

SUPREME COURT UPHOLDS FUNDING SYSTEM FOR UNIVERSITY STUDENT GROUPS

Dealing a major set-back to right-wing groups that are seeking to "defund the left" on university campuses, the U.S. Supreme Court ruled unanimously on March 22 that a university may distribute funds drawn from student activity fees to a wide range of campus organizations without violating the free speech and association rights of those students who object on political grounds to the activities of particular campus organizations. *Board of Regents of the University of Wisconsin System v. Southworth*, 2000 WL 293217. The decision is expected to have significant importance for lesbian and gay student organizations.

As in other similar cases cited by Justice Anthony M. Kennedy Jr. in his opinion for the court, the plaintiffs in *Southworth* were conservative students who objected to having to pay student activity fees that would be disbursed to campus organizations with whose political stances they disagreed. In particular, Scott Southworth and his co-plaintiffs objected to gay and lesbian students groups, AIDS organizations, socialist and consumer-oriented groups, the campus chapter of the American Civil Liberties Union, and other similar organizations that are among the 400 or so student groups functioning on the enormous University of Wisconsin campus in Madison, Wisconsin. They were successful in persuading the U.S. District Court in Madison and the U.S. Court of Appeals for the 7th Circuit that they had a constitutional right to have their activity fees reduced in proportion to disbursements to the campus groups to which they objected.

The 7th Circuit's opinion was to similar effect as a California Supreme Court decision in a case challenging the student fee system of the vast University of California system, *Smith v. Regents of University of California*, 4 Cal. 4th 843, 844 P.2d 500, cert. denied, 510 U.S. 863 (1993), but conflicted with decisions in some other circuit courts. The 7th Circuit was persuaded by the plaintiffs' argument that this case should be controlled by prior cases in which the U.S. Supreme Court upheld First Amendment-based challenges by dissenting individuals to the use of their labor union or bar association dues for political activities to which they objected.

The Supreme Court's grant of certiorari, premised on the division in the lower courts, was needed to resolve an important question left open in *Rosenberger v. Rector and Visitors of University*

of Virginia, 515 U.S. 819 (1995), in which the Court held that a state university had denied its students' constitutional rights by rejecting a funding application for a student publication that had a Christian orientation; the Court held in that case that a state university may not deny recognition or support to a student organization based on the organization's viewpoint, but left open the question whether students who disagreed with that viewpoint could object to their activity fees going to that organization.

In an opinion representing the views of six members of the Court, Justice Kennedy found that the student activity fee system, as structured at Wisconsin, did implicate the First Amendment rights of the objecting students. Referring to the union and bar association dues cases, Kennedy wrote: "The proposition that student who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases... It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her."

The problem for the Court, however, was that the University setting is enough unlike the union or professional association setting to require a different approach. "In *Abood* and *Keller* the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is unworkable, however," wrote Kennedy. "The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." While this might support an argument that individual students should be able to decide for themselves which organizations to support and to reduce their individual fees accordingly, the Court described this as an "unworkable system" that would put the whole program of University support for campus student groups "at risk."

However, Kennedy found that the University was obligated to provide some "protection" for the objecting students' First Amendment rights. "The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support." Indeed, Kennedy observed, in *Rosenberger*, the Court had stated that the University *must* be viewpoint neutral in distributing money to student groups; otherwise, those student groups who were denied funding might have their own valid constitutional claims. (To wit, but not cited by the Court, cases holding that state universities violated the constitution by refusing to recognize or provide funding for gay and lesbian student groups.) Since the parties in this case stipulated that the University's system of granting funding was viewpoint-neutral, the University had done what the Court required to protect the rights of objecting students.

In a concurring opinion joined by Justices John Paul Stevens and Stephen Breyer, Justice David Souter differed from the Court's analysis by concluding that the viewpoint-neutral system administered by the university, as such, does not place a burden of any consequence on the First Amendment rights of objecting students. Thus, for Souter, the Court's subsequent discussion and analysis was unnecessary to resolve the case. Souter emphasized (and Kennedy's response and anticipation of this point can be found toward the end of his opinion) that the case did not present any question concerning speech by the University itself, or any argument by students that they should be entitled to tuition remissions so their money would not support the activities of professors with whose views they differed.

Where all nine justices agreed, however, was that if the system of allocating funds was not viewpoint-neutral, there could be a serious constitutional issue raised on behalf of the objecting students. And one aspect of the Wisconsin system left room for doubt: there was a mechanism for student referenda to approve or disapprove funding of particular organizations, in addition to the more usual mechanisms of applications for funding to the student government or to a designated fund administrator. Kennedy observed that it was "unclear... what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality, it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." So, rather than just dismissing the case, the Court remanded to resolve the question whether the referendum part of the system could be al-

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lowed to stand unaltered in light of the constitutional analysis in its opinion.

While the Court's opinion appears to deal a major setback to the right-wing groups that were funding and providing legal representation in these cases, they are not likely to disappear without a fight. In a post-mortem article on the Court's decision published in *The Milwaukee Journal Sentinel* on March 24, Southworth's lawyer, Jordan Lorence, said that future litigation will rely on

the Court's decision to challenge the viewpoint-neutrality of University activity funding schemes. "We intend in future litigation in the case to flesh that out and to show a system that gives money in great proportion to left-wing groups is not balanced. We do not believe that this is over yet." Lorence's comment echoed a university attorney, Pete Anderson, who expressed concern that the litigation could next turn to challenging the university's requirement that student groups not dis-

criminate in their membership based on race, religion, or sexual orientation. And concern was expressed in the article by another observer that "the threat of a lawsuit might encourage schools to give money to student groups that endorse discrimination." Refusal to fund such groups might be criticized as a departure from the viewpoint-neutrality standard that the Court has now mandated for university student fee systems in deciding how to distribute their money. A.S.L.

her suit under the Gender-Motivated Violence Act of 1994 due to the unprecedented nature of the court's holding under that statute.

Schwenk, who self-identifies as female and grooms and dresses accordingly, was incarcerated in an all-male state prison in Walla Walla, Washington, subject to the authority of guard Robert Mitchell beginning in September 1994. According to Schwenk's complaint, Mitchell is an aggressive sexual harasser who repeatedly importuned Schwenk for sexual favors, including oral sex, which she repeatedly rebuffed, culminating in an attempted anal rape in her cell accompanied by threats to transfer her into a situation where she would be more vulnerable to sexual attack by other prisoners. Schwenk presented evidence of severe emotional distress resulting from Mitchell's actions. She sued under 42 U.S.C. sec. 1983, alleging cruel and unusual punishment and naming as defendants various prison officials in addition to Mitchell. After she was assigned counsel, her complaint was amended to add a count under the Gender-Motivated Violence Act (GMVA), a provision of the 1994 Violence Against Women Act that specifically outlaws gender-motivated violence.

Mitchell moved for summary judgment after discovery, claiming qualified immunity under both legal theories. (The other defendants were dismissed from the case by the district court prior to discovery.) He claimed there was no established federal constitutional or statutory protection for transsexuals, and thus as a public employee he enjoyed qualified immunity against all of Schwenk's claims. District Judge Robert H. Whaley (E.D.Wash.) rejected Mitchell's arguments and denied the motion for summary judgment, and Mitchell took an interlocutory appeal, a procedural device that is available in qualified immunity cases.

