RHODE ISLAND SUPREME COURT REVIVES GAY PALIMONY CLAIM

The Rhode Island Supreme Court has revived a gay palimony claim that was dismissed by the trial court on the ground that the alleged agreement arose from a "meretricious" relationship. According to the supreme court, the nature of the relationship is irrelevant if there is valid consideration for the agreement. *Doe v. Burkland*, 2002 WL 31510758 (Nov. 12, 2002).

"John Doe" and John Burkland lived together as domestic partners for nine years. At some point during their relationship, they registered as domestic partners with the city of New York. However, their relationship "soured and ended on bad terms," according to the opinion for the supreme court by Justice Flanders. Indeed, the terms of dissolution were so heated that the plaintiff, identified as "John Doe" in the court's opinion, filed an action in the Providence County Superior Court seeking an injunction against Burkland's alleged harassment and threats. Burkland responded with a denial of Doe's allegations, and counterclaimed alleging breach of an oral agreement to share equally all property acquired by either of the men during their period of living together. Burkland asserted a variety of alternative theories in addition to his breach of contract claim, including implied contract, promissory estoppel, constructive trust, resulting trust, and unjust enrichment. Doe, which originally filed this action under his own name, moved to dismiss the counterclaims.

Granting the motion to dismiss, the trial judge asserted that an agreement arising out of a "meretricious relationship" could not be enforced as a matter of public policy. Finding that Rhode Island law does not recognize "a marital dissolution between unmarried couples, homosexual or heterosexual," she rejected all of Borklund's counterclaim theories, and he appealed. Once the appeal was filed, Doe, apparently concerned that his name might end up being published in an official state supreme court decision, filed a motion for permission to redact his name in all court papers and to proceed anonymously as John Doe. The superior court granted that motion.

The Supreme Court totally rejected the trial court's conception of the case. Justice Flanders rejected the idea that the alleged property-sharing agreement arose from a meretricious relationship, pointing out that Burkland's counterclaim does not say anything about a sexual relationship between the men. Rather, Burkland identifies them as being domestic partners who were registered as such in New York City, and alleges that he agreed to "devote his skills, effort, labors and earnings" to assist Doe in his career, and that Burkland provided homemaking services, business consulting and counseling. Justice Flanders found that if these allegations are proven, they would constitute lawful consideration for a property-sharing agreement.

Flanders invoked the seminal California Supreme Court palimony ruling, *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), in which that court accepted a breach of contract claim by actor Lee Marvin's former girlfriend, who asserted that Marvin had made various promises of financial support to her in the course of their relationship, and that she had provided a variety of non-sexual services to him. Flanders also noted that a lower California court had extended the palimony concept to same-sex partners in *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (1988). In a footnote, Flanders observed that more than 30 states have followed the lead of *Marvin*, and in more than 20 of those states implied as well as express agreements are recognized in a palimony context. Only three states were known to have rejected the concept outright.

Flanders also observed that the fact of a sexual relationship does not preclude parties from making valid contracts with each other. In Rhode Island, for example, the court has ruled that the Family Court has jurisdiction to enforce a child custody and visitation agreement made between lesbian co-parents who were domestic partners, in *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000), and in another case from Wisconsin, *Estate of Steffes*, 290 N.W.2d 697 (Wis. 1980), a home-care nurse who had an adulterous affair with her patient could bring an action against his estate for non-sexual services rendered. "In sum," wrote Flanders, " as long as the alleged consideration for the parties' putative agreement was not illegal, a suit for enforcement of that contract can proceed, subject to whatever other defenses may exist."

Furthermore, Flanders found that the trial court should not have automatically rejected Burkland's other theories. Unjust enrichment restitution could provide a valid claim: "Here, Burkland asserted that the legal consideration he provided to his former domestic partner for more than nine years unduly enriched plaintiff by benefiting his career and by helping him maintain his relationship with his children," wrote Flanders. "Also, a resulting or constructive trust may have arisen in this case when plaintiff allegedly acquired property in his individual name during the relationship subject to an agreement to share the same with Borklund." Flanders concluded that at least a court with equitable jurisdiction should entertain these claims on the merits.

Finally, turning to the issue of anonymity, the court found that the Superior Court erred in granting Doe's motion, nine months after commencement of trial, to render his participation anonymous. Doe's real name had been on court papers on file in the clerk's office for that entire period of time, and his real name had been used by counsel during the arguments in open court, so the supreme court found that he had waived any claim retreat into anonymity at this point. However, the court did not use Doe's real name anywhere in the opinion, which suggests that he could preserve his anonymity by offering an acceptable settlement to Borklund in exchange for an agreement to withdraw the complaint. A.S.L.

LESBIAN/GAY LEGAL NEWS

Louisiana Appeals Court Rebuffs Sodomy Challenge

The Associated Press reported that a panel of the Louisiana 4th Circuit Court of Appeal had voted 2–1 to rebuff a pending challenge to the state's sodomy law brought by the Louisiana Electorate of Gays and Lesbians, Inc., in a vote announced on Nov. 20. However, the dissenting judge had not yet filed his complaint when the press report appeared on Nov. 22, and a copy of the majority opinion was not yet available at our deadline. A full discussion of the case will be published in the January 2003 issue of *Law Notes*. According to the press report, the state's Supreme Court had previously rejected an argument that the sodomy law violated privacy rights; in this next stage of the proceedings, the issue was whether the law improperly discriminated on the basis of sexual orientation. The appeals court majority ruled that there was no evidence that the statute, an antique "crime against nature" law that makes all oral or anal

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sex a felony, regardless of the gender of the actors, discriminates against gays and lesbians. The court also reportedly rejected an argument that the trial court erred in not allowing testimony by a state legislator that opponents of attempts to repeal the law were motivated by anti-gay animus, and by excluding evidence as to the harmful side-effects of the law. Plaintiffs' attorney John D. Rawls, who has been litigating this issue for many years, told the AP that the statute "obviously expresses Louisiana's overarching public policy to treat its gay citizens like scum." A.S.L.

D.C. Court Rebuffs City Commission in Boy Scouts Case

A local human rights commission may not reinterpret the policies of the Boy Scouts of America to find that Scouting's "expressive message" is not served by barring homosexuals from its ranks. Therefore, the District of Columbia's Commission on Human Rights cannot force the regional Boy Scout council to enroll self-proclaimed homosexuals as adult members. *Boy Scouts of America v. District of Columbia Commission on Human Rights, 2002 WL 31477935 (D.C. Ct. App. Nov. 7, 2002). The outcome of the case could have been in little doubt after the Supreme Court held that the Scouts had a First Amendment right to bar gays. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Nevertheless, the litigants at D.C.'s local high court were supported by as many amici as might weigh in on a Supreme Court case.

In February 1992, Roland Pool and Michael Geller, two adults with meritorious records as Boy Scouts in their youth, read in a newspaper statements by Ron Carroll, Executive of the National Capital Area Council of the Boy Scouts, stating that gays do not make good role models for "male youth progressing into adulthood." Pool and Geller, without knowledge of one another, let Carroll know of their disagreement with the statement, and informed Carroll of their own exemplary Scouting records, as well as their homosexuality. They included details of their participation in gay organizations. In addition, Pool applied for a volunteer position as Unit Commissioner with the Scouts. Each received a letter stating that his registration with the Scouts had been terminated, and asking him to sever all relations with the Boy Scouts. Their names were added to the ineligible volunteer file.

On October 16, 1992, Pool and Geller filed complaints with the D.C. Office of Human Rights alleging that the Scouts had engaged in unlawful discriminatory practices by revoking their membership because of sexual orientation. In its decision, issued more than eight years later, the Commission found that the Scouts had engaged in an unlawful practice under the D.C. Human Rights Act, which prohibits discrimination in the provision of goods, services, facilities, privileges, advantages and accommodations in any place of public accommodation. A "place of public accommodation" includes an institution or a club, and encompasses membership organizations such as the Boy Scouts. Citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Commission stated that the large size of the organization, its purpose and the non-selectivity of its membership make the Boy Scouts a public accommodation subject to the law.

In light of the Supreme Court's Boy Scouts decision, which was announced before the Commission finished its work, the Commission had to square its determination with the Court's First Amendment concerns. The Commission determined that allowing the two complainants to remain Scouts would not significantly affect the Boy Scouts' ability to advocate its public or private viewpoint, because the Scouts' policy is no more than a private statement of a few BSA executives, not an actual expression of BSA policy. This reasoning prevailed in spite of BSA's various position statements propounding the anti-gay position. According to the Commission, the position statements were either generated for media relations or were merely an attempt as part of state litigation in California "to document a policy that didn't really exist." Furthermore, admitting Geller and Pool as leaders would not significantly burden the Scouts' expression because — unlike Dale — neither Geller nor Pool was "a gay activist" and neither was likely to "advocate homosexuality as a BSA adult leader" or "send messages about homosexuality or its lifestyle" just by occupying such a position.

The D.C. court, however, found that this case could not be meaningfully distinguished from *Dale*. The attempt by the Commission to interpret the Boy Scouts' beliefs in a way that contradicted statements by the Boy Scout organization was impermissible under *Dale*. The Scouts' statements of their tenets must be accepted, and are protected by the First Amendment's freedom of speech and its necessary corollary, the freedom of association. Government actions that intrude into the internal structure or affairs of an association, like a regulation that forces a group to accept members it does not desire, are an unconstitutional incursion on that freedom, according to the court.

The court also analyzed whether the *Dale* outcome was based in any way on James Dale's status as an "activist," and thereby a living billboard for his views. In contrast, the Commission had found that Pool and Geller were not activists, and therefore would not be sending out messages contradicting the Scouts' core beliefs. The D.C. court stated that "it would be … mistaken … to read too much into" the Supreme Court's use of the term "gay activist" as having a bearing on its decision. However, even accepting the proposition that the term had dispositive meaning for the Supreme Court, the D.C. court could find little distinction between James Dale's activities and those of Pool and Geller. "Both joined gay and lesbian employee associations as adults, and both openly told the Boy Scouts they were homosexual when they initiated contact with the organization in 1992."

Therefore, Geller and Pool cannot be distinguished from Dale as to whether their "acceptance would derogate from the organization's expressive message." *Dale*, 530 U.S. at 661. A concurrence to the D.C. court's unanimous opinion noted that not all discrimination can be tolerated in support of an expressive message. Quoting Chief Justice Rehnquist's majority opinion in *Dale*, the concurrence reiterated: "That is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." The concurrence went on, those words from the majority opinion "may become pertinent in a future case presenting a different context." *Alan J. Jacobs*

Mass. Superior Court Finds Transgender Protections in Law Against Discrimination

Ruling on a question of first impression for Massachusetts, Superior Court Justice Linda E. Giles held that a transgendered person who claims she was discharged because of her refusal to dress as a man at work could claim unlawful discrimination on account of sex and disability. *Lie v. Sky Publishing Corporation*, 2002 WL 31492397 (Mass. Super., Oct. 7, 2002).

Allie Lie, born Robert Lie, began working as an editorial assistant at Sky Publishing Corporation in Cambridge, Massachusetts, in December 1994. When hired, Lie went by the name of Robert and dressed as a male. But beginning in May of 1998, Lie began dressing as a woman. On June 16, management personnel met with Lie and demanded that she wear only male attire while at work. Management indicated that they did not want to discharge her, only to get her to dress in conformance with what they saw as "reasonable business policy." But Lie persisted in dressing as a woman. It appears from the court's decision that the employer may not have fully understood what was going on, and it is not clear what Lie told them in that meeting. She had been diagnosed as having the condition known as "gender dysphoria," the formal diagnosis for transsexuals seeking a change of gender, and she was receiving psychotherapy and had begun hormone treatments to conform her body to her desired gender. But the employer took the position that she was merely a transvestite and should not cross-dress in the workplace.

After being told that she could not dress as a woman at work, Lie filed a complaint with the Cambridge Human Rights Commission, claiming she was being discriminated against. But on June 29, she received a written demand from her employer that she refrain from "dressing as a woman," and threatening termination. She replied to the letter, stating that she had been diagnosed with gender dysphoria and she would continue to dress as a woman.

