.Y.L.S. L. Rev. 349 (2002–2003).

Richardson, Pamela S., *Mandatory Juvenile Sex Offender Registration and Community Notification: The Only Viable Option to Protect All the Nation's Children*, 52 Catholic Univ. L. Rev. 237 (Fall 2002).

Schwartz, Jennifer L., Lawrence v. Texas*: Court of Appeals of Texas Holds Texas Ban on Homosexual Sodomy Does Not Invidiously Discrimination Against Homosexuals Under Federal and State Constitutions*, 12 L. & Sexuality 363 (2003).

Skaggs, J. Adam, *Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library*, 68 Brooklyn L. Rev. 809 (2003).

The More, the Not Marry-Er: In Search of a Policy Behind Eligibility for California Domestic Partnerships, 40 San Diego L. Rev. 427 (Feb-Mar 2003).

The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School, 35 Col. J. L. & Soc. Prob. 317 (Summer 2002).

Specially Noted:

Volume 12 of *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* (2003), has been published by students at Tulane University Law School. Individual articles are listed above. For information about buying a copy, consult the Tulane Law School journals website.

Volume 23, Number 3 of the *Women's Rights Law Reporter* (Summer 2002) includes a report of a panel discussion on *Gender, Race, and Sexuality: Historical Themes and Emerging Issues in Women's Rights Law*. Panelists include Martha F. Davis, Suzanne B. Goldberg, and Tanya K. Hernandez.

The Sharon Kowalski Case: Lesbian and Gay Rights on Trial, by Casey Charles (University of Kansas Press, ISBN 0–7006–1233–5, 2003), is a book-length treatment of one of the most important cases in lesbian and gay family law. The subject was previously treated at book length by Karen Thompson, Sharon Kowalski's domestic partner who had spearheaded the legal battle for recognition of their family after Sharon was seriously disabled in an auto accident, in the form of an autobiographical account of the struggle. This new third-person account enlists the apparatus of scholarly examination to present a detailed history of the case and its consequences for the law. Despite the academic apparatus, the book is a lively read, and contains numerous details that will have been previously unknown to most casual followers of the case. Furthermore, Prof. Charles attempts with some success to steer a neutral course and understand the points of view of all the key players as the story unfolds. Prof. Charles, who teaches English literature at the University of Montana, is also a lawyer with several years of practice experience, and thus brings the insights of a legally trained observer to the story. The book is available in both paperback and hard cover, and is highly recommended by your Editor.

Praeger Publishers has issued an anthology titled "Marriage and Same-Sex Unions: A Debate," consisting of a series of point-counterpoint essays by legal scholars on both sides of the issues concerning legal recognition of same-sex partnerships. In addition to your Editor, other "debaters" include Evan Wolfson, Maggie Gallagher, Mark Strasser, John Witte, Jr., Lynne Marie Kohm, Stephen Macedo, Lynn D. Wardle, Robert P. George, Carlos A. Ball, Teresa Stanton Collett, William N. Eskridge, Jr., Andrew Koppelman, Richard G. Wilkins, David B. Cruz, Richard F. Duncan, Greg Johnson, Barbara J. Cox, Patrick J. Borchers, James D. Wilets, and Robert John Araujo, S.J. Not surprisingly, many of the debaters from the "opposition" teach at religiously-affiliated schools, and some of the essays leave a sense of having talked "past" each other. The volume is co-edited by Wardle, Strasser and Duncan.

Vol. 11, No. 3 (2002) of the Widener Journal of Public Law contains a symposium consisting of six articles grouped under the title "Civil Unions In Vermont: Where to Go From Here? A Symposium Addressing the Impact of Civil Unions." The symposium was organized by the late Prof. David Orgon Coolidge, and assembles papers by persons generally predisposed against legal recognition of same-sex partners. The slant of the articles is not fully reflected in the neutral-sounding title of the symposium or the titles of many of the articles. Some of the articles collect interesting and useful statistical data and make helpful analytical points, in the overall context of disapproval of what was done in Vermont and warnings against negative consequences for society predicted as a result. The authors and articles are: Randy Lee, "A Tribute to My Friend David Orgon Coolidge" (p. 353); William C. Duncan, "The Many Questions of Civil Unions: An Introduction to a Symposium Addressing the Impact of Civil Unions" (p. 361); Teresa Stanton Collett, "Benefits, Nonmarital Status, and the Homosexual Agenda" (p. 379); Lynn D. Wardle, "Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law" (p. 401); Lynne Marie Kohm, "The Collateral Effects of Civil Unions on Family Law" (p. 451); and Michael A. Scaperlanda, "Kulturkampf in the Backwaters: Homosexuality and Immigration Law" (p. 475).

AIDS & RELATED LEGAL ISSUES:

Bix, Brian H., *Physician-Assisted Suicide and Federalism*, 17 Notre Dame J. L. Ethics & Pub. Pol. 53 (2003).

Bucholtz, Barbara K., *Employment Rights and Wrongs: ADA Issues in the 2001–2002 Supreme Court Term*, 38 Tulsa L. Rev. 363 (Winter 2002).

Craver, Charles, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 The Labor Lawyer 417 (Winter/Spring 2003).

Noah, Barbara A., *AIDS and Antiretroviral Drugs in South Africa: Public Health, Politics, and Individual Suffering: A Review of Brian Tilley's* It's My Life, 31 J. L. Med. & Ethics 144 (Spring 2003).

Weimer, Deborah J., *Medical Treatment of Children With HIV Illness and the Need for Supportive Intervention: The Challenges for Medical Providers, Families, and the State*, 54 Juvenile & Fam. Ct. J. No. 1, 1 (Winter 2003).

Student Articles:

Friedgen, Kelley A., *Rethinking the Struggle Between Health and Intellectual Property: A Proposed Framework for Dynamic, Rather Than Absolute, Patent Protection of Essential Medicines*, 16 Emory Int'l L. Rev. 689 (Fall 2002).

Lovett, William B., Jr., *Supreme Court's Clarification of the Effect of "Mitigating Measures" in Disability Determinations Muddies Disabilities Waters:* Sutton v. United Airlines, Inc., 21 Miss. Coll. L. Rev. 153 (Fall 2001).

Specially Noted:

Vol. 44, No. 3 (Feb. 2003) of William and Mary Law Review contains a symposium on Disability and Identity, with particular focus on some issues raised by the Americans With Disabilities Act.

EDITOR'S NOTES:

Corrections: Some errors slipped into recent Law Notes requiring correction. In reporting on the publication by BNA's Family Law Reporter of the *Kantaras* decision from Florida, we mistakenly referred to the judge as a federal district judge. In fact, he is a state trial judge. In our introduction to a reader's letter concerning the *Strome* decision from Oregon, we mistakenly identified the case as a custody dispute between a gay man and his ex-wife, when in fact the opinion in question dealt with a dispute between the gay man and his mother, thus the relevance of *Troxel* to the outcome. ••• All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.