Writing for a panel that included Judges Betty B. Fletcher and Sidney R. Thomas, Circuit Judge Stephen Reinhardt found the qualified immunity

Court, they cannot be considered to be a source of clearly-established law. Indeed, the court went so far as to say that prior judicial decisions are not necessary to a determination of “clearly established law” where statutory language clearly applies. The problem was that it was not clear from the face of the statute that violence motivated by the victim’s gender identity would be construed as gender-motivated violence, without the additional analysis flowing from *Hopkins* and applying it to overrule the past transgender cases under Title VII.) Consequently, the court reversed the district court’s denial of summary judgment on the GMVA claim.

The potential significance of this decision under the GMVA (and by express extension, Title VII), is enormous, but on the other hand its precedential value might prove short-lived. If Mitchell petitions for rehearing en banc, this ruling by a notably liberal panel of the 9th Circuit might fall at the circuit level, and if Mitchell attempts to take the case to the Supreme Court, its ultimate survival might be even more questionable. It is unlikely that Congress, when considering the GMVA, contemplated that the statute would be used to mean that federal law outlaws anti-transgender violence, as such, and it is uncertain that the Supreme Court plurality that produced the *Hopkins* decision contemplated that it would be used as a basis to extend protection against gender-identity discrimination under Title VII. (Significantly, the author of that plurality opinion, Justice William Brennan, is gone from the Court.) On the other hand, in its recent decision in *Oncale v. Sundowner*, the Supreme Court held, per Justice Scalia, that Title VII could be extended to cover situations not contemplated by Congress, such as same-sex harassment, so long as the language and logic of the statute itself extends to those situations. So the lack of express consideration of transgender issues by Congress would not necessarily be dispositive of the current interpretation of the GMVA (assuming it survives constitutional review) or Title VII. Predicting how this might develop is a difficult task.

But there is no doubt that, at least for the moment, transgendered people are protected within the 9th Circuit from gender-motivated violence under the GMVA and, arguably, from gender identity discrimination under Title VII of the Civil Rights Act of 1964. This puts them a major step ahead of the lesbian and gay rights movement, which still faces an uphill vote to obtain favorable congressional action on the Employment Non-Discrimination Act (ENDA). Transgender rights activists have been pushing hard to have ENDA extended to include gender identity. ENDA congressional sponsors and some of the gay rights lobbying groups have been resisting the call, contending that the addition of gender identity would sink ENDA. It will be interesting to see how this debate plays out in light of *Schwenk v. Hartford*. A.S.L.

Minnesota Appeals Court Approves Tri-Partite Award of Parental Rights in Dispute Involving Lesbian Co-Parents and Gay Sperm Donor

In a case that appears to have no obvious precedent, a panel of the Court of Appeals of Minnesota has approved a trial court order that awards some type of parental rights to three different parents (all lesbian or gay) with respect to a child conceived through donor insemination. The ruling in *LaChapelle v. Mitten*, 2000 WL 272032 (March 14) is not ideally clear about the degree of parental rights to be awarded each of the parties, and even disavows approving a tripartite parenting scheme at one point. The unusual nature of the case would make it a good candidate for review by the Minnesota Supreme Court, if any of the parties seek further clarification. The parties are Denise Mitten, biological mother of the child, Valerie Ohanian, Mitten’s former same-sex partner who is co-parent of the child, and Mark LaChapelle, a gay man who is the sperm donor (and thus biological father) of the child, and who formed a relationship with the child by agreement of the parties before the current dispute arose.

According to the opinion for the court by Judge Shumaker, the child’s conception was planned jointly by Mitten, Ohanian, LaChapelle, and LaChapelle’s same-sex partner, at a time when Mitten and Ohanian were living in a committed same-sex relationship. Under a written agreement signed by all four, which was made before the insemination took place, they agreed that LaChapelle would donate the sperm but would have and assert no parental rights, and that Mitten would not hold LaChapelle financially responsible for the child. Mitten became pregnant in April 1992. The next month, the four signed a new agreement, stating that Mitten and Ohanian would have physical and legal custody of the child, and that LaChapelle and his partner would be entitled to have a “significant relationship” with the child. The child, referred to throughout the opinion as L.M.K.O., was born January 4, 1993. The M.K.O. in her name stood for Mitten, a name beginning with K that is a significant surname in LaChapelle’s family, and Ohanian, but LaChapelle was not designated as the father on her birth certificate. Mitten and Ohanian petitioned for adoption; in their petition, the father was identified as “artificial insemination,” and LaChapelle was not mentioned to the court, which granted the adoption in September 1993.

From the time of L.M.K.O.’s birth, LaChapelle was a regular visitor to the Mitten-Ohanian household, forming a relationship with L., until August 1994, when the mothers terminated visitation for reasons not specified in the court’s opinion. LaChapelle then initiated this lawsuit, seeking to void the adoption on the ground that the mothers defrauded the court by failing to disclose his identity or the prior written agreements of the parties. The court then vacated the adoption. In August 1995, LaChapelle filed an affidavit with

the court seeking parental rights, and a petition to adjudicate paternity. At that time, the court granted temporary custody of L.M.K.O. to Mitten.

In the spring of 1996, Mitten and Ohanian terminated their relationship. Mitten sought permission of the court to move with L.M.K.O. to Michigan to pursue a job opportunity; at the same time, Ohanian petitioned for custody of L.M.K.O. The court gave Mitten her requested permission to move, ordered blood tests to establish LaChapelle’s relationship to L., and consolidated Ohanian’s custody petition into the pending case between LaChapelle and Mitten. Mitten moved to Michigan, and the court granted visitation rights to Ohanian and LaChapelle. The visitation required quite a bit of travel for all concerned, and the court issued an order allocating costs among the parties. In June 1997, the court declared that LaChapelle was the biological father of L.M.K.O., but allowed Mitten to retain temporary custody while visitation continued. A guardian ad litem was appointed to represent L.M.K.O.’s interests. In November 1997, the court ordered LaChapelle to pay past and future child support, dating back to the declaration of paternity.

After trial in February 1999, the court awarded sole physical custody to Mitten, on condition that Mitten provide a permanent residence for L.M.K.O. in Minnesota. The court ratified Mitten and Ohanian’s prior agreement to have joint legal custody over L.M.K.O., finding it to be in her best interest, and awarded visitation rights to Ohanian and LaChapelle, also finding that all three parties should have a right to participate in decision-making about L.M.K.O. based on their various kinds of parental status.

Mitten had petitioned for a change of surname for L.M.K.O., so that her surname would be solely Mitten, but the court denied that petition, finding that by this time, at the age of 6, L.M.K.O. had developed an identity reflected in her name that included all three parents. Mitten appealed the grant of joint legal custody, the condition placed on her sole physical custody of having to move back to Minnesota, and the final awards concerning visitation and support, as well as the denial of the name change petition.

The opinion by Judge Shumaker first faced the question of Ohanian’s standing to participate in the custody proceeding. Minnesota law allows somebody other than a legal parent to commence a custody proceeding, and Shumaker concluded that because the statute was clear on the point, Mitten’s objections to Ohanian’s standing had to be rejected. “The wisdom of allowing non-parents to seek custody of a child is not relevant to whether such persons have standing to do so,” Shumaker insisted, rejecting Mitten’s arguments about the problems that would be created if non-parents can freely seek custody of children from their legal parents.