On July 9, the Cambridge Commission issued a finding of probable cause that Sky Publishing had violated the city's human rights ordinance. A few days later, Lie filed new charges with the Massachusetts Commission Against Discrimination. Two weeks later, she was discharged. Then she amended her charges with the state Commission to add a charge of retaliation. On December 18, she filed a new charge, claiming that Sky discriminated against her based on sex, gender, sexual preference, perceived sexual preference, disability, and perceived disability. Lie ultimately withdrew these charges and filed a lawsuit in the Superior Court on July 20, 2001. Sky filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law and no trial was needed.

Sky's position, in brief, was that Lie was not discharged for cross-dressing, but rather for sending an insubordinate email to two supervisors on July 17, using hostile and disrespectful language. Sky also argued that discrimination, if any, against somebody who is transgendered does not violate the Massachusetts ban on sex, sexual orientation or disability discrimination.

Justice Giles found that no previous Massachusetts court decision has directly considered the question whether the state's Law Against Discrimination protects transsexuals from discrimination. She found that there are at least two, and possibly three, theories under which a transgendered person could seek relief.

First, she found that this could be sex discrimination. Looking first at federal civil rights laws, Giles noted that some federal courts, including the 1st Circuit, have found that discrimination against transgendered people for their fail to conform to a business's gender norms or expectations may be discrimination on account of sex. "The First Circuit Court of Appeals has weighed in on the matter, holding that a biological man who was denied a loan application because he was dressed in traditionally female clothing had established a *prima facie* case of sex discrimination under the Equal Credit Opportunity Act sufficient to avoid a motion to dismiss," she wrote, citing the court's decision in *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (2000). She also noted a recent state court decision from New Jersey, interpreting that state's civil rights law to cover anti-transgender discrimination as a form of sex discrimination, *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501 (2001). Although such cases have not yet percolated up to the top state appellate courts, there may be a trend getting started to adopt a broader definition of sex for purposes of interpreting state and federal laws that ban sex discrimination.

Justice Giles also found that since gender dysphoria is a diagnosable condition recognized in the diagnostic manual of the American Psychiatric Association, it could qualify as a "handicap" under the state's Law Against Discrimination. Unlike the federal Americans With Disabilities Act, which specifically provides that "gender identity disorders no resulting from physical impairments" may not be considered a disability for purposes of federal civil rights laws, the Massachusetts law contains no such statement and is open to a contrary interpretation. Giles found that Lie could plausibly claim both to have an actual impairment the substantially limits major life activities, or that she is regarded as having such an impairment, which is just as good for purposes of finding statutory protection. (In dicta, she also commented that recent discoveries about genetic or biological causes of transgenderism may actually bring that condition outside the exclusionary language in the federal statute.)

However, Giles concluded that Lie's complaint would not support a claim of sexual orientation discrimination. For that to work, Lie would have to be able to allege that she was discharged because of her actual or perceived sexual orientation, and there was nothing in her allegations to support this. All the statements attributed to the company went to the issue of cross-dressing and gender identity, and nothing was ever said about her sexual orientation. However, Giles left open the possibility that in an appropriate case, a transgendered plaintiff could claim sexual orientation if she could show that the employer's motivation in terminating her was attributable to her sexual orientation as such.

Giles also found that Lie's retaliation claim should not be dismissed at this stage of the lawsuit. There is a dispute between Sky Publishing and Lie as to the actual reason for the discharge, and such disputed questions of fact are not supposed to be resolved in summary judgment motions, but rather through the presentation of evidence at trial.

This is a decision of potentially great importance, especially if Sky Publishing appeals and it is upheld at an appellate level. Transgender rights activists have been urging the addition of specific language to civil rights laws to protect transgendered people from discrimination. They have achieved limited success at the state level (Minnesota and Rhode Island) and much success at the municipal level, with close to 50 municipal ordinances in cities of varying sizes, but no success at the federal level. An emerging body of judicial interpretation finding that transgendered people are already protected against discrimination could have varied effects: it could undermine the drive for new statutory language, but could also obviate the need to expend political efforts on new enactments. Of course, it also might provoke a backlash of amendments narrowing the scope of sex discrimination laws, but such a backlash has yet to materialize. A.S.L.

Same-Sex Cohabitation Terminates Alimony Rights in Utah

The Utah Court of Appeals has ruled that a formerly-married woman's right to alimony was terminated when she began living with another woman in a sexual relationship. The November 15 decision in *Garcia v. Garcia*, 2002 WL 31538576, reversing a trial court, terminated alimony payments from Amado Garcia to Diane Garcia.

Under Utah's divorced law, Utah Code Ann. Sec. 30–30–5(9), the court's grant of alimony rights to Diana could be terminated if Amado proved that Diana was "cohabitating with another person." On March 2, 1999, Amado filed a petition with the Farmington County District Court, seeking a modification of his divorce decree, on the ground that Diana was living with Kimberly Ellis. According to Amado's petition, Diana and Kimberly had been living together in a sexual relationship since September 19, 1997. Diane failed to file a timely response to the petition, so the court had to treat Amado's allegations as being true.

District Judge Jon Memmott found that the Utah courts have construed this statute as requiring two factual findings: that the ex-spouse is sharing a residence with another person, and that the ex-spouse and the other person have "sexual contact evidencing a conjugal association." According to Judge Memmott, a "conjugal association" means a relationship similar to a marriage. Because Utah does not allow same-sex marriages, Memmott concluded that same-sex cohabitation cannot qualify as a "conjugal association."

In his opinion, Memmott concluded that "had these individuals been of the opposite sex, their conduct would be viewed as 'participating in a relatively permanent sexual relationship akin to that generally existing between husband and wife.' However, there are substantial legal differences between a man and a woman having common residency and 'sexual conduct evidencing a conjugal association' and a 'same sex' common residence and 'sexual conduct evidencing a conjugal association.'" Based on that conclusion, Memmott denied Amado's petition.

On appeal, Presiding Justice Jackson wrote that Memmott had misconstrued the statute. Jackson pointed out that the statute used the term "with another person," and so clearly did

not require that the cohabitant be of the opposite sex. "The plain language of the statute requires only that the alimony payee cohabit 'with another person,' and contains no requriement that the other person be a member of the opposite sex," wrote Jackson. Thus, Amado's uncontradicted petition met both requirements of the statute, and the court of appeals reversed the trial court's decision and sent the case back down to the trial court for appropriate follow-up to this opinion.

The ruling demonstrates the hypocrisy of the law on same-sex partners. While Utah refuses to give any legal recognition to same-sex partners when such recognition would prove useful to them, it does recognize them when the result would be to deprive them of an on-going benefit. Of course, one might alternatively look at this ruling as a foot in the door toward the beginning of legal recognition of same-sex partners in Utah. Is the glass a little bit full or mainly empty? A.S.L.

California Appeals Court Rejects Former Partner's Claims of Undue Influence

In *Hover v. Chapman*, 2002 WL 31458296 (Cal.App. 4 Dist., Nov. 5), the California Court of Appeal affirmed a trial court decision that the former life partner of a deceased life insurance policy holder had not made a sufficient showing that the sister of the deceased had unduly influenced the deceased to name her the beneficiary of the insurance policy instead of the former life partner.

Mark Alsaker, the decedent, lived with Timothy Hover for five years until the two argued in September 6, 2000. Hover threw Alsaker, who was terminally ill with cancer, out of his house. Alsaker went directly to his bank, where he removed Hover's name from his bank account, and then named his sister, Sandra Chapman, as his designee on his health care proxy. In early October, Alsaker named Chapman as the beneficiary on his life insurance policy. Alsaker spent the last six weeks of his life in his sister's house, and died a week after changing the beneficiary designation. The trial court found that Hover made no showing of undue influence, as not even Hover's own witness presented any testimony to support his claim. On the record presented, the appellate court affirmed. *Steven Kolodny*

Nebraska Federal Courts Rejects Sexual Orientation Discrimination Claim Against Community College

U.S. District Judge Joseph F. Bataillon granted summary judgment to the public employer on a claim by a gay employee that he had been subjected to harassment and denial of promotion due to his sexual orientation. *Cracolice v. Metropolitan Community College*, 2002 WL 31548706 (D. Neb., Nov. 15, 2002). Finding that the few factual issues as to which there were disputes would not affect the outcome, the judge concluded that the employer had done what it could reasonably be expected to do in combating the alleged harassment, and that the plaintiff provided no factual allegations to support the claim that his sexual orientation had anything to do with the failure to be promoted.

Gregory Cracolice was hired on July 1, 1999, to be an Academic Advisor at the Fort Omaha campus of the community college, and to teach courses at both Fort Omaha and the South Omaha campuses. He alleged that when he was hired he was told that he would be considered for promotion to a coordinator position when they those positions next opened up the following summer. Cracolice alleged that he encountered no problems on the job until November 10, 1999, when he attended a staff meeting titled "Sexual Orientation in the Workplace," at which he and several other gay employees were encouraged to "come out." In a deposition, Cracolice testified that he felt good about the meeting and his ability to share personal information in a safe environment. But he alleges that shortly after the meeting he began to receive hate mail and harassing correspondence through campus mail, Internet, voice mail, and attached to the windshield of his car. Cracolice complained to his immediate supervisor, who expressed support for him and passed the information up to higher level supervision. At various times, the Executive Dean of Campus and Student Services and the Director of Human Resources got involved in dealing with Cracolice's complaints. Since almost all of the incidents involved unknown perpetrators, there was not much they could do, although when Cracolice identified one employee who was making fun of him, that employee was called in for a disciplinary lecture and a notice placed in her personnel file. The administration also hoped to improve the situation by publishing an article titled "Coping with Change at Metro" in the weekly in-house publication, and the secretaries in Cracolice's office were allowed to reposition their desks so they could observe anybody who placed anything in Cracolice's campus mailbox. Nonetheless, the anonymous harassment continued and Cracolice decided to quit, giving notice on May 3, 2000, and in a May 10 meeting with management informing them that he would not be teaching his class at the Fort Omaha campus. He was then informed that he would not be considered for teaching future classes at South Omaha, either.

Cracolice had applied for a promotion to a coordinator position, and the decision to that was pending while all this other business was taking place. About a hundred people applied for the three available coordinator positions. While Cracolice was ranked in the top 15 applicants, he did not get the job. In his complaint, he asserted that he had been promised when he was hired that he would be promoted when these jobs became available, but in his brief to the court in opposition to the summary judgment motion he had modified this position to being told that he would be considered for such a promotion.

Based on this factual record, Judge Bataillon determined that the college was entitled to summary judgment. Cracolice was basing his claim on substantive due process under the constitution, not any announced non-discrimination policy or statutory basis of protection. (The court noted that this was *not* a same-sex harassment case brought under Title VII; indeed, Cracolice did not know the gender of his anonymous harassers, and the one person he did identify was a woman.) As such, the court found that Cracolice had a burden to allege facts showing "conduct that shocks the conscience" and "interferes with the rights implicit in the concept of ordered liberty." Measured against this standard, the court found that his allegations fell far short.

Bataillon noted that "Metro took immediate and numerous actions to provide a safe environment for Cracolice" when he brought the allegations of harassment to the attention of school officials. "Where a government entity tries to eliminate discrimination but it is not totally successful, the courts will not require a disproportionate use of resources, particularly, where not much more could have been done, given the anonymity involved." Bataillon found no "egregious facts" on which a due process claim could be based. He also found that Cracolice alleged nothing that would contradict the college's position that he had been fairly considered for the promotion, and that his sexual orientation had nothing to do with their decision to select other applicants for the coordinator positions. The court also found no support for an allegation that his First Amendment rights were violated, finding that the claim had not been raised in a timely manner and that Cracolice had not been forced to reveal his sexual orientation to anybody; he had done it voluntarily at the Nov. 10 meeting. A.S.L.

Magistrate Recommends Dismissal of Same-Sex Harassment Claim

In *Moran v. Fashion Institute of Technology*, 2002 WL 31288272 (S.D.N.Y. Oct. 7), a federal magistrate recommended that summary judgement be granted to the defendant in a same sex sexual harassment case. In doing so, whether one agrees with the reasoning or not, the court sets forth a useful discussion of the factors to be considered in such cases, and the manner in which they are evaluated, at least in the Second Circuit.