Next, Shumaker addressed Mitten’s contention that the joint legal custody agreement she had made with Ohanian had been procured through

coercion. It appeared that prior to the trial, Mitten had indicated that she would accept joint legal custody either with Ohanian or with LaChapelle; reacting to this, LaChapelle withdrew his custody claim and it was represented to the court that Mitten and Ohanian had agreed to joint legal custody. Shumaker found that this did not meet the level of coercion necessary to void the agreement. Mitten raised a new argument on appeal: that there was evidence in the record that she and Ohanian could not cooperate with each other, so it was not in L.M.K.O.'s interest to order joint custody. But Shumaker found evidence in the record that Mitten and Ohanian were "willing to try to cooperate for L.M.K.O.'s sake, and that there are methods in place for resolving disputes that might arise," thus supporting the trial court's conclusion that joint custody would be in L.M.K.O.'s best interest.

Mitten then argued that the court could not grant joint legal custody to a non-parent over the objection of a fit biological parent. Shumaker's response to this argument was, in effect, that Mitten was estopped from raising it, because she had agreed to share legal custody with Ohanian.

"Finally, Mitten argues that in granting joint legal custody to her and Ohanian and in giving LaChapelle all the rights of a joint legal custodian as well, the trial court created an impermissible 'triumvirate' parenting scheme." Shumaker found that LaChapelle had renounced his claim to legal custody before the trial court. Although the trial court did award LaChapelle visitation rights and other rights to participate in decision-making for L.M.K.O., Shumaker found that "any rights LaChapelle has under the agreement with Mitten and Ohanian are not those of a joint legal custodian."

Shumaker rejected Mitten's argument that the trial court lacked authority to condition her physical custody on creating a permanent residence in Minnesota for L.M.K.O. First, Shumaker found that the order allowing Mitten to relocate to Michigan had been a temporary order pending trial on the merits, and thus did not preclude reconsidering the matter of L.M.K.O.'s residence as part of a final order. Then, the court noted that the best interests analysis had included many different factors, including the factors of proximity to L.M.K.O.'s other parents, and her interest in maintaining a continuing relationship with them, which was significantly complicated by her living out of state.

Shumaker rejected Mitten's attempt to raise constitutional barriers to the order, finding that the state's compelling interest in protecting L.M.K.O.'s best interest would overcome Mitten's constitutional claims. "Here the trial court specifically found that it would be in L.M.K.O.'s best interests to reside in Minnesota where she could maintain a relationship with Mitten as her biological mother and Ohanian as her 'emotional parent,' and LaChapelle as her biological father. The trial court used the term 'emotional parent' in its order

to refer to a person L.M.K.O. looks to for comfort, solace, and security... The trial court did not restrict Mitten's right to remain in Michigan; the court only required L.M.K.O. to be returned to Minnesota. Any burden on Mitten's right to travel arises from her desire to remain L.M.K.O.'s sole physical custodian." In addition to rejecting Mitten's right to travel argument, the court also rejected her argument that this condition custody award violated her equal protection rights, emphasizing that custody awards are based on the best interest of the child, "not the parents, and therefore the standard applies equally to all parents."

Mitten had also objected to the court's requirement that she bear expenses of sending L.M.K.O. back to Minnesota for periodic visits with her other parents while the case was pending, but Shumaker found that the trial court had made a fair division of the expenses occasioned by Mitten's decision to move out of state, and refused to second-guess it. The court also rejected Mitten's claim that LaChapelle should have been ordered to pay back child support from L.M.K.O.'s birth, finding that in light of the unusual nature of the case, the trial court's order dating from the determination of paternity was sufficient.

The court also approved the trial court's refusal to order a name change for L.M.K.O. "The trial court found that L.M.K.O. needs and has a sense of community in her full name, and keeping it the same will enhance her identity and will not add any more confusion to her sense of who her family is. The court also found that L.M.K.O.'s current name is important for her relationship with each of her parents because it contains a family name from LaChapelle's family and contains both Mitten's and Ohanian's surnames. L.M.K.O. has been known by her current name for six years. On the facts of this case, six years is long enough for the child to have developed a sense of identity through her name... In addition, the custody evaluator recommended that L.M.K.O.'s name remain the same."

In a concluding paragraph, headed "Decision,"¹⁷⁰ the court wrote: "We affirm the trial court's judgment and decree granting Mitten sole physical custody on the condition that she move back to Minnesota from Michigan and granting Mitten and Ohanian joint legal custody with LaChapelle to have the right to participate in important decisions affecting L.M.K.O...." By failing to place a comma after the words "legal custody" in that sentence, the court creates an ambiguity and apparent contradiction with its earlier treatment of the "triumvirate" argument. With a comma, the sentence would appear to mean that the joint legal custodians are Mitten and Ohanian, and that LaChapelle will have a right to participate in important decisions affecting L.M.K.O. Without the comma, it appears that LaChapelle has also been granted joint custody. Perhaps this ambiguity will be corrected in the final version of the opinion, as

the omission of the comma does not seem consistent with the overall conclusions of the opinion.

Even as corrected, however, the opinion would appear to be rather unprecedented in awarding some sort of parental rights simultaneously to a biological mother, her former same-sex partner, and a gay male sperm donor. (If *Law Notes* readers are aware of another such published decision, they are urged to bring it to our attention for inclusion in a further report on this issue.) This unusual result seems to rest heavily on various voluntary agreements made by the parties at different times, however, and it is difficult to say how much of a precedent it would make for subsequent cases arising from differing factual circumstances. After all, custody and visitation decisions are extremely fact-intensive, so that the role of cases as precedent in this field relates more to holdings of general principles than to the precise results in particular cases.

Mitten is represented by Gary A. Weissman, of Weissman Law Office, and Susan Rhode of Moss, & Barnette. Ohanian is represented by Christopher D. Johnson of Best & Flanagan. LaChapelle is represented by Mary Madden, of Madden Law Offices. Rosanne Nathanson, of Leonard, Street & Deinard, serves as guardian ad litem for L.M.K.O. All the attorneys practice in Minneapolis. A.S.L.

South Dakota Supreme Court Affirms Discharge of Homophobic Police Officer

A decision by the Civil Service Board upholding the discharge of a police officer who engaged in homophobic and disruptive conduct in a Sioux Falls gay bar was unanimously affirmed March 1 by the South Dakota Supreme Court. *Green v. City of Sioux Falls*, 607 N.W.2d 43, 2000 S.D. 33. Writing for the court, Justice Konenkamp asked: "Can anyone reasonably trust that an officer who harasses minorities by night will ungrudgingly protect their lives and property by day?"

Michael Green had already received a disciplinary warning for using undue force to restrain a prisoner when he joined with several other off-duty police officers on the evening of June 4, 1998, for a night on the town. They went to several bars, including one mixed bar in which it was alleged that Green, spotting two men dancing together, got up and insinuated himself into their dancing in a lewd manner. The group of police officers ended the night by going to a gay bar. They entered with open bottles of beer, and were told by the bartender (who had been tipped off to Green's activity at the prior bar) that they could not bring in outside beer. After some conversation with the bartender, where it was alleged that Green used homophobic language, some of the police officers left the bar, but Green went back, ostensibly to find someone who had stayed behind. He went into the poolroom and broke a pool cue over his knee and left the broken fragments on the floor. The bartender (who didn't know that the offending men were police officers) called 911 and reported

the license-plate number of Green's car, which resulted in a disciplinary investigation in which Green was discharged. The Circuit Court affirmed the Civil Service Board's ruling, and Green appealed to the Supreme Court.