In a male/female sexual harassment case against an employer, the plaintiff must estab-

lish 1) a "sufficiently severe or pervasive [harassment] to alter the conditions of employment and create an abusive working environment" and 2) that a specific basis exists for imputing the objectionable conduct to the employer. The court stated that the plaintiff in a same sex harassment case has an additional burden of proof because the plaintiff in a same sex case may not take advantage of inferences which the court will draw in opposite sex cases. The court gave as, an example in opposite sex harassment cases, "in instances of explicit or implicit sexual proposals or instances of physical conduct, there is a presumption that the conduct occurred because of gender differences." The court stated that this presumption, however, may not be reasonable in same-sex harassment cases.

Therefore, in same sex harassment cases, a plaintiff may prevail if, in addition to the two factors above, s/he presents: (1) evidence that the harasser was homosexual and the harassment is motivated by sexual desire; (2) evidence that the harasser is motivated by a hostility to the presence of the victim's sex in the workplace; or (3) evidence that the harasser treated males and females differently in a mixed-sex work environment.

In this case, the plaintiff, Thomas Moran, worked as a student account representative in the bursar's office at the Fashion Institute of Technology (FIT) from May 1996 until he was terminated in May 1998. Co-defendant James DeBarbieri became his supervisor when he became bursar in October 1997. The court states that from the beginning, Moran got the "distinct impression" that DeBarbieri was attracted to him and wanted their relationship to be "more than professional." Moran's affidavit stated that DeBarbieri "watched him closely and stared at him wide-eyed; lingered close to his chair and touched his arm and/or shoulder for long periods while speaking to him; complimented his appearance and demeanor; shared his private thoughts and impressions of other bursar office staff; boasted about his authority to run background checks on individuals; and privately let him know that he could arrange for him to get a management level position outside the union contract." The court stated that Moran interpreted this behavior as "indicators of his sexual interest." Moran was advanced in the bursar's office shortly thereafter, even though a $130 discrepancy was found in one of his accounts. DeBarbieri did not seem concerned at the time. Shortly thereafter, DeBarbieri promoted Moran to a supervisory position outside Moran's union contract. Moran felt that DeBarbieri's conduct became more obvious, prompting comments from his co-workers ("Jim likes you Tom," and "Jim has the hots for you," and "You can get anything you want from Jim."), and more embarrassing.

In January 1998, the two had to work in close proximity for an extended period, apparently during spring semester registration. The conduct continued until Moran told his supervisor off, telling DeBarbieri to leave him alone and that he did not want DeBarbieri around him. DeBarbieri suddenly became very concerned about the $130 discrepancy at that time. DeBarbieri"s supervisor was notified of this discrepancy for the first time shortly thereafter, and Moran was dismissed as of May 1, 1998. FIT took the position that Moran was terminated because the funds were missing from accounts he managed, and there was no other credible explanation. Moran filed a complaint with the Equal Employment Opportunity Commission, which issued a right to sue letter. This action ensued. FIT was sued for sexual harassment and retaliation in violation of Title VII the Civil Rights Act of 1964, as amended. DeBarbieri was sued individually under New York Executive Law Sec 296(6).

Surprisingly, given the court's statement of the facts, the court found that Moran did not meet his burden of proof of showing that there as a material issue of fact that DeBarbieri's conduct towards him was because of his sex. The court stated that Moran "has presented facts demonstrating that DeBarbieri paid a lot of attention to him, stood close to him, touched his arm or shoulder for a minute or less, talked to him about co-workers, and stared at him," and thus "(b)ased on his life experiences in social situations, Moran felt that DeBarbieri's actions toward him were sexual, and that DeBarbieri was therefore homosexual." However, the court ruled, Moran presented no evidence beyond co-worker comments that DeBarbieri was homosexual, and stated Moran even conceded that he did not know if DeBarbieri was a homosexual. Because no evidence was presented that DeBarbieri was a homosexual, no inference could be drawn that DeBarbieri's actions were done out of sexual desire. In addition, no showing was made that DeBarbieri acted out of malice towards males in the workplace or that DeBarbieri treated males differently from females. The court found DeBarbieri's attentions to Moran to be facially neutral, and that the level of conduct towards Moran was insufficient to support a claim that DeBarbieri's attention created a hostile working environment. Apparently, DeBarbieri was a pest, not a sexual harasser.

Moran's claim that he was he was dismissed in retaliation for rebuffing DeBarbieri's advances was rejected by the court because he did not take action which was sufficient to bring it to the attention of appropriate management within FIT, not articulate enough to highlight the nature of his complaint. All Moran could point to were discussions he has with one of DeBarbieri's subordinates and, finally, to DeBarbieri, and none of the complaints highlighted the problem in a context of sexual harassment. The court deemed this necessary in order for FIT to be held liable for DeBarbieri's conduct.

Summary judgment was granted to DeBarbieri on Moran's complaint under New York Executive Law Sec. 296(6) because liability would first have to be found against FIT before DeBarbieri could be held liable. Since FIT had no liability, DeBarbieri would have no liability. *Steven Kolodny*

Delaware Family Court Agrees to Expanded Visitation, Contact With Father's Same-Sex Partner

In *Santiago A. v. Pamela A.*, 2002 WL 31453319 (Del.Fam.Ct), a gay father sought to expand the visitation schedule that was in place for two years, in part because he wanted to gradually introduce his life partner to his children. On July 10, 2002, the Family Court of Delaware ordered the father's visits to be extended to seven days, not the ten requested. The court also ordered that when a new therapist is selected for the children, father may begin to slowly introduce the children to his life partner.

Father lives in Florida and mother resides in Delaware. Father wishes to extend his children's Florida visits from six days to two consecutive weeks each June and August in the hopes of making his children feel at home with him. He also wants custody of the children for a full week at Christmas and during their entire Easter school break. Additionally, the father also requests that the children commence air travel under the supervision of a flight attendant rather than himself, which the mother is opposed to because of the events of 9/11.

In addition to extending the time of his visits with his children, father wants to have his children spend time with his life partner, Mr. Padilla, a pediatrician who lives with father. Father proposed that they start with dinner visits in public places with a family friend and eventually, after the children are accustomed to Mr. Padilla, father would like Mr. Padilla to be permitted to stay with father when the children are visiting.

First, the court looked to the best interest of the children. They are very involved in sports and the court wanted to ensure that they did not miss any of their sport-related activities unnecessarily. Second, the court would not grant father's request that the children travel on their own to and from Florida. The court believes that father and children can bond on the plane ride. Lastly, father expressed discontent with their current therapist, which the court remedied by allowing the father to choose another therapist.

With regards to father's life partner, the court ordered that Mr. Padilla be slowly introduced to the children on the stipulation that a new therapist was selected and that he or she meet with

the children before and after their Florida visits. The court also set forth rules for these visits with Mr. Padilla. Primarily, the first dinner visit with Mr. Padilla cannot be followed by any other visits during that particular visitation period. Gradually, the number of visits can increase until there are three public dinners with Mr. Padilla during any visit in Florida longer than five days. By allowing the father to slowly introduce the man he loves to his children the court is recognizing the value of family, even if same-sex partners are members of that family. This decision is important because in many other cases the court has turned down visits with a life partner altogether. *Tara Scavo* —

Election Results

The general elections held throughout the United States on Nov. 5 produced mixed results for lesbian and gay legal issues. The Republican achievement of majority control in the U.S. Senate makes it unlikely that much gay-affirmative legislation could be passed in that chamber over the next two years, but such legislation would have little hope of passing the Republican-controlled House of Representatives in any event. The bigger issue, in terms of gay law (and AIDS law), is the impact the change in Senate control will have on the judicial confirmation process, since President Bush appears inclined to appoint appellate judges whose views are rather far to the right. (For example, Judge Dennis Shedd, a district court judge nominated for the 4th Circuit Court of Appeals, already the nation's most conservative circuit, who was reluctantly reported out of the Judiciary Committee and confirmed by the Senate shortly after the election, despite his testimony at his confirmation hearing that in eleven years as a federal district judge he had never seen a plaintiff in a civil rights case who had a meritorious claim.)

All three incumbent openly-gay members of the House were overwhelmingly re-elected (one, Barney Frank, Democrat of Massachusetts, without any opposition candidate on the ballot). Both Tammy Baldwin, a Wisconsin Democrat, and James Kolbe, an Arizona Republican, received more than 60% of the vote in their successful re-election campaigns. However, three other openly gay or lesbian candidates were unsuccessful in their bids for election to contested seats in the House, including openly-gay Chicago-Kent Law School Dean Hank Perritt.

History was made when Bonnie Dumanis, an openly-lesbian state court judge, was elected District Attorney in San Diego as a Republican candidate. Dumanis, whose sexual orientation was evidently not a major issue in the campaign, was hailed in the press as the first openly-lesbian or gay person to be elected the head of a prosecution office. (We'll sit back and wait for some reader to come up with a contrary claim.) The election was very close, with Dumanis receiving just a few thousand votes more than incumbent Paul Pfingst, out of more than half a million votes cast. *San Diego Union-Tribune*, Nov. 7 & 8, 2002.

As expected, a referendum to amend the Nevada constitution to ban same-sex marriage recognition passed overwhelmingly, but three other referenda went in favor of gay rights. In Sarasota, Florida, a measure overwhelmingly passed mandating the city commission to adopt a civil rights law that includes sexual orientation. The *Sarasota Herald-Tribune* reported that the measure passed in every city precinct, in some by a 3–1 margin. The effect of the vote was to amend the city charter, adding language to ban discrimination in housing, employment and public accommodations on the basis of age, disability, gender, marital status, national origin, race, religion, sexual orientation or veterans status. Now it is up to the commission to adopt implementing legislation, including establishment of an administrative agency charged with mediating disputes. In three other cities Westbrook, Maine; Ypsilanti, Michigan; Tacoma, Washington voters rejected ballot measures to repeal gay rights laws.

David Cicilline, an openly-gay man, was elected mayor of Providence, Rhode Island, making that city, the state's capitol, the largest municipality in the United States with an openly-gay mayor. (Not the largest in the world, of course, since both Paris and Berlin have openly gay mayors.)

Among other significant election results: Jack Jackson, Jr., a Democrat who is a member of the Navajo Indian tribe, is the first openly gay American Indian to win a legislative seat, in Arizona's House of Representatives. LeGaL Member Daniel O'Donnell became the first openly-gay man to be elected to the New York State Assembly, where he will joined re-elected openly-lesbian incumbent Deborah Glick. The Maryland General Assembly gained its first openly gay male member, Democrat Rich Madaleno. Jarrett Barrios, a Democrat, became the first openly gay Latino person ever elected to a state senate with his Massachusetts victory. Mark Leno and John Laird were the first openly-gay men to be elected to the legislature in California, and openly lesbian Assemblywoman Carole Migden won a seat on the state's Board of Equalization representing 8 million constituents, the largest constituency of any openly-gay elected official. Also noteworthy was Democrat Jim Roth's election to the Oklahoma City county commission, as the first openly-gay candidate ever to win an election in that municipality.

LeGaL also notes with pride the election of our member, Rosalyn H. Richter, as a Justice of the New York State Supreme Court for New York County. A.S.L.

Civil Litigation Notes

U.S. Bankruptcy New York — In *In re: Joseph Aiello, Debtor*, 2002 WL 31496400 (E.D.N.Y., Nov. 4, 2002), Bankruptcy Judge Craig, observing that $10,000 in debt incurred by Aiello for medical expenses of his cohabiting domestic partner were no compelled by any legal support obligation, held that the remaining $7,000 owed on that debt should not be treated differently from other personal expenses of the debtor in evaluating a motion by the U.S. Bankruptcy Trustee seeking dismissal of Aiello's Chapter 7 bankruptcy petition. (The petition was granted, mainly because Aiello sharply increased his monthly contributions to his 401(k) pension fund shortly before filing the bankruptcy petition, and apparently sought to conceal this from the Trustee and the creditors.)