Green's main contention on appeal was that the factual findings of the Board were not supported by the record, but the Supreme Court found ample support. The more interesting issue, of course, is Green's argument that even if his conduct was as found by the Board, it was not sufficiently bad to justify his discharge from the force. To deal with this, the court had to define the term "conduct unbecoming an officer," which was not clearly defined in South Dakota law. After canvassing decisions from other jurisdictions, and military decisions from which the term was derived, Justice Koenkamp found that it had two major components: "The misconduct, although it need not be a crime, must be a serious breach of law, morality, or decorum, exposing the offender to personal discredit, and it must tend to bring dishonor or disrepute on the offender's profession or organization."

Koenkamp found that this standard had been met in Green's case. The Police Chief and the Board properly took into account the totality of Green's conduct, not focusing on any particular incident. "Green's behavior in taunting members of the public by acts and words, in abusing a prisoner, in damaging private property, all discredit him. Green argues that whatever he may have done on June 4 while off-duty should not reflect on his job performance. Yet, the laws he broke while off-duty were the same laws he swore to enforce while on-duty. Police are expected to uphold the highest standards of conduct... Law enforcement officers, whether on or off duty, live under the public view. An officer's image is vital to the police mission. Can anyone reasonably trust that an officer who harasses minorities by night will ungrudgingly protect their lives and property by day? Green's conduct is particularly troublesome in that it took place in the area of Sioux Falls where he patrolled as an officer." Clearly, the court found, his conduct reflected discredit on him.

Finally, the court found that Green's conduct also reflected badly on the police force. "If intolerance and aggression are accepted, that attitude may permeate other aspects of the criminal justice system. In the exercise of their duties, there can be no 'second-class citizens' in the eyes of police officers. All people are entitled to impartial treatment. Green's reprehensible conduct, committed in a public place, diminishes community confidence in police impartiality and public respect for the quality of law enforcement." A.S.L.

Federal Magistrate Awards Damages to Lesbian Target of Harassment Campaign

The lesbian owner of a restaurant and bar in a small town in Oregon successfully sued a homo-

phobic couple who had engaged in a harassing letter-writing campaign against her and her partner, in *Simpson v. Burrows*, 2000 WL 246473 (February 22). Although U.S. Magistrate Judge Hubel did not accept all of Simpson's theories for recovery, he ruled in her favor on most of her claims, and awarded her \$257,500 in damages.

V. Jo Anne Simpson and her romantic and business partner, June Swanson, purchased the Christmas Valley Lodge and Restaurant, located 100 miles southeast of Bend, Oregon, in 1996. Their first year of business was profitable, with their customers resulting primarily from weddings, anniversaries and after-church lunch crowds. However, almost immediately after Simpson and Swanson purchased the Lodge, letters began circulating throughout the community, calling the two women "Lesbians" and "an immoral abomination," who would transform the Lodge into "a mecca for Queers, Lesbians, Perverts & other degenerates." Other letters called upon the community to fight "the lesbian spirit," which was "on the prowl in Christmas Valley." The first letters were filled with homophobic epithets; later letters contained threats of violence. For example, one letter pronounced: "Is the death penalty at work in this country today? You better believe it is and it will be enacted by the people of this country who are sovereign on those who corrupt this country and who are the enemies of this country."

As a result of the stress caused by the campaign of hate, Simpson's relationship with Swanson deteriorated. Swanson pulled out of the joint venture with Simpson and left Christmas Valley in November 1996. Soon after, Simpson received another letter, saying "JUNE LEFT. NOW IT[']S YOUR TURN TO GO. HEAD FIRST OR FEET FIRST." The author of the letters also targeted one of Simpson's supporters, John Widenoja, and warned him that he had "made a target of himself and he is going down too." The state police officers investigating the harassment claim determined that the letters' author had sent approximately 20 to 30 letters to community residents, including Eric Lloyd, the pastor of the Christmas Valley Community Church. Lloyd assisted the police by suggesting who among his congregation might be capable of writing letters with extensive passages from the Book of Revelations calling for hellfire and damnation of sinners.

With the help of Pastor Lloyd, the state troopers tracked the letters to the home of Howard "Bud" Burrows and his wife Jean. In the Burrows' home, the police found original copies of the letters that had been distributed to the community. Four envelopes containing letters received by Pastor Lloyd were tested for fingerprints, and matched Bud Burrows's fingerprints from his gun permit application. The police determined that Jean Burrows had traveled almost weekly to Bend or LaPine, the towns from which many of these letters had been postmarked. Also in the Burrows' home were pamphlets entitled "ENGAGE THE ENEMY," which called for the awakening of police,

soldiers and patriots. The police tested three unsent letters found in the Burrows' home, two addressed to Widenoja and the third addressed to the Lodge, for DNA, and determined that they matched Bud Burrows's DNA.

A criminal prosecution resulted from the investigation, and Bud Burrows entered an *Alford* plea, a procedural device that allowed him to plead guilty without admitting that he committed the charged offense. [The practice originated with *North Carolina v. Alford*, 400 U.S. 25 (1970)]. Although under Oregon law a guilty plea may be given preclusive effect in a subsequent civil proceeding, Judge Hubel determined that there were procedural defects in the taking of the plea — the criminal court never determined that the plea was voluntarily and intelligently made or that there was a factual basis for the plea — which would require him to conduct an independent review of the facts. However, Hubel rejected all of Bud and Jean Burrows' explanations for how the evidence was found in their home, and determined that they had in fact written and circulated the letters to the Lodge and the community. Hubel also found that although Bud Burrows had been the primary actor in the harassment campaign, Jean Burrows "assisted in the creation and circulation of the letters," and therefore would be held jointly liable for her husband's actions.

Simpson's first claim alleged that the Burrows had intentionally inflicted emotional distress upon her through the letter-writing campaign. In order to prove this charge, Simpson had to prove that (1) they intended to inflict severe emotional distress on the plaintiff, (2) their acts were the cause of her severe emotional distress, and (3) their acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. Judge Hubel found that the Burrows' motive was clear — to inflict severe emotional distress on Simpson and Swanson — and that the acts did cause Simpson distress. Simpson had described to the court her reputational and dignitary harm, as well as physical manifestations of distress including upset stomach, headaches and crying spells. With regard to the final prong, the court found that "[the Burrows'] acts clearly amount to an extraordinary transgression of the bounds of socially tolerable conduct... Defendants have the right to believe that homosexuality or lesbianism is at odds with the teachings of the Bible. Certain expressions of that opinion are protected by the First Amendment and the Oregon Constitution. That does not mean, however, that defendants are immune from tort liability for their actions. The letters here rise beyond rude, boorish or mean conduct."

Simpson also raised a claim of intimidation. Oregon statute ORS 30.190 provides for civil remedies against someone who "intentionally, because of the person's perception of [the] sexual orientation of another subjects such other person to alarm by threatening to inflict serious physical injury upon or to commit a felon affecting such

other person.” The court found that at least three of the letters sent by Burrows qualified as actionable intimidation justifying a tort remedy: one saying “NO FAGS IN C.V.” with a swastika; another suggesting that the community will inflict their own death penalty on Simpson and Swanson using a high powered rifle; and third, the “HEAD FIRST OR FEET FIRST” letter.

Judge Hubel also accepted Simpson’s invasion of privacy claim. Hubel found that all three elements of the claim had been satisfied. First, Simpson’s sexual orientation was a private fact. Second, the Burrows disclosed those facts to the public generally through their letters. And finally, the disclosure in the letters was “extremely outrageous and thus, was publicity of a ‘highly objectionable kind’” (citing *Tollefson v. Price*, 247 Or. 398, 430 P.2d 990 (1967)).

The court was less receptive to Simpson’s allegation of libel. First, the court refused to consider the series of letters a “continuing tort.” Instead, Hubel found that each individual letter had caused its own distinct harm. Therefore, the letters written before November 28, 1996, could not form the basis of the claim because the one-year statute of limitations for those letters had already expired. Next, the court considered the claim that the remaining letters were libelous. In particular, Simpson alleged that Burrows had defamed her by calling her a pervert, a degenerate and an immoral person. While the court agreed that these statements were the type that could diminish Simpson’s standing within the community and subject her to “hatred, contempt and ridicule,” and that the statements had been published to a third party, the court rejected the libel claim. Hubel found that statements of opinion are not actionable under defamation law, and even if the Burrows’ statements were not just opinion, they “fail[ed] to contain sufficient facts to be susceptible of being proved true or false.” The judge acknowledged that the statements were “rude, boorish, churlish and mean,” but nevertheless, “they amount to only rhetoric and ranting and are not the kind of ascertainable factual statements required to sustain a defamation claim.”

In assessing damages, Judge Hubel awarded Simpson \$200,000 in non-economic damages for the harm she suffered from the hate letters. Simpson had also claimed economic damages in the form of lost income from the Lodge and a depreciation in the resale value of the property when she tried to get out of the business. Hubel found that, despite Simpson’s projections about how the profits of the Lodge would grow, he would limit his determination to the actual profits made in the first year of operation. He also rejected as too speculative Simpson’s claim that the value of the Lodge had been artificially depressed when she attempted to sell her business because of the harassment campaign. Finally, the court noted that the letter-writing campaign was not the sole cause of Simpson’s economic woes, because other people had decided to boycott the Lodge simply be-

cause the owners were lesbians, independent of the actions of the Burrows. Judge Hubel determined that only half of Simpson’s economic losses could be attributed to the hate letters, and settled on an award of \$52,500 in economic damages.

Finally, the court considered the question of punitive damages. As a preliminary matter, Judge Hubel held that according to *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1195 (D.Or. 1998), the Oregon Constitution exempted “true threats” from constitutional protection. He then found that a number of Bud Burrows’s letters qualified as true threats: “These statements express unconditional threats of death. While avoiding express language, they are unequivocal and convey a sense of immediacy and imminent action. They demonstrate a gravity of purpose. A reasonable person would interpret these statements as a serious expression of harm or assault.” In so holding, Hubel rejected the Burrows’ claim that awarding punitive damages would chill expression in violation of Oregon Constitution Article I § 8, the state’s free speech provision. In a footnote, however, the court expressly found that Burrows’ words would not qualify as fighting words or incitements to imminent lawlessness. (Simpson had not pursued damages under either of these theories.)

Hubel was satisfied that four of the five factors in favor of awarding punitive damages were appropriate in this case: (1) punishing willful, wanton or malicious wrongdoers, (2) deterring the wrongdoers and others similarly situated from engaging in such conduct, (3) the character of the defendant and (4) the defendant’s motive. Nevertheless, the court awarded a mere \$5,000 in punitive damages because Simpson had failed to satisfy the fifth factor — offering evidence of the defendant’s income and assets. Judge Hubel seemed to acknowledge the fact that the sum was paltry in light of the events in question, but insisted “while a \$5,000 punitive damages award may seem modest in proportion to the seriousness of defendant’s misconduct, it is appropriate in light of the lack of a record regarding defendant’s financial position.” Further reducing the amount Simpson will ultimately receive, Oregon law requires that 60% of the punitive damages award be paid to the state’s Criminal Injuries Compensation Account.

As a final matter, the court dismissed all of Burrows’ counterclaims for attorneys fees, noting that plaintiff had prevailed on the majority of her claims, and that Simpson had an objectively reasonable basis for raising the defamation claim, even though it was ultimately rejected by the court. *Sharon McGowan*

Massachusetts Judge Orders Lesbian Co-Parent to Pay Child Support

A Middlesex County, Massachusetts, Probate and Family Court judge has entered an order requiring

a de facto lesbian mother to pay child support. Believed to be the first such order in Massachusetts (in which a non-legal parent is required to pay child support), the order came after the dissolution of a 14 year lesbian relationship during which three children were born to the couple. This report on the case, in which the parties proceeded anonymously, is provided by Joyce Kauffman of Cambridge, Mass., the attorney for the biological mother.

The couple had jointly decided to have children and the non-biological mother had performed the inseminations which had resulted in the conception of each of the children. At various times throughout the relationship, one of the mothers stayed at home with the children while the other worked and at other times both women worked to support the family. However, for the four years prior to the break-up, the non-biological mother had provided the family’s sole support. By mutual agreement, the couple had decided that the biological mother would remain at home following the birth of their youngest child. The relationship began to deteriorate approximately one year ago and the nonbiological mother moved out about six months ago. After leaving the relationship, the nonbiological mother sporadically provided financial assistance to the family but, despite attempts at mediating a resolution, refused to sign any agreement to pay child support.

Ultimately, the biological mother was forced to seek public assistance, and filed a Complaint seeking a support order. She alleged that the non-biological mother was a *de facto* parent, according to the standard set forth in *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 429 Mass. 824 (1999), and therefore had a duty to support the children. At the hearing, the nonbiological mother sought visitation (which had not been previously denied by the biological mother), but her attorney argued that the court did not have authority to order support. The judge disagreed, stating that “with rights come responsibilities.” The judge expressed disbelief that the nonbiological mother could argue that she was a *de facto* parent as to visitation, but not as to any financial responsibility to support the children. The order has not been appealed.

Federal Court Reverses to Dismiss Sexual Orientation Discrimination Claim Brought by Alleged Practicing Heterosexual Against City of Philadelphia

In *DiBartolo v. City of Philadelphia*, 2000 WL 217746 (E.D.Pa., Feb. 15), the U.S. District Court, denying a defense motion to dismiss, ruled that a city employee’s stated claims of reverse discrimination in employment based on the plaintiff’s race (white), his sexual orientation (heterosexual), and his gender (male) stated a cause of action under the U.S. civil rights laws and should proceed to trial.