U.S. Illinois — A federal district court jury in Chicago awarded $2 million in punitive damages and $15,000 in compensatory damages to Kentin Waits, a gay man who claimed that he was the victim of excessive force from Belmont District Officer Daniel Durst, and that Sgt. Michael Prusank stood by and failed to stop the beating that Durst was administering to Prusank. It was alleged that Durst was motivated by revenge, as Waits had squirted him with water the previous day. (A news report did not indicate why Waits had done that.) The Nov. 1 jury decision imposed $1.5 million in punitive damages on Prusank and $500,000 on Durst; the $15,000 award was against the city. The jury rejected a claim that the defendants were motivated by Waits' sexual orientation. *Chicago Tribune*, Nov. 2.

U.S. District Ct. — Oregon — A federal magistrate found that a hostile environment sexual harassment claim brought by a male Oregon resident against his former employer, a California-owned food services management company, should be returned to the Oregon state courts where it was filed, over the objection of the defendant. Jason Hawkins worked for Bon Appetit Mgt. Co. for about a year. He complained several times about a stream of sexually explicit communications targeted at him by two male supervisory employees. (Hawkins did not specify the nature of the sexually explicit communications, beyond asserting that they were sexually explicit and graphic and that he made clear that they were unwelcome.) As his complaints (and the alleged harassment) mounted, he was finally discharged. He sued both his employer and the supervisors, alleging harassment and retaliatory discharge against all defendants and intentional infliction of emotional distress against the supervisors. The company sought to remove to federal court on diversity grounds; Hawkins resisted by pointing out that the supervisors were also Oregon residents, so there was not complete diversity. Hawkins did not raise any claim under Title VII

or any other federal law. The company argued that the intentional infliction of emotional distress claim was invalid on its face, and that only the employer could be sued under the state discrimination law, and accused Hawkins of having fraudulently joined the supervisors as co-defendants in order to defeat removal to federal court. U.S. Magistrate Judge Stewart disagreed with the employer on this. While finding that not every hostile environment case concerns facts egregious enough to support a claim for intentional infliction of emotional distress under Oregon tort law, Stewart concluded that the allegations in this case were sufficient to defeat a removal attempt, even if an Oregon court were to subsequently determine that the IIED claim had not been proven. *Hawkins v. Bon Appetit Mgt. Co.*, 2001 WL 34039135 (D. Or., Oct. 22, 2002).

U.S. District Ct. — Puerto Rico — Demonstrating yet again how difficult it is for a plaintiff to win a sexual harassment case in the federal courts, Chief U.S. District Judge Laffitte of the U.S. District Court in Puerto Rico granted summary judgment in favor of the defendant in a rare female same-sex harassment case. *Crespo v. Schering Plough Del Caribe, Inc.*, 2002 WL 31496552 (Oct. 31, 2002). Alice Lee Crespo alleged constructive discharge and both hostile environment and quid pro quo discrimination, her allegations focusing on the behavior of her immediate supervisor, Mayra Gonzalez. As recounted by the court, the conduct upon which Crespo based her charges was neither severe nor pervasive enough to justify finding a constructive discharge or a valid harassment claim under Title VII (although some of it appears to this reader to have skated close to the line, wherever that line might be place). No evidence was introduced as to the sexual orientation of Ms. Gonzalez.

Arkansas — On Nov. 8, Pulaski County, Arkansas, Circuit Judge David Bogard denied cross-motions for summary judgment in a pending legal challenge to state regulations banning gays from being foster parents. Bogard said he could not decide this important constitutional issue as a matter of law, but would need to hold hearings. "At issue is what is in the best interest of children," he said. "It's too big of an issue in this case to decide it on the law without having a hearing… I want to make sure we're doing what's right. I don't feel comfortable granting summary judgment in this case. We're not dealing simply with the rights of gays." The case was set down for trial in January 2004, by which time Bogard will be retired from the bench and will have successfully passed the buck in this controversial case to another judge. *Arkansas Democrat Gazette*, Nov. 9.

California — In *Low v. Golden Eagle Insurance Co.*, 2002 WL 31598843 (Cal. App., 1st Dist., Nov. 20, 2002) (not officially published), a unanimous panel of the court of appeal affirmed a trial court's ruling that an insurance company in liquidation did not have a contractual obligation to defend its insured, an employer, against a defamation and invasion of privacy claim brought by a supervisory employee against the employer arising out of a radio broadcast during which the supervisor's sexual orientation and positive HIV status was discussed. The radio station was covering a story about a lawsuit brought by another employee who claimed that the supervisor forced him to have sex in order to keep his job. The supervisor, made defendant in a discrimination claim, cross-complained against the company, and its insurer refused to provide a defense, citing the Employment Related Practices (ERP) provision of the employer's liability policy. The court of appeal panel, after analyzing four California appellate cases raising similar issues, found that the weight of precedent supported the trial judge's ruling in this case, and that the insurer had no obligation to defend.

Michigan — On July 31, 2002, the Michigan Supreme Court ruled in *Mack v. City of Detroit*, 467 Mich. 186 (2002), that a sexual orientation discrimination claim premised on a city ordinance could not be the basis for a suit in state court because of the governmental tort liability act of Michigan, and the burden of raising and arguing the issue of immunity was on the plaintiff. The ruling drew a dissent. Just as impassioned were the dissents filed when a majority of the court voted to deny rehearing and reconsideration. The dissenters contended that the court's prior disposition of the case denied Linda Mack's due process rights, because before the court's opinion was issued there had been no argument or briefing on the immunity issues, which had not been raised by the city in its defense of the case. The announcement of the denial of rehearing, with accompanying dissenting and concurring opinions, is published as *Mack v. City of Detroit*, 2002 WL 31558036 (Mich. Nov. 19, 2002).

Minnesota — The Duluth School Board voted unanimously on Nov. 19 to approve a $30,000 settlement of a sexual orientation discrimination claim pending against the school before the Minnesota Department of Human Rights, in which Deborah Anderson claims that the principal of her school discriminated against her based on sexual orientation. The brief newspaper report on this in the Nov. 20 issue of the *Duluth News-Tribune* did not contain any details of Anderson's allegations.

Ohio — Two Ohio Probate Judges have recently refused attempts by transgendered individuals to obtain marriage licenses. Trumbull County Probate Judge Thomas A. Swift refused to grant a marriage license to Jacob Nash, a female-to-male postoperative transsexual, and Erin Barr, on the ground that neither Nash nor his attorney would answer the judge's questions about his genitalia and surgery, asserting personal privacy rights. Stark County Probate Judge R. R. Denny Clunk is now defendant in a federal civil rights suit by Sean M. Brookings, a female-to-male transsexual who was ordered arrested by Clunk after he discovered following the death of Brookings' wife that Brookings had listed himself as male on licenses that Clunk had approved. *Washington Blade*, Nov. 15.

Pennsylvania — The Associated Press reported on Nov. 22 that Bedford County Judge Thomas Ling rejected a petition from Daniel Gryphon MacNeal, who was born Ellen Bernadine Thompson, for a new birth certificate taking account of his sex-change last year. MacNeal, who has been taking hormone treatments for twelve years, is employed as a truck driver, and is desperate to get a new drivers license, which requires as a prerequisite a new birth certificate. "Every time I get stopped for safety checks or whatever, if it's a super cop, they pick up on the fact that my license says I'm a female and I look like a male," said MacNeal, who has a beard and mustache. In his ruling, Ling reportedly said that genes and chromosomes are the only legal basis for designating sex on a birth certificate. Reacting to the story, Tiffany Palmer, the legal director at the Center for Lesbian and Gay Civil Rights in Philadelphia said that MacNeal should not have filed a court action, because Ling was correct in asserting that he did not have authority to make this change. Palmer said that MacNeal should have applied to the state's Department of Vital Statistics, which could address the issue administratively.

Vermont — The Vermont Supreme Court has ruled that an 18–year-old who was living with his mother and her male domestic partner in July 1996 when he suffered injuries while riding his motorcycle and being struck by an uninsured motorist was not covered under the AAA insurance policy that covered the male domestic partner and members of his family. *Congdon v. Automobile Club Insurance Co.*, 2002 WL 31528471 (Nov. 8, 2002). The court found that the case involved a matter of construing the policy itself as a contract, and that the terms were not ambiguous. Paul Boffa, the domestic partner, was designated as the insured, and Jane Werley, the plaintiff's mother, was designated on the contract as an insured driver. (Werley and Boffa were co-owners of the house in which they lived with the plaintiff, Lucas Congdon.) The policy contract provided that coverage would extend to people related to the insured by blood or marriage or adoption, but the court found this concept could not be stretched under the guise of statutory interpretation. Congdon could not be considered Boffa's "ward," because he is not an orphan, and he couldn't be considered a "foster child" because he was over 18. The court did not discuss whether the result would be different had the accident occurred after the passage of the Civil Union Act several years later, and had Boffa and Werley

been registered with the state as reciprocial beneficiaries, a status provided for opposite-sex unmarried couples under that law. Also, no dicta concerning civilly-united same-sex partners and their children…

Washington State — The *Seattle Times* (Nov. 3) reported that Yakima County Superior Court Judge Heather Van Nuys has ordered that a lesbian couple that is breaking up should be ordered to divide assets equally, despite the lack of any state law that deals with property rights of unmarried couples. Van Nuys reportedly said that the relationship between Dr. Julia Robertson and Linda Gormley was "sufficiently marriagelike to provide equitable relief.". Gormley, a nurse, sued Robertson, a physician, when they ended their relationship in 1998. Van Nuys issued her written order on Nov. 1, referring to the relationship as an "intimate domestic partnership," and noting that the women "did engage in activities directly affecting their careers, assets and debts, including pooling resources, commingling funds, becoming jointly liable on debts." Under those circumstances, Van Nuys found that it would be unfair for Robertson "to retain all the property, the home, the equity and the improvements and be responsible for only half of the jointly held credit cards she maintained during the relationship." The news report indicated that Robertson had not yet announced whether she would appeal. A.S.L.

Criminal Litigation Notes

California — In *People v. Knee*, 2002 WL 31623598 (Cal. App., 5th Dist., Nov. 21, 2002) (not officially published), a three-judge panel unanimously upheld the first degree murder convictions of Steven James Knee for the killing of Virgil Turner. On appeal, Knee argued that the jury was not properly instructed on the standard to use in deciding whether he committed the murder out of passion. Knee, who identifies himself as gay or bi but who was struggling with his sexual orientation at the time that he gunned down Turner while Turner and Turner's wife were serving food in a church pantry, claims that he was motivated by Turner's conduct. Turner had allegedly told Knee that he was bisexual and had come on to him sexually in the past, but when confronted with this by their pastor, had called Knee a "pervert" and had also repeated a story Knee had allegedly told him about being sexually interested in a 13–year-old girl in their congregation. At the prosecution's request, the court had instructed the jury that "a defendant's subjective mental state, such as voluntary intoxication, depression, mental illness, physical illness or other such condition which may cause him to more readily give way to passion, is not relevant to the objective standards used to determine the sufficiency of provocation. In other words, the reasonable person's disposition does not include a defendant's particular idiosyncrasies." Knee argued that this instruction wrongly communicated to the jury that it could not take his homosexuality into account in determining whether he was sufficiently provoked for his crime to be manslaughter rather than first degree murder. The appeals court rejected Knee's argument, observing that there "is simply no…rule of evidence specifically permitting evidence of the reasonable homosexual or bisexual person. This is because the law does not permit a defendant to set up their own standard of a reasonable person based upon a particular defendant's personal characteristics. This is not to say that such evidence is not relevant, nor pertinent, to the issue of whether a particular murder is or is not reducible to the crime of manslaughter. This evidence is relevant and pertinent solely on the issue of whether the particular defendant on trial actually, and subjectively, acted in the heat of passion. However. It may not be considered by the jury in determining whether a reasonable person would have been sufficiently provoked by the victim to kill." The court upheld Knee's sentence of 50 years to life and restitutionary fines.

California — In an unofficially published opinion, a unanimous panel of the California Court of Appeal, 2nd District, upheld the 50–year-to-life prison sentence of Michael E. Shaw for the murder of his former lover, Albert Sanchez. *People v. Shaw*, 2002 WL 31589935 (Nov. 20, 2002). The opinion by Acting Presiding Justice Johnson sets out a detailed story about a once-happy relationship that went sour, in which the wealthier man, a successful lawyer, demanded that his partner move out of his house, and was shot to death. (This vastly oversimplifies a complex story that is related in detail in the court's opinion.) Ironically, the victim had told somebody just days before his murder that he was afraid something like this might happen, and had taken steps to avoid being alone with the defendant, but at the time he and his brother went to the house to demand that the defendant leave, the victim had been taking drugs and was undoubtedly not thinking clearly. The issues on appeal involved allegations of ineffective assistance of counsel and prosecutorial misconduct, but the court found that neither the defense attorney's failure to make a particular meritorious objection nor the prosecutor's inappropriate questioning of the defendant about his opinion of other witness's veracity during cross-examination were likely to have been outcome-determinative. Johnson wrote: "The evidence appellant deliberately killed Albert was compelling. Appellant knew Albert wanted him to move out, if from no other source then from Albert's letter telling him goodbye. When appellant saw his car missing from the garage, he prepared by placing his fully loaded handgun at the ready in his handbag. When clear he had to leave, appellant enticed Albert to come to help him by crying and wailing about not knowing what to do and what to pack. Once in the bedroom and away from Richard [the victim's brother], appellant fired once into Albert's heart, dropping him to the floor. Then in a mocking voice appellant repeatedly asked 'Is this extreme enough?' between firing off rounds into Albert's groin area. He emptied his gun and may or may not have been preparing to reload when he emptied the cylinder of the shell casings into the toilet. In addition… physical evidence, as well as portions of appellant's own testimony severely undermined his defense. This combination of strong evidence of guilt, and a less than credible defense, convinces us there is no reasonable probability the prosecutor's improper questioning affected the verdict in this case."

Cincinnati, Ohio — Jeffrey Kibler is soon to be tried for aggravated murder in the death of his domestic partner, William Gibbs. According to the prosecution's theory of the case, pending in Hamilton County Common Pleas Court, Kibler feigned a fatal illness in a desperate attempt to keep Gibbs from leaving him. When Gibbs finally announced he was leaving anyway, Kibler allegedly shot his in the chest with a .25–caliber handgun and hit him in the head and face with a baseball bat. At first Kibler told paramedics summoned to the scene that it was an accident, then that Gibbs had attacked him and he responded, and finally that they were wrestling and the gun "went off." The prosecution had asked the court for an order for a medical examination of Kibler, but Kibler has now confessed that he was not ill. If convicted, he faces a maximum life sentence. *Cincinnati Post*, Nov. 2.

Georgia — After some initial hesitation, Fulton County, Georgia, District Attorney Paul Howard announced that the baseball bat beating of a Morehouse College student accompanied by homophobic epithets will be prosecuted as a hate crime under Georgia law. Responding to the incident, Morehouse officials have formed a panel to examine how the campus deals with diversity, tolerance and homophobia. The first three persons named to the panel were Peter Gomes, the Plummer Professor Christian Morals and Pusey Minister at Memorial Church at Harvard University, who is openly gay, and Paul Burkgett, senior adviser to the president at the University of Rochester, and Caryn M. Musil, vice president of diversity, equity and global initiatives at the Association of American Colleges and Universities. *Atlanta Journal-Constitution*, Nov. 22. A.S.L.

Legislative Notes

Colorado Springs, Colorado — The city council voted 5–4 on Nov. 6 to adopt a domestic partner benefits plan for same-sex partners of city em-

ployees. At present, the city extends such benefits to all legal spouses (including common law spouses) of employees. Thus, only opposite-sex partners who do not qualify as common law spouses would be excluded from the benefit. *Colorado Springs Gazette*, Nov. 7.

Orlando, Florida — On Nov. 18 the Orlando, Florida, City Council voted 4–3 in favor of adding "sexual orientation" to the city's anti-discrimination laws. The vote was preliminary; a second vote was to be held on Dec. 2. The local laws cover employment, housing, and public accommodations, and exempt businesses with fewer than 6 employees, landlords with fewer than 4 housing units, religious groups and private clubs. If complaints are brought to a city agency, the only penalty for violation is a $500 fine, which is not paid to the victim of discrimination, who otherwise must fend for himself or herself by hiring counsel to sue. The mayor, Glenda Hood, voted against the measure, opining that it was unnecessary. "This is a city that does respect diverse lifestyles, and this is a city that does accept different definitions of family," said Hood. *Associated Press*, Nov. 20.

Chicago, Illinois — The Chicago City Council voted on Nov. 6 to add the term "gender identity" to the city's ordinance against discrimination. The measure was passed with the support of Mayor Richard J. Daley. *Washington Blade*, Nov. 15.

Boston, Massachusetts — On October 30, Mayor Thomas Menino signed into law an amendment to the city's law against discrimination that adds "gender identity or express" to the forbidden bases for discrimination in employment, housing, public accommodations, education, credit, lending and insurance. *Washington Blade*, Nov. 15.

Texas — The same-sex marriage battle again surfaces in Texas, where Rep. Warren Chisum, a Republican from the town of Pampa, has filed a bill that would ban recognition of same-sex marriages or civil unions in Texas. The bill has been identified by Republican leaders in the state as a high priority for the session that begins early in 2003. *Houston Chronicle* A.S.L.

Law & Society Notes

Lambda Legal Defense has posted a chart on its website demonstrating that bureaucratic or judicial refusals to approve name changes for transitioning transgendered persons are unlawful in almost every state. According to a Nov. 12 press release noting its recent victory in obtaining a new birth certificate for a transgendered person in Virginia, 47 states now have specific laws, more general laws, or administrative procedures that would allow such modifications to birth records. Only three states either have no relevant statutory law or have case law involving absolute judicial refusals to approve such changes. The data can be found at www.LambdaLegal.org.

At a forum at Rutgers University hosted by the university's Center for Women and Work on the subject of domestic partnership benefits, data was presented showing that between 10 and 15 percent of all employers in the U.S. now offer health care coverage to same-sex partners of employees. Thirty percent of the Fortune 500 companies were reported to provide such benefits, and 85% of employers who have adopted such benefits plans have reported no significant increase in benefits costs as a result. *The Record*, Hackensack, N.J., Nov. 9.

More support for the theory of genetic (or at least physical) bases for sexual orientation: A research team at Oregon Health & Science University created news by announcing studies on sheep that tend to confirm that sexual orientation is reflected in differential brain structures. *Reuters*, Nov. 5.

The State of Oregon will be issuing an official apology to those who were subjected to eugenic sterilization under a law that singled out "sexual perverts" and "moral degenerates" for such treatment. The law defined "sexual perverts" as individuals who were addicted to the practice of sodomy. The law was in effect from 1917 until 1966, and the last "sexual pervert" to be sterilized, according to news reports, was in 1953. A 1935 revision of the law was specifically modeled on a eugenics law enacted by the Nazi regime in Germany, which had been praised by state officials. The 1935 revision authorized referral of "sexual perverts" and "moral degenerates" to the state's Eugenics Board, which would decide whether they were to be sterilized. State records show that about 2,600 people were sterilized (on these and other grounds) during the period when the law was in effect. Although seven states maintained such laws, to date only Virginia has apologized formally to those who were sterilized. Our thanks to historian George Painter for alerting us to this development.

While New York City's mayor, Michael Bloomberg, recently disavowed support for a pending bill that would require the city to contract only with employers that provide domestic partnership benefits, ostensibly on the ground that NYC is not a large enough purchasers of goods and services to give companies an incentive to adopt such policies, a much smaller purchaser of such services, Portland, Maine, is having a real effect with its policy. According to a Nov. 14 report in the *Portland Press Herald*, Catholic Charities Maine is considering changing its benefits policy to allow employees to extent coverage to unrelated adults who live with them in a common household, in order to remain eligible for Portland contracts on various social services programs. But then, Portland's purchasing power is so overwhelming by contrast with puny NYC.

Nine Republican U.S. Representatives have sent a letter to President Bush, who is honorary co-chairman of Big Brothers and Big Sisters of America, asking him to get the organization to back away from its announced non-discrimination policy on sexual orientation. Conservative religious and "family values" groups went ballistic last summer when the national organization proclaimed its non-discrimination policy and instructed local chapters that gay men and lesbians may serve as mentors for children in the program. The leader on the letter is Rep. Tom Tancredo, who wrote: "Many of these kids are emotionally fragile and desperate for attention and affirmation from an adult of their own gender. The new policy ignores the psychological research and common sense. As a general rule of thumb, Big Brothers doesn't match up adult men and teenage girls. Obviously, that would set up a risky situation that could lead to sexual abuse." A spokesperson for Human Rights Campaign responded that the letter was "spreading misinformation in an attempt to smear innocent members of the gay and lesbian community." The White House had no comment beyond acknowledging having received the letter. *Rocky Mountain News*, Nov. 20.

Reacting to receiving a "zero" rating from Human Rights Campaign as a place for gay people to work, the Lockheed Corporation has reversed direction on its policies, announcing that it will add "sexual orientation" to its non-discrimination policies and will come up with a plan to offer health benefits to same-sex domestic partners of its employees. The company sent an email announcement about the change to its 125,000 employees on Nov. 21, according to a report in the *Washington Post* (Nov. 23). Just a year ago the company had recommended that shareholders reject a proposal to mandate the addition of "sexual orientation" to the company's non-discrimination policy. A.S.L.

"Fat Tuesday" in England and Wales: Limited Cohabitation Rights and Joint Adoption for Same-Sex Partners and Parents

Tuesday, November 5, 2002, will probably be remembered as one of the most important days in the struggle for LGBT equality in England and Wales, as the Court of Appeal and the House of Lords (in its legislative capacity as the upper house of the United Kingdom Parliament) effected the greatest expansion of rights for same-sex partners and parents to date. In *Mendoza v. Ghaidin* (http://www.courtservice.gov.uk), the Court of Appeal held unanimously that the phrase "a person who was living with the original tenant as his or her wife or husband" in the Rent Act 1977 must be read as meaning "a person who was living with the original tenant *as if they were* his or her wife or husband," and that the phrase covers the

same-sex partner of the original tenant. Juan Mendoza was therefore entitled to succeed to a tenancy of the private sector rented apartment he had shared for 18 years with the original tenant, his deceased partner Hugh Walwyn-James, on the same terms as if he were the legal spouse of the original tenant.

The Court of Appeal was able to reach this conclusion because sec. 3 of the Human Rights Act 1998 (in force since Oct. 2, 2000) requires it to read all legislation, "so far as it is possible to do so," in a way which is compatible with the European Convention on Human Rights. Before the Human Rights Act 1998 came into force, the House of Lords (in its judicial capacity as the highest appellate court of the United Kingdom) had held in *Fitzpatrick v. Sterling Housing Association*, [1999] 4 All E.R. 705, that a same-sex partner can succeed to a private sector tenancy as a "family member," but not as a person "living ... as ... wife or husband" (the latter involving a below-market rent and a lease that can be passed on to a partner). The new interpretative obligation in sec. 3 of the Human Rights Act 1998 allowed the Court of Appeal to overcome the grammatical objection of the House of Lords in *Fitzpatrick* that the statutory language implicitly required persons of different sexes. However, the Human Rights Act 1998 would not have allowed the Court of Appeal to strike down statutory language that was expressly contrary to the European Convention on Human Rights, e.g., "a person *of the opposite sex* who was living with the original tenant ...."

The issue for the Court of Appeal was whether failure to interpret "living … as … wife or husband" in the Rent Act 1977 as covering a same-sex partner would constitute discrimination violating Article 14 of the Convention, combined with Article 8 (right to respect for one's home). Lord Justice Buxton found that the difference in treatment between same-sex partners and unmarried different-sex partners did not have an objective and reasonable justification. "[A]s to the interests of landlords and flexibility in the housing market, Parliament has … extended full Rent Act protection to survivors of heterosexual unmarried partnerships, a class that one would instinctively think to be much more numerous, and thus whose recognition was much more threatening to flexibility, than would be the category of same-sex partnerships. And so far as protection of the family is concerned, it is quite unclear how heterosexual family life (which includes unmarried partnerships) is promoted by handicapping persons who are constitutionally unable, or strongly unwilling, to enter into family relationships so defined.… Sexual orientation is now clearly recognized as an impermissible ground of discrimination … Parliament having swallowed the camel of including unmarried partners within the protection given to married couples, it is not for this court to strain at the gnat of including such partners who are of the same sex as each other."