The plaintiff, Philip DiBartolo, began working for the city of Philadelphia’s infectious disease

program in January 1987, first in programs doing contact tracing relating to sexually transmitting diseases, then in the city's AIDS surveillance program, then, with the city's tuberculosis program. He began as a contract employee, but became a civil service employee a year later. He was listed as a supervisory employee, but, according to this decision, he found that he was not being considered for supervisory positions in the units in which he worked, while others who were less qualified and, indeed, ineligible for these positions, were getting promotions. According to DiBartolo, a heterosexual white man, he was being denied these positions by supervisors, some of whom were homosexual and or members of minority groups. Many of those whom DiBartolo alleged to have gotten the positions for which he was passed over were women, minorities, or were homosexuals or lesbians. This state of affairs went on from 1993 until he filed suit against the City of Philadelphia, and seven supervisors and commissioners in their personal and official capacities, alleging violations of his civil rights under 42 U.S.C. §§1983, 1985 and 2000(e) and under state law, conspiracy to violate his civil rights, breach of contract (as there were union contracts involved). DiBartolo seeks compensatory and punitive damages.

The court denied the motion to dismiss the federal civil right claims as against the city based on diBartolo's supervisors' refusal to allow career advancement on a theory of reverse discrimination. The court found sufficient facts alleged by diBartolo to support a claim of denial of his civil rights under §1983, and denied the city's assertion that this would be duplicative of DiBartolo's §2000(e) (Title VII) claim. Facts were also sufficiently alleged to support DiBartolo's §1985 claim (conspiracy to violate civil rights) against the city and several of the supervisors. Claims that statute of limitations were exceeded were rejected on the grounds that the violations were ongoing over a period of years. The most salient point made by the court in this decision is that DiBartolo has successfully pleaded that supervisors essentially took the city's declared policy against sexual harassment and favoritism in the workplace "has in fact been turned on its head" and, as implemented, resulted in the discrimination he alleges. Thus, DiBartolo will be allowed to go forward and prove his case. The contract and state claims also survived the motion to dismiss, but the punitive damage claims were dismissed.

Although not discussed as such by the court, the case is significant in recognizing that a claim for sexual orientation discrimination against a municipal employer may be brought under 42 U.S.C. section 1983, in that such claims have in the past been dismissed by some federal courts on the ground that "sexual orientation" has not been determined by the Supreme Court to be a suspect classification for purposes of equal protection

claims under the 5th and 14th Amendments of the Constitution.

This is a complex decision involving numerous parties (the City of Philadelphia and seven individuals in their individual and official capacities) and ten causes of action involving violations of state and federal civil rights laws. One feels the need for a spreadsheet to work it all through. No single cause of action survived against all parties, and few parties saw all claims against them dismissed, but no claims were dismissed entirely. *Steven Kolodny*

Federal Court Finds Chicago Lacked Authority to Give Gay Discriminatees a Right to Sue

Echoing a 1998 decision by the Cook County Circuit Court, U.S. District Judge Castillo (N.D. Ill.) found that the City of Chicago did not have authority to open the state courts to discrimination claims under its city human rights ordinance, and thus a supplemental claim of discrimination on the basis of perceived sexual orientation had to be dismissed from a pending Title VII case. *Quela v. Payco-General American Credits, Inc.*, 2000 WL 204215 (Feb. 18).

Michael Hakim was hired by Payco in 1997 to work as a collector of debts. He alleges that shortly after he started working, he began to suffer verbal and physical harassment at the hands of his manager, George Chaharbakhshi, and other employees, on account of his perceived sexual orientation. He complained to the Cook County Human Rights Commission, which authorized him to bring suit in civil court as per the city's ordinance. Several women who worked for Payco were filing a Title VII suit at the same time protesting sexual harassment at the company, so Hakim joined with them and added his claim under the Chicago ordinance as Count III of the Title VII complaint in federal court. Hakim also alleged assault and battery claims as Counts IV and V. He joined in the Title VII claim, asserting that after he complained about the harassing atmosphere in the workplace, he was subjected to further harassment in retaliation for his actions. The employer moved to dismiss Counts III, IV and V, arguing that the Chicago ordinance was an unconstitutional attempt to open the Illinois state courts to suits under a local law, relying on *Lucas v. Zeta Int'l*, No. 96M3 2687 (Cook County Cir. Ct., Jan. 26, 1998) (not published), and that the tort claims were preempted by Workers Compensation Law.

Judge Castillo found *Lucas* to be a very persuasive precedent in its interpretation of *Ampersand, Inc. v. Finley*, 338 N.E.2d 15 (Ill. 1975), which provided that home rule legislative authority in Illinois should be exercised solely on matters of local concern, and not extended to cover issues of state or national import. The *Lucas* opinion maintains that administration of justice in Illinois is a state, not local, concern, and thus municipalities may not create new causes of action in the state courts. Finding that the Chicago ordinance may

not create a court-administered remedy, Castillo held that the federal court could not assert supplemental jurisdiction over this claim, and dismissed it with prejudice.

However, Castillo rejected the argument that Hakim's tort claims were preempted by Workers Compensation Law. Such preemption applies to negligence claims against the employer, but not, under Illinois law, to intentional torts such as assault or battery. The employer also argued that Hakim's claims were not sufficiently related to the Title VII claims to justify the assertion of supplemental jurisdiction over them, but Castillo disagreed, noting that Hakim's allegations tied the assault and battery incidents to his Title VII retaliation claim. All that is needed for supplemental jurisdiction under federal procedure is a "loose factual connection," Castillo observed. A.S.L.

Federal Court Dismisses Title VII Claim Based On Homophobic Work Environment

Comparing the reasoning and result in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 2000 WL 236459 (E.D.Pa., March 2) with that in other Title VII same-sex harassment cases (e.g.: *Spearman* in "District Court Embraces Sexual Stereotyping Theory," and *Samborski* in "Federal Court Refuses to Dismiss Claim," *Law Notes* 10/99 and 2/00, respectively) demonstrates the variety of propositions from the Supreme Court's ruling in *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), on which courts can choose to focus.

During four years of John Bibby's employment by the defendant subsequent to his self-identification as a gay man, he was subjected to a litany of homophobic slurs, physical attacks, and disparate workplace treatment familiar to readers of Title VII cases where the plaintiff is or appears homosexual. Bibby suffered post-traumatic stress disorder, depression, and intestinal disorders as a result. Defendant's Vice President of Operations, Cliff Risell, and director of warehousing, Gene Keller, allegedly participated in the harassment. Bibby's complaints to defendant's Vice President of Human Resources brought no respite.

The case was decided on the defendant's summary judgement argument that any discrimination Bibby suffered was due to sexual orientation rather than sex, the former being a non-protected class under Title VII. Judge Dubois quotes three dictionary definitions of sex including "pertaining to . . . sexual activity; arising from a difference or consciousness of sex," nevertheless ruling that Congress intended the word "sex" in Title VII to mean anatomical sex exclusively, without reference to sexual activity. Congress' intent is found in "the context in which the word sex was placed in the statute . . . along with . . . a characteristic so deeply rooted for most that it is almost immutable," i.e. religion. Citing *Higgins v. New Balance Athletic Shoe*, 21 F.Supp.2d 66 (D. Me. 1998),

Judge Dubois rejects any gender stereotyping theory that would find "socio-sexual roles typically associated with masculinity" within the "because of sex" definition. Discussing homophobic graffiti aimed at Bibby, the court stated that, contrary to the *Oncale* requirement, "none of these statements indicate that plaintiff is exposed to conditions of employment different from members of the opposite sex," but did not describe the conditions under which the defendant's women employees work. The court granted the defendant's summary judgement motion as to the Title VII issue, and declined to exercise supplemental jurisdiction over Bibby's state law claim of intentional infliction of emotional distress. *Mark Major*

Evidence of Homosexuality Admitted at Court Martial to Convict Sailor of Larceny

A divided panel of the U.S. Court of Appeals for the Armed Forces upheld, by a 3-2 vote, allowing evidence of a sailor's homosexual activity in a case involving an alleged "invalid marriage" to obtain married member's benefits. *U.S. v. Phillips*, 52 M.J. 268, 2000 WL 253622 (March 6). Allen B. Phillips allegedly had a "sham marriage" in order to move into an off-base apartment with Jerry Runey, who serves in the Army.

Phillips was convicted of conspiracy to commit larceny, falsely signing official records, and larceny. The court held that a court-martial judge did not abuse his discretion in admitting evidence of Phillips' "homosexual conduct." Phillips was sentenced to 120 days of confinement, a bad-conduct discharge and demotion.

Phillips sought to exclude evidence of his sexual orientation, arguing it was not relevant and "would be highly prejudicial" due to the antigay bias of members of the court martial panel. Two of the members testified that they considered homosexuality morally wrong. One officer said that he would consider Phillips's sexual orientation on sentencing if "allowed by the judge." Another officer said she would be biased toward discharge. The court martial members also said they would follow the judge's instructions. The other members said that they had no negative feelings about homosexuality. One of them, however, "would be uncomfortable sharing a berthing area with a homosexual."

Lori Lussier, Phillips' wife, was the director of a day care center in Honolulu, worked long hours, and did not want to move due to the long trip between his duty station and Honolulu. He testified that his wife arranged a month-to-month lease so that she could move if he could break his lease. Phillips said he spent time with his wife as his schedule permitted and that while she did not ask for money, he "supported her when she needed [his] support." The court-martial judge allowed evidence of Phillips' sexual orientation to counter the defense argument that Phillips and Lussier "held themselves out as a married couple, were married, and engaged in a traditional relation-

ship." He ruled that it could not be used to assess if Phillips was a "good or bad person." Runey testified that he and Phillips held themselves as a couple to close friends before and after the marriage and that they had an understanding that their relationship would continue after the marriage. Lussier, Runey said, was aware of the relationship between himself and Phillips. Runey also testified that his wife, Allison LeGros, and Lussier were a couple before the marriage. Runey did not testify to specific sexual acts. Another male servicemember testified that he and Phillips had a relationship during the same time period.

Phillips argued that his sexual conduct does not affect the validity of his marriage, as a same-sex relationship has no legal status. Judge Gierke, writing for the majority, held that Phillips and Lussier did not seek to "establish a life together and assume certain duties and obligations." The testimony, he wrote, "made it more probable that Phillips and his spouse intended to continue their separate lives and relationships.⁷⁰ The appeals court found that the "homosexual nature of the relationships" were not at issue, but that the relationships "existed before and continued after the marriage" was contracted. Judge Gierke wrote that Phillips's case would have been seen in the same light if the outside relationships were heterosexual.

While upholding the court-martial judge's evidentiary ruling, Judge Gierke, found that he did not present "factors he considered in balancing probative value against prejudicial impact." The use of "generalized" and "non-inflammatory" testimony minimized the impact of the evidence of Phillips's sexual orientation, according to Gierke.

Judge Effron, dissenting, dismissed the traditional notions of marriage evoked by the majority and pointed out the harsh view the military holds of gays and lesbians. "In an era of two-career relationships, the timing of marriage and the nature of marital living arrangements may be heavily influenced by such unromantic factors as tax laws, occupational benefits, and professional opportunities." Effron noted that "there is little indication that heterosexual activity outside the marital relationship has led to allegations of 'sham' marriages" in military prosecutions. Infidelity, Judge Effron wrote, "does not prove that a marriage is a sham. In the present case, the infidelity relied upon by the prosecution during its case in rebuttal was different. The prosecution sought to discount Phillips's testimony through proof of his homosexual conduct." Statutes, Judge Effron wrote, "underscore the high degree of antipathy to homosexuality in the armed forces. Under these circumstances, it is essential that military judges ensure that evidence of homosexuality not be introduced into a court-martial unless it is clear that the probative value substantially outweighs the danger of unfair prejudice."

Judge Effron noted that servicemembers who engage in adultery, heterosexual sodomy, fraterni-

zation, sexual harassment, or child abuse are not subject to mandatory discharge, but that "homosexual conduct" requires mandatory discharge, "with very limited exceptions." *Daniel R. Schaffer*

Ohio Appeals Court Upholds Battery Conviction of Sexually Aggressive Gay Prison Nurse

The Court of Appeals of Ohio, 8th District, affirmed the conviction of Aaron Hresko, a gay man, for improperly taking advantage of his prison staff position to try to have sex with male prisoners. *State of Ohio v. Hresko*, 2000 WL 301079 (March 23).

Aaron Hresko was hired as a nurse at the Cuyahoga County Jail in October 1997. He didn't wait very long to attempt to take advantage of his position to satisfy his sexual urges, according to Judge Corrigan's summary of the trial record. Hresko admitted at trial that he was "romantically interested" in one of the prisoners, Jason Smith, and Smith testified that Hresko frequently asked Smith to let Hresko have oral and anal sex with him, beginning in November 1997. Smith testified that prison guards allowed Hresko into his cell, and that Hresko attempted to force himself sexually on Smith. Another prisoner, one Robert Andrews, testified that when he went to the infirmary for treatment of a head injury late in 1997, Hresko told him that he was "cute," manipulated things so he could watch Andrews urinating, and at a later point tried to grope Andrews' penis.

One might suspect that this was a case of some prisoners trying to "set up" a gay man on the prison staff, but Smith's testimony was corroborated in a way fatal to Hresko's case. When Smith finally complained to his lawyer about Hresko's repeated sexual overtures, the lawyer arranged with prison officials to put "a wire" on Smith, producing a recording clearly documenting Hresko making improper advances while present in Smith's cell against prison rules. Furthermore, there was indication on the tape that Hresko was promising Smith money to have sex with him, and there was documentary evidence found to corroborate Hresko's attempt to deposit \$50 to Smith's prison account.

In his defense, Hresko denied knowing or having had any contact with Andrews, and tried to put an innocent gloss on the situation with Smith, including testifying that he did not think it would be improper for somebody in his position to stand next to a prisoner's cell to watch the prisoner masturbating (the only charged activity to which he readily admitted).

Hresko was charged with aggravated sexual battery, two counts, under a statute that particularly singled out people with supervisory authority over prisoners. Hresko argued that he was merely a nurse, not somebody in authority, but the court broadly construed the provision to extend to situations where prison staff members take advantage of their position of authority to impose themselves on prisoners. In this case, Hresko al-

legedly told prisoners that he could help them “make bail” if they submitted to having sex with him, which supported the conclusion that he was, or at least held himself out to be, in a position of authority. That he could get prison officials to allow him into prisoners’ cells, in violation of prison rules, also suggested his authority and standing within the prison.