Although Mendoza concerns the interpretation of a "living … as … wife or husband" in only one statute, there are many other United Kingdom statutes that use variations of this expression, because unmarried different-sex partners in the United Kingdom have achieved limited recognition (much more than in the United States and much less than in Canada or the Netherlands). Depending on their wording, the Mendoza interpretation could be applied to all such statutes, thereby extending the entire, limited package of rights and duties enjoyed by unmarried different-sex partners to same-sex partners. Examples are succession to public sector housing (which is restricted to spouses, blood relatives and persons "living ... as ... wife or husband"), and wrongful death claims by surviving unmarried partners under the Fatal Accidents Act 1976.

Later on Nov. 5, same-sex partners in England and Wales acquired the right to adopt children jointly, along with unmarried different-sex partners, when the House of Lords (in its legislative capacity) approved the Adoption and Children Act 2002 (which received Royal Assent and became law on Nov. 7; see http://www.hmso.gov.uk/acts/acts2002.htm). The final version of the Act has not been posted, but an earlier version allowed adoptions by "a couple" (sec. 48(1)), and defined "couple" as "(a) a married couple, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship" (sec. 139(4)). Resistance in Europe to joint adoption by same-sex partners is at last starting to crumble. England and Wales (the Scottish Parliament has jurisdiction over Scottish family law and will likely follow soon) join the Netherlands, Sweden and the Navarra region of Spain in allowing joint and second-parent adoptions (the Netherlands excludes inter-country adoptions), while Denmark and Iceland allow one partner to adopt the other partner's genetic (but not adopted) child. It is surprising that the United Kingdom Parliament, which has yet to pass legislation prohibiting any form of sexual orientation discrimination or expressly recognising same-sex partners, would start with joint adoption of children. The explanation lies in the fact that the Government presented the issue solely as one of widening the pool of potential adoptive parents, because it is in the best interest of children needing adoptive parents, and not as one of the rights of unmarried partners, same-sex or different-sex. *Robert Wintemute*

Other International Notes

Canada — The Ontario Court of Appeal has announced that it will hear the government's appeal of the July 12 decision by the Ontario Superior Court in *Halpern v. Canada (Attorney General)*, which held that the failure to allow same-sex couples to marry violates the Canadian charter's equality requirements. The Superior Court had given the government 24 months to come up with a legislative solution. Justice Minister Martin Cauchon indicated that he is appealing the case in order to keep his options open while deciding what to do in response to the decision. The government has begun a consultative process that will involve hearings in different parts of the country to elicit public opinion on whether the open marriage to same-sex partners or to provide some other legal vehicle to achieve the results mandated by the court decision. Canada has already gone a long way towards full legal recognition for same-sex partners, with both provincial and federal laws providing a large measure of recognition for specifically-designated purposes. *National Post*, Nov. 15.

Canada — A suit by 2,000 residents of British Columbia seeking survivors benefits from the Canadian Pension Plan will be consolidated with a pending nationwide class-action, where the total amount in contention is expected to be more than $400 million. The action will be consolidated before Ontario Superior Court Judge Maurice Cullity. Relying on recent equality rulings from the Canadian courts, the suit claims that surviving same-sex partners of individuals covered by the plan should be entitled to the same survivors benefits as surviving spouses. The plaintiffs are individuals whose claims accrued prior to the changes in Canadian statutory law that now extend such benefits entitlements, effective Jan. 1, 1998. *Canadian Press*, Nov. 22.

United Kingdom — Reversing a prior action, the House of Lords voted on Nov. 5 in favor of the government's proposal to allow same-sex couples to adopt children. The Commons was poised to attempt to override the Lords in a subsequent vote, but calmer heads prevailed. According to a news report by the Associated Press, when the matter is finalized the U.K. will become the fifth European country to allow joint adoptions by same-sex partners, after Sweden, Denmark, Iceland and the Netherlands.

United Kingdom — British press outlets reported on Nov. 10 that a policy review led by Barbara Roche, the Minister responsible for equality issues, had concluded that same-sex couples in Great Britain should be allowed to register their relationships with the government and be recognized as equal to married spouses as "next of kin" for legal purposes, including property and inheritance rights. A report to that effect will be provided to the Parliament. Stonewall, the gay rights lobby in England, is backing a private member's Bill introduced in the House of Lords by Lord Lester to create a "civil partnership" system that would include same-

sex partners. This bill does not have the backing of the Blair government, which is apparently working on coming up with its own legislative proposal. A.S.L.

Professional Notes

At the annual meeting of the Association of American Law Schools to be held in Washington, D.C., on January 2–5, 2003, the Section on Sexual Orientation and Gender Identity Issues will cosponsor a program on law school diversity and will present a program on transgender legal issues and their relevance to bar-required courses. The section is also sponsoring a "town meeting" on the Solomon Amendment and the recent successful push by the Defense Department to get recruitment access to law school campuses. The meetings are being held at the Marriott Wardman Park Hotel. A.S.L.

AIDS & RELATED LEGAL NOTES

Another Setback on ADA Protection for People Living With HIV Infection

The Fifth Circuit ruled that an HIV+ man had not established that he was disabled so as to warrant protection under the Americans with Disabilities Act (ADA). *Blanks v. Southwestern Bell Communications, Inc.*, 2002 WL 31355003 (Nov. 4). In an opinion that demonstrates the limits of the Supreme Court's landmark ADA decision in *Bragdon v. Abbott*, the court determined that plaintiff was not disabled under the ADA because he failed to demonstrate that any major life activity, and in his particular case, reproduction, had been impaired due to his disability.

Albenjamin Blanks began working for Southwestern Bell in 1977. After almost twenty years with the company, Blanks took short-term medical disability leave from his position as a residential customer service representative due to depression and work-related stress. While on leave, doctors diagnosed Blanks with HIV. Blanks received a medical release to return to work in early 1997, but his doctor had recommended that he not work in customer service relations because the pressures of dealing with belligerent customers had contributed to his previous stress and depression. For several months, Blanks and his employer attempted to work out an appropriate reassignment. Bell offered to reinstate him as a supplies attendant, the position he had held prior to becoming a customer service representative, but Blanks was not able to perform the heavy lifting duties associated with that job due to recent hemorrhoid surgery. Blanks suggested a position as an internal customer service representative, but Bell denied this request. Bell ultimately offered him a position as a general clerk, but for $100 less per week in salary. Although Bell originally accepted the reassignment, he resigned after two weeks on the grounds that he could not continue to support his family due to the pay cut associated with the new position. Bell filed a charge of disability discrimination against Bell for its failure to reasonably accommodate his disability.

The district court granted Bell's motion for summary judgment on the grounds that Blanks had failed to produce any evidence that he was disabled. On review, the Fifth Circuit affirmed. First, the court rejected Blanks's claim that his HIV had limited his major life activity of reproduction, based on the fact that his wife had undergone a procedure to prevent her from becoming pregnant with any additional children years before Blanks was diagnosed with HIV. Furthermore, Blanks conceded that he did not want to have any more children. Accordingly, the court agreed that there was no basis for finding Blanks disabled on this ground.

Apparently, Blanks did not present evidence regarding any other major life activities that had been limited as a result of his HIV, because the court commented next that, "[i]f an individual is not substantially limited with respect to any other major life activity, the Court may consider whether the individual is substantially limited in the major life activity of working." The court noted that Blanks' willingness to take any other position at Bell with comparable pay indicated that he was not substantially limited in the life activity of working as a general matter. Rather, he was only unable to perform the job of residential customer service representative. The court noted that "one is not substantially limited in working if he or she is unable to perform a single job or narrow range of jobs." Therefore, the court affirmed the trial court's determination that Blanks had failed to prove that he was disabled under the ADA. The court also summarily rejected any argument that Blanks had been discriminated against because he had a record or history of impairment, because, to the extent that Blanks was impaired, the impairment in the court's view had not substantially limited a major life activity.

Finally, the court agreed with the decision below that Blanks had not demonstrated that his employer had regarded him as disabled. The court noted that Bell had tried to place Blanks in a number of different positions upon his return to the company, which demonstrated that the company did not in fact regard Blanks as disabled and unable to perform any other tasks. Rather, Bell only considered him unable to perform the tasks associated with the position of customer service representative. Due to its determination of these questions, the court did not reach the question of whether Bell failed to reasonably accommodate Blanks' disability. *Sharon McGowan*

Attorneys Fees Assessed Against Doctor Who Filed "Bad Faith" HIV Disability Claim

The U.S. Court of Appeals for the 2nd Circuit has approved an award of more than $100,000 in legal fees to Sun Life Assurance Company for having to defend against a disability benefits claim filed "in bad faith" by Peter Seitzman, an HIV+ doctor. The November 14 ruling in *Seitzman v. Sun Life Assurance Company of Canada, Inc.*, 2002 WL 31545075, approved District Judge Loretta Preska's finding that Dr. Peter Seitzman had misrepresented his physical condition when he filed his insurance claim.

Although there was a time in the mid to late 1980s when an HIV diagnosis was treated by some insurers as automatically qualifying a person for disability retirement, the drastic improvements in health associated with newer AIDS treatments that became generally available in the mid 1990s has wrought an important change in benefits eligibility practices. Today, a person seeking disability insurance benefits in connection with HIV must demonstrate actual impairment preventing him from performing his usual employment.

According to the 2nd Circuit opinion by Circuit Judge Dennis Jacobs, Seitzman diagnosed himself as HIV+ in 1986 and began to experience symptoms or illnesses in 1989. He relied primarily on himself for treatment until February 1998. In 1996, Seitzman sold his medical practice for $1.5 million to TPS of New York, Inc., but continued to work in the practice as an employee of Manhattan Medical Care, Inc., a company affiliated with TPS, with the understanding that he would train a physician to replace him and retire from practice by mid-June 1998. According to his longtime office manager, who testified in the lawsuit, Dr. Seitzman wanted to "enjoy life while he was feeling well" and "enjoy the fruits of what he had earned." The office manager planned a surprise retirement party for Seitzman on June 10, 1998, which he attended. Despite the complications of his medical condition, Seitzman continued to work in the practice until June 7, 1998, missing very little time to ill health. In fact, he appeared so healthy that the doctor he hired and trained to replace him testified that he didn't know Seitzman was ill until he called in sick on June 8, claiming to have experienced a severe

asthma attack and being unable to continue working.

Dr. Seitzman filed claims under two different policies, seeking disability benefits payments. Sun Life denied the claims, and Seitzman went back to work, finding a job with New York State evaluating medical claims. But in his benefits claims, he alleged, under oath, that he was too disabled to work as a doctor.

Judge Preska found that Seitzman's testimony at trial about his disability was not credible, being contradicted by the testimony of those who worked with him and by his own demeanor on the stand. Seitzman was employed at the time of the trial, about two years after his retirement from practice.

After the court of appeals had upheld Judge Preska's ruling denying Dr. Seitzman's benefits claim, the case went back to Judge Preska to decide whether to award attorney fees to Sun Life, the defendant. The statute under which Seitzman sued, the Employee Retirement Income Security Act (ERISA), allows judges the discretion to award attorneys fees to the winning party. Generally, attorneys fees are not awarded against claimants unless it is determined that the claim was made in bad faith, that the claimant can afford to pay the fees, that the award of fees would deter others from acting similarly, and the relative merits of the parties' positions. Judge Preska found that Seitzman made the claim in bad faith, knowing that he was not really qualified to receive disability benefits since his HIV infection was not actually disabling him from working, but desiring to have the income from the disability policy provided by his employer.

The appeals court approved Judge Preska's findings, rejecting Seitzman's argument that awarding fees might deter future benefits claimants from filing meritorious claims. Judge Jacobs pointed out that Seitzman's case did not involve a valid claim, and furthermore that Seitzman's repeated misrepresentations of his physical condition on a variety of questionnaires and forms took his case outside of the more normal situation where somebody might inadvertently misstate a fact in a single incident.

Judge Preska found that Sun Life's attorney fee claim of over $200,000 was reasonable, but cut it in half, apparently in light of Seitzman's diminished earning position as a result of his retirement from full-time practice. (Seitzman's situation was complicated by the default on payments for his practice by TPS.) The appeals court, while upholding Preska's finding that Seitzman made the claims in bad faith, rejected Sun Life's argument that Preska abused her discretion by cutting in half the amount Seitzman would have to pay. A.S.L.

Federal Court Finds N.Y. Police Violating Laws Authorizing Needle-Exchange Programs

In a pair of rulings issued Nov. 19, U.S. District Judge Robert Sweet found that law enforcement officers in New York City and in the town of Chester (Orange County) were improperly arresting needle-exchange program participants for possession of hypodermic works and trace elements of drugs. *Roe v. City of New York*, 2002 WL 31599522 (S.D.N.Y.); *L.B. v. Town of Chester*, 2002 WL 31599521 (S.D.N.Y.).

The allegations of the plaintiffs in the New York City case assert that police officers apparently routinely ignore the needle-exchange program cards that are supposed to give their possessors immunity from arrest for possessing hypodermic needles obtained from a needle-exchange program. Indeed, the claim is that officers tear up the cards and arrest the individuals for possessing the needles (and any trace element of drugs found in the needles), even though a formal Police Dept. policy specifies that they are not to be arrested. In plain English, the cops on the street do not appear to like needle-exchange programs and are intent on enforcing the laws against possession. Similarly, the allegation of L.B. is that he was arrested for possessing some clean needles he had obtained from a needle-exchange program in New York City when he was moved up to a program in Chester and was carrying his needle supply with him, the local law enforcement people taking the position that his needle-exchange program card was of no effect outside the five boroughs of New York City.

Judge Sweet found that there is a problem of statutory construction here. The legislature outlawed unlawful possession of hypodermic needles, but specified that one of the laws to be consulted in determining whether possession is unlawful is the Public Health Law. All parties in these cases agreed that the Commissioner of Health did have the authority to promulgate the regulations establishing the needle-exchange programs and providing identity cards to participants that were supposed to serve to protect them from arrest when they were going to and from the exchange program to swap used needles for clean ones.

"It would be bizarre to conclude that the Legislative intent was to permit the creation of needle exchange programs in order to remove dirty needles, while at the same time frustrating that goal by making the essential steps of participation criminal," asserted Judge Sweet. The defendants had asserted that participation in the exchange programs was at best an affirmative defense to a criminal charge of possession, but Sweet disagreed with this interpretation: "Since unlawful possession of a hypodermic needle is defined by reference to the Public Health Law and thereby the regulations authorizing registered participants, there is no underlying crime," he wrote. "Logically and as a matter of law there can be no probable cause. It is also noted that the Defendants' position is not supported by the relevant Operations Order of the NYPD or by the Deputy Commissioner for Legal Matters. They have taken the position that needle exchange participants are not to be arrested or charged… Given the aim of needle exchange programs to encourage participants to return dirty needles for clean ones, and thereby remove infected equipment from circulation, this construction is necessary."

Sweet concluded that certain of the defendant police officers should not be granted dismissal on grounds of qualified immunity, noting continuing factual disputes regarding particular arrests, but conceding that prior to his ruling there was not a clear judicial decision harmonizing the criminal and health laws on this issue. A.S.L.

California Appeals Court Upholds Long Sentence for Spitting

A 3 judge panel of a California Court of Appeal unanimously upheld the conviction of Angelo Labathe, who is HIV+, for assault with a deadly weapon by spitting. *People v. Labathe*, 2002 WL 31458258 (Cal.App. 2 Dist, Nov. 5, 2002). Labathe was sentenced to 63 years to life.

According to the opinion for the court by Judge Woods, in late 1999 Lauren Nochella and Labathe were patients at a psychiatric hospital and became friends. After they were discharged they agreed to meet. Labathe purchased cocaine for them. The next day, Nochella drove Labathe to a motel where Nochella went to sleep. When she woke, Labathe was gone. He came back and asked Nochella to buy more drugs with him. Nochella refused and Labathe pushed her to the ground, held a knife at her stomach and said "I'm gonna kill you" repeatedly. Nochella fled the room, after which Labathe threw her belongings into the parking lot. Nochella ran to her car and Labathe went after her, but she managed to get in and lock Labathe out. Labathe then climbed on the roof. Nochella drove to the entrance of the parking lot, where she waited for Labathe to get down. Labathe climbed down and walked down the street.

A stranger called 911 reporting a "guy [was] beating the holy hell out of his woman." Officers Vincent Albano and Greg Stys of the Los Angeles Police Department responded and placed Labathe in the back seat of their patrol car. Stys went to Nochella's car and interviewed her. Nochella told Stys she had learned in the hospital that Labathe was HIV+. Stys returned to the patrol car, and Albano went to interview Nochella. When Albano returned, Stys told Albano that Labathe had confirmed he was HIV+. When Labathe was told that he would

be charged, he "flew off the handle" and "went crazy." Labathe yelled, screamed and kicked the passenger side car window, yelling; "Fuck you. You're not gonna take me to jail." Stys opened the patrol car's back door and Labathe jumped out. Stys grabbed Labathe, and they fought on the ground. Stys and Albano grabbed Labathe. During the course of the struggle, Labathe kicked Albano 20 to 30 times. Albano received blows on most of his body. In addition to kicking Albano, Labathe was spitting and trying to bite Stys. Albano managed to tie a hobble cord around Labathe's knees, and the officers placed Labathe in the patrol car's backseat again.Labathe continued to kick in the car.

Six back-up officers arrived. Labathe banged his head against the window, which was partially open, causing his forehead to bleed. Albano heard another officer say, "Watch out." When Albano looked over, he saw Labathe with blood running down his forehead and into his mouth. Labathe spat through the open window into Albano's mouth. Albano tasted blood, spat on the ground and saw his saliva was tinged pink with what appeared to be blood. Labathe, who had broken free of the hobble cord, opened the car door by reaching out the window and jumped out of the car again. The eight officers restrained Labathe. Albano and Stys took Labathe to a hospital; en route, he said he was "gonna kill" them and banged his head against the patrol car's plastic partition.

After the incident, Albano immediately received a blood test. Albano has had four tests which were all negative for HIV.

Appealing his conviction, Labathe argued that the jury should have been told to view his admission of being HIV+ with "caution" due to its prejudicial nature. The appellate panel rejected Labathe's position, noting that his admissions were uncontradicted and that the jury was given other witness credibility instructions. In addition, the panel found that Labathe's spitting at the officers and telling them he was going to kill them, "strongly corroborate his admissions he was HIV positive." *Daniel R Schaffer*

HIV+ Attorney Loses Out on Disability Insurance Claim

An HIV+ Massachusetts attorney, Russell Sampson, has lost his legal battle against his former employer for damages arising out of the employer's failure to notify Sampson that it had terminated its long term disability insurance plan. *Sampson v. Rubin*, 2002 WL 31432701 (Oct. 29). Judge Woodlock of the United States District Court for the District of Massachusetts granted the defendants' summary judgment motion, ruling that Sampson was without a federal remedy, since ERISA does not allow for the recovery of compensatory damages.

Sampson was hired as an associate attorney by defendant Perlman, Rubin and Stein, P.C. in March of 1993. The following January, the firm purchased a group short-term and long-term disability insurance policy for its employees. Defendant Michael Rubin canceled the plan one year later without telling the firm's employees. Sampson did not know until 1998 that his long term disability benefits were terminated in 1995.

Sampson was laid off in March of 1995 due to financial cutbacks at the firm. Ultimately, three months later the firm hired Sampson back on an hourly contract basis, although Sampson was paid directly by name partner Joel Stein (with a personal check) rather than by the firm. Sampson did not report the income he earned for his contract work to the I.R.S., and accepted full unemployment benefits while working for Stein. In November of 1995, Sampson agreed to accept a reduced salary, and the firm hired him back as a full time associate.

In 1998, Sampson decided to leave work due to his health. When he could not find his copy of the firm's short and long term disability policies, he contacted the firm's bookkeeper. The bookkeeper advised Sampson that the long term disability policy had been canceled in 1995. Sampson confronted Stein, revealing that he was HIV+, and asked if the firm would obtain a new long-term policy. Stein denied knowing that the long-term policy had been canceled. In September of 1998, defendant Stein purchased a new short and long term disability insurance policy for firm employees from a different insurance carrier.

Sampson ultimately left the firm during the first week of November of 1998 due to his health. He applied for short and long term disability benefits, but was advised in December of 1999 that his claim for long term benefits had been denied due to Sampson's pre-existing health condition. Sampson did not appeal the insurance company's determination.

In his lawsuit against the firm, the individual partners of the firm, and a second law firm that had partners overlapping with the Perlman, Rubin and Stein firm, Sampson alleged that the defendants breached their duties as fiduciaries under ERISA when they canceled the 1994–1995 long term disability insurance plan without first notifying the firm's employees. Sampson sought compensatory damages as well as statutory damages for the failure of the plan administer, Rubin, to provide Sampson with information about the plan that he repeatedly requested in 1999.

In granting the defendants' motions for summary judgment, Judge Woodlock concluded that based on the United States Supreme Court's recent rulings in *Great-West Life & Annuity Insurance Company*, 534 U.S. 204 (2002) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1996), there is no remedy under ERISA for compensatory damages. Woodlock explained that "because Sampson has and seeks no essentially equitable remedy, his claim against the defendants for breach of fiduciary duty for failure to timely notify him of the cancellation of the plan must be dismissed." Even if Sampson had asserted claims for equitable relief under ERISA, the court ruled that he would not have been entitled to recover because there was no showing of "active bad faith, deliberate concealment or fraud" on the part of the defendants.

The court interpreted ERISA extraordinarily narrowly (as the Supreme Court appears to have required in *Great-West*) in denying Sampson's claim for statutory damages. Although the court ruled that Sampson was entitled to receive notice of the disability plan's termination in 1995, and that Rubin breached his duty as plan administrator by failing to provide Sampson with this notice, Sampson could not recover monetary damages from Rubin because ERISA does not explicitly provide for monetary damages under these circumstances. (ERISA only allows a plan participant to recover statutory monetary damages if a plan administrator fails to provide information specifically requested by a plan participant.) The court went on to note that Sampson could not even recover damages for Rubin's refusal to honor Sampson's 1999 requests for plan information, since Sampson was no longer a plan participant at the time of his request.

The practical significance of the court's ruling, both for Sampson and others like him, is distressing because it insulates employers and plan administrators from suit where their own inaction leads employees to make uninformed, and ultimately very costly, choices. Perhaps the lesson learned is that employees should do their best to request information about their benefits before making decisions that could affect their employment status. Given the Supreme Court's recent rulings narrowing the scope of ERISA and federal anti-discrimination statutes, litigation appears to be less of a viable option for aggrieved employees. *Ian Chesir-Teran*

No AIDS Panic Claim in Pennsylvania

In a November memorandum decision, the U.S. District Court for the Eastern District of Pennsylvania dismissed Leah Wilder's claim against Covenant House, Inc., for damages based on alleged negligence and emotional injury after being misdiagnosed with HIV. *Wilder v. U.S.A., Covenant House, Inc., Covenant House Health Services, Inc. & Dr. Trinka Luzinski*, 2002 WL 31492264. The court granted defendants's motion for summary judgment as a matter of law based on that fact that plaintiff's claims were time-barred by Pennsylvania's two-year statute of limitations and because

Pennsylvania does not recognize a cause of action for "fear of AIDS."

On or about November 10, 1990, Wilder consulted with Defendant Dr. Trinka Luzinski at Covenant House Health Services for a gynecologic exam and was referred for an HIV test. Plaintiff was then informed on November 19th by Dr. Luzinski and/or staff members of Covenant House that she had tested positive for HIV. In reliance on that diagnosis, she subsequently terminated four pregnancies between April 1992 and December 1997, fearful of giving birth to an HIV-infected baby. Plaintiff did not undergo a second HIV test until her fifth pregnancy in March 1998 at Pennsylvania Hospital, when she discovered that contrary to defendant's earlier diagnosis she was HIV negative and did not have AIDS. On December 10, 1999 Plaintiff filed suit alleging that she suffered "considerable anguish, humiliation, limitation and restriction of [her] usual activities, pursuits, lost earnings and earning capacity [and] a chronic neurological and physical impairment to her body." Wilder sought damages based on defendant's alleged negligence and negligent and intentional infliction of emotional distress.

In order to bring a claim to recover damages for injuries in Pennsylvania under a theory of negligence, according to the opinion by Judge J. Curtis Joyner, Plaintiff had to commence suit within two years of the negligent act. The court points out that the "limitations period begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute." However, the court points out "an exception known as the discovery rule arise[s] from the inability of the injured, despite due diligence, to know of the injury or its cause." But if the injury is reasonably ascertainable, the discovery rule will not apply.

Defendants argue that plaintiff should have known through additional inquiry that she was not infected. She was advised as early as March 1991 that her blood counts were inconsistent with an HIV+ status and was told she should consult an infectious disease specialist. Yet the court found that defendant continued to counsel and treat plaintiff as if she was HIV+. It wasn't until March 1998 that defendant learned that she did not have HIV. Based on this evidence, the court believed that the issue of whether the statute of limitations began to toll was still open and denied defendants' motion for summary judgment on this issue.

The court granted summary judgment on defendants's second issue as a matter of law, find that since Pennsylvania law does not recognize a cause of action and allow recovery for fear of contracting AIDS in the absence of actual exposure to the disease. The Supreme Court stated that this is a case of first impression regarding recovery for fear of contracting AIDS. However, the court has held in that past that the burden rests on the plaintiff to show some actual exposure to a disease in order to present a cause of action. Here, they found that plaintiff has presented none whatsoever.

Plaintiff still alleged the issues of negligence in rendering medical care and negligent and intentional infliction of emotional distress. The court denied all these allegations, stating that defendants's actions were not extreme and outrageous and did not go beyond all possible bounds of decency. Sympathetically, the court stated that it was "unfortunate that the plaintiff was advised that she was HIV-positive when she was not [but] there is nothing in the record to suggest that the defendants intentionally deceived her or that they relayed this information to her in an atrocious or offensive manner." The court did point out that defendants repeatedly urged Plaintiff to seek another opinion but plaintiff refused.

The court stated that in order to bring a negligence claim plaintiff must establish that defendant owed her a duty of care, that he breach that duty, which resulted in injury and that plaintiff suffered actual loss or damage. The plaintiff must demonstrate that the breach was both the proximate and actual cause of the injury. The question of proximate cause must be determined by a judge; and defendant's acts must have been a substantial factor in bringing about harm to the plaintiff. While the court held that the defendants owed her a duty of care, the plaintiff was unable to show any medical evidence to support her injury. Since plaintiff learned of her HIV status approximately two years prior to her first pregnancy, the court stated that "it is clear that her damages were caused by other factors other than defendants' alleged malpractice and were clearly not contemporaneous with the defendants' conduct." Since plaintiff produced no medical or psychiatric evidence necessary to support her claim, by law she is unable to submit her claim to a jury for determination regarding any emotional distress injury. The court therefore held that in absence of substantial support for plaintiff's claim, defendant's motion for summary judgment in its entirety is warranted. *Audrey E. Weinberger*

Corrections Officers Held Immune to HIV Disclosure Liability

Inmate Reginald Petty brought a pro se action against officials of New York State's Department of Correctional Services, alleging that their disclosure of Petty's HIV+ condition violated his rights to privacy and freedom from cruel and unusual punishment under constitutional and state law. U.S. District Judge Michael Mukasey's November 4 summary dismissal of Petty's complaint contains a detailed, and discouraging, analysis of the qualified immunity of government officials to liability for such acts. *Petty v. Goord*, 2002 WL 31458240 (S.D.N.Y.).

On September 11, 1996, a nurse at Green Haven Correctional Facility interviewed Petty about his HIV status and medications in front of security staff. The next day, Petty passed out on the floor of his cell with pain and a nose bleed, then heard the nurse tell a guard that his illness was due to HIV. While Petty was being handcuffed to a stretcher for transport to an outside hospital, another nurse told the transportation officers and EMTs that Petty was HIV+ and would not be trouble. On September 18, a specialist at Green Haven questioned Petty about his HIV status in the presence of Corrections Officer Amora and Sergeant Wilk. While escorting Petty back to his cell Amora and Wilk questioned Petty about his HIV status, then made degrading jokes about his condition with other officers.

Petty filed an administrative grievance the next day, complaining of verbal harassment and citing the Patient & Physician Confidentiality and Privacy Act under N.Y. Public Health Law. On September 20, Petty wrote to Green Haven's medical director and to the state Commissioner of Correctional Services, explaining that the harassment caused him to become depressed and suicidal. In October, three officers rushed into Petty's cell, knocked him to floor, and handcuffed him while a fourth stated that Petty had AIDS and therefore care should be taken to avoid cutting him with the cuffs. Petty, the subject of a pending disciplinary action, was confined to a Special Housing Unit, where the ongoing harassment drove him to several suicide attempts and eventual transfer to a psychiatric hospital. The harassment by corrections officers resumed on Petty's return from the hospital in December, resulting in a second hospitalization, and ultimately, transfer to a different prison facility.

Judge Mukasey first dismissed Petty's constitutional claims for failure to exhaust all available administrative remedies per 42 U.S.C. 1997e(a). The judge may have signaled sympathy for Petty's assertions that he did not file an appeal because he received no response to his grievance of September 19, by citing *John v. N.Y.C. Dep't of Corrs.*, a 2002 S.D.N.Y. case finding that plaintiff's grievance exhausted administrative remedies because "there was no adverse decision to appeal." However, the judge found *McNair v. Jones*, a 2002 S.D.N.Y. decision with an opposite result, dispositive. N.Y. Comp.Codes R. & Regs., tit. 7, sec. 701.7 provides that an inmate may make an administrative appeal if their initial grievance gets no response in seven days. Judge Mukasey read McNair to require that such an appeal be made.

The court also applied the doctrine of qualified immunity, that shields government employees "from liability for damages … insofar as their conduct does not violate clearly estab-

lished" rights. The main issue for analysis is whether an inmate's right to the confidentiality of HIV status was "clearly established" by September, 1996. *Powell v. Schriver* (2d Cir. 1999) establishes that the constitutional privacy right applies to inmates, but wasn't "clearly established" as of 1994. Even if an inmate's right to privacy was established by 1996 (as several district courts had held), Judge Mukasey notes that the right protects inmates from disclosure to their peers, but not to prison staff.

Petty's Eighth Amendment claim, that defendants' actions constituted deliberate indifference to a substantial risk of harm by other inmates, was rejected on his failure to allege any threats of physical violence. Additional and alternative bases were found to insulate corrections officers in their individual and official capacities, and bar compensatory damages. Further, the post-September 19 harassment suffered by Petty, not reached here, is time-barred (14 days) from administrative scrutiny by N.Y. Comp.Codes R. & Regs., tit. 7. *Mark Major*

AIDS Litigation Notes

Federal — California — Ruling on First Amendment claims by AIDS doctors seeking to be free of a federal threat against them regarding recommendation of marijuana use to their patients, the U.S. Court of Appeals for the 9th Circuit opined in *Conant v. Walters*, 309 F.3d 629 (Oct. 29, 2002), that the doctors had stated a valid First Amendment claim, affirming the issuance of an injunction against the government by District Judge William H. Alsup. Some persons with AIDS have found relief from the side effects of HIV infection and medications used to combat HIV by smoking marijuana, which is also said to be of assistance in maintaining appetite (and thus healthy levels of food consumption) among individuals who otherwise could be subject to the wasting syndrome typical of endstage AIDS.

Maryland — Anthony Young, who is HIV+, has been sentenced to 30 years in prison by Prince George's County Circuit Court Judge Maureen M. Lamasney, upon his conviction of sexually assaulting two teenagers, a boy and a girl. The boy has seroconverted, but the girl has not. Young had a record of prior convictions and plea bargains on charges of sex with teenagers. He continues to maintain his innocence of the charges. *Washington Post*, Nov. 2.

South Carolina — How's this for an expensive clerical error? In 1994, a woman who was eight months pregnant went to Palmetto Health Richland in Columbia, South Carolina, for a blood test. She tested negative for HIV, but due to a clerical error a positive test result was entered in her records, and she was told she was HIV+. She immediately undertook a regimen of powerful AIDS drugs to prevent her child from being infected, and continued treatment for several years until a doctor at an HIV Clinic noticed that she had put on weight and suggested that she be tested again. The new test was, of course, negative, and she filed suit against the hospital a scenario that has generated successful motions to dismiss in many other jurisdictions. But her case was allowed to go to the jury, which awarded her $1.1 million, according to a Nov. 22 report in the *National Law Journal*.

The hospital has filed a motion seeking to have the damage award reduced to $250,000 under the state's Tort Claims Act, a so-called "tort reform" measure that limits damages against public entities. Although the hospital is now privately-owned, it was a state-operated institution in 1994 when the negligence occurred. *Jane Doe v. Palmetto Health Alliance*, No. 00CP 40–0371 (Richland Co., S.C., Ct. Comm. Pl.). A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Lambda Legal seeks a Staff Attorney for its Southern Regional Office in Atlanta. Three or more years litigation experience; high level of independence/initiative; excellent writing/speaking skills required, as well as ability to talk about legal and other complex issues in clear, persuasive terms for non-lawyer audiences. Salary depending on experience; full benefits. People of color and people with disabilities are especially encouraged to apply. Letter, resume, and writing sample to: Ruth E. Harlow, Lambda Legal, 120 Wall Street, Suite 1500, NY, NY 10005. Check www.lambdalegal.org for details. Equal Opportunity Employer.

CONFERENCE ANNOUNCEMENT

Here's a long advance hold-the-date announcement. On September 18–20, 2003, the Hofstra Cultural Center and Hofstra University Law School will hold a conference descrbied as "a retrospective on the justifications and efficacy of U.S. military policy on service by lesbian, gay and bisexual Americans, and the impact of this policy on service members, universities, and the Reserve Officer Training Corps. The Conference Director is Prof. Eric Lane of Hofstra Law School, and people interested in participating should certainly contact him at the law school (516–463–1210; LAWEZL@Hofstra.edu).

LESBIAN & GAY & RELATED LEGAL ISSUES:

Bakken, Tim, *The Effects of Hate Crime Legislation: Unproven Benefits and Unintended Consequences*, 5 Int'l J. Discrim. & L. 231 (2002).

Ost, Suzanne, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 J. L. & Society (UK) 436 (Sept. 2002).

Student Articles:

Wrightson, Rachel M., *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection*, 10 J. L. & Pol'y 635 (2002).

Specially Noted:

Constitutional Law: Equal Protection of the Laws, a new paperback hornbook by Prof. Louis Michael Seidman (Foundation Press, 2002), includes a thoughtful analysis of *Romer v. Evans*on pages 220–228. ••• The Third Annual Review of Gender and Sexuality Law has been published in 3 Georgetown J. Gender & L. NO. 2 (Spring 2002).

EDITOR'S NOTE:

This issue of *Law Notes* had a special early deadline due to the coincidence of Dec. 1 occuring during Thanksgiving holiday weekend. Legal developments occurring during the last week of November will be covered in the January 2003 issue of *Law Notes*. ••• In our report on *Fulk v. Fulk*, 2002 WL 31248616 (Miss. Ct. App. Oct. 8, 2002), in the November 2002 issue of *Law Notes*, we should have made clear that the descriptions of the parents in that contested custody/visitation case were taken from the court's opinion (even though not always placed in quotation marks) and were not the opinions of the writer or of *Law Notes*. Of course we do not have an independent basis for evaluating the qualifications of parents contesting custody. ••• 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.