The court sustained the trial judge’s sentence, which required Hresko to undergo one year of community control sanctions, pay a \$750 fine, and surrender his nursing license. Concluded Judge Corrigan, “Despite the fact that appellant’s victims were inmates, they were nonetheless also his patients and were entitled to be treated with dignity and respect. Instead, they were dehumanized in some of the foulest fashions imaginable. The appellant thoroughly betrayed the trust bestowed upon him as a medical professional and a civil servant. His sworn testimony that he did not believe that it was unacceptable for a registered nurse to engage in “dirty talk” while watching a patient masturbate, or to engage in other lascivious conduct while on duty, is indicative of his unfitness to ever again be employed as a health care provider.” Corrigan rejected the argument that there was insufficient evidence to convict, or that the conviction was against the weight of the evidence in the record. While Jason Smith was not necessarily a very credible witness in light of the nature of his crimes, the court found the corroborative tape decisive in crediting his testimony. A.S.L.

N.Y. Trial Court Refuses to Dismiss Prosecution for Harassing Letters

New York City Criminal Court Judge Paul Feinman (a LeGaL member) rejected motions to dismiss an aggravated harassment prosecution premised on two letters a woman sent to her former male friend accusing him of being “a closet homosexual” and “a substance abuser,” and asserting that she “had to go get an AIDS test because of you.” The first letter was sent to the complainant shortly after he and the defendant terminated their relationship; the second, similar letter, was sent to the complainant’s workplace. *People of State of New York v. Allen*, NYLJ, 3/17/2000 (N.Y.C. Crim.Ct., N.Y. Co.).

Judge Feinman found that the accusatory instrument was not facially deficient, and the question whether the letters could be seen as harassing within the meaning of the statute was for a factfinder at trial, not appropriate to be determined on a dismissal motion. Responding to the defendant’s argument that the letters were protected as free speech, Feinman wrote, “there is no unfettered right to free speech... To the extent that defendant is arguing that the letters were not intended to annoy, harass or alarm the complainant, but rather, to legitimately communicate to her former intimate partner her perceived sense of betrayal, the merits and persuasiveness of such an

argument could only be evaluated by a trier of fact after the record has been fully developed at trial and not in the context of a motion to dismiss at the pleadings stage.

Defendant Tabitha Allen also sought dismissal in the interest of justice. After reviewing the statutory factors specified in sec. 170.40 of the N.Y. Civil Practice Law & Rules for determining such motions, Judge Feinman found that allowing the case to go forward would not create a miscarriage of justice. He found that “the public is becoming increasingly concerned about the growing number of known incidences involving ex-spouses, ex-domestic partners, or ex-lovers who harass their former partners. While it is true that the complainant was not physically harmed, the court views offenses involving all type of harassment, including allegations of emotional abuse, as serious.” A.S.L.

N.Y. Judge Strikes Down New N.Y. City Regulation on Adult Businesses

Is it back to the drawing boards for the Giuliani Administration in its continuing attempt to close down “adult” businesses under a city zoning ordinance? In an opinion announced late in March, N.Y. State Supreme Court Justice Douglas E. McKeon found that the city’s latest attempt to modify its regulations to enforce the law fell short constitutionally. Ruling in *City of N.Y. v. Love Shack* (Sup.Ct., Bronx County) (to be published in NYLJ, 4/4/2000), McKeon rejected the city’s attempt to define adult establishments based on the percentage of sales made up of sexually-oriented material. McKeon said that this approach could let city enforcement officials adopt a strategy of “laying in wait” for a violation to occur when the balance of transactions conducted by a business tipped over a particular percentage, making it virtually impossible for a business to stock any adult materials and be certain of compliance. Finding that this constituted a content-based regulation of material protected by the First Amendment, McKeon basically held that the city was stuck with its prior approach of determining whether a business was an “adult use” by measuring the proportion of its physical space devoted to such uses.

McKeon also rejected the argument that a business could not comply with the zoning ordinance by reconfiguring its space to come within the percentage requirements of the prior guidelines. The city had argued that any reconfiguration under which a business still sells sexually-oriented materials is automatically a “sham.” McKeon wrote: “An entrepreneur who takes measures to comply with a regulatory scheme need not undergo an analysis of the purity of his heart. Nor should obstacles be placed in his path to make compliance unreachable.”

McKeon rejected as well the city’s argument that when two adult businesses are operating within 500 feet of each other, the decision which

one must close or relocate should be based on which one first filed for a permit from the city’s Buildings Department. McKeon accepted the argument of attorney Herald Price Fahringer, representing the Love Shack in the Bronx, that priority should be given to the first business to exist. A.S.L.

9th Circuit Finds No Immunity for Prison Officials Who Cut Off Hormone Treatments for Transsexual Inmate

In an unpublished disposition, a panel of the U.S. Court of Appeals for the 9th Circuit affirmed a decision by U.S. District Judge David F. Levi (E.D.Cal.) that prison officials did not enjoy immunity from suit by an inmate contesting the abrupt termination of hormone therapy upon a transfer from one state prison to another. *South v. Gomez*, 2000 WL 222611 (Feb. 25).

The defendants, seeking a ruling of qualified immunity, contended that there was no established authority at the time holding that transsexual prison inmates are entitled under the 8th Amendment to receive hormone therapy. In its unsigned memorandum, the 9th Circuit panel found this to be a mischaracterization of the issue, which was better stated as whether the defendants were “deliberately indifferent to serious medical needs.” Said the court: “We have repeatedly rejected attempts by defendants to define the right allegedly violated with greater specificity.”

In this case, there was uncontradicted expert testimony on the record that once it is begun, hormone treatment should not be terminated

ing that the law violates Art. I, sec. 1 of the Virginia Constitution inasmuch as it penalized consensual sodomy.

Judge Smith found that the Virginia Constitution's Equality and Rights of Man provision could not be construed to provide greater protection for personal privacy than is found under the federal constitution. Smith also rejected an equal protection challenge, finding that Virginia's sodomy law is gender neutral, that people who engage in sodomy or not a suspect class, and that the prohibition of sodomy has a rational basis in legitimate legislative objectives. "The sodomy statute was enacted to prohibit certain sexual conduct deemed by the legislature to be deviant, with a goal of promoting decency by prohibiting such conduct. Laws often represent moral choices, and the fact that the morality reflected in the law is not shared by Mr. Paris does not render the law unconstitutional," wrote Smith. "Mr. Paris and others who attack the existence of the sodomy laws do not stand remediless in this situation; their remedy is however in the ballot box, not in the courts." Paris is represented by Richard E. Gardiner of Fairfax. A.S.L.

Lesbian & Gay Litigation Notes

The U.S. Supreme Court hears oral argument in *Boy Scouts of America v. Dale* on April 26. At issue is whether the Boy Scouts of America are entitled, by virtue of the First Amendment, to maintain a policy of dismissing any members or leaders found to be gay, despite a New Jersey law banning discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Supreme Court found that the organization is a public accommodation, and that requiring them to retain openly gay members and leaders would not unduly burden the organization's First Amendment rights. As final briefs were filed in the case during the later part of March, there was a flurry of media commentary, including a nationally syndicated column by George Will highlighting the filing of an amicus brief on behalf of the Scouts by Gays and Lesbians for Individual Liberty, a self-identified gay libertarian group which argued that the Scouts should not be compelled to accept members they don't want.

Oakland County, Michigan, Circuit Judge Gene Schnelz rejected a defense motion for a new trial in the wrongful death lawsuit brought by Patricia Graves and Frank Amedure, Sr., parents of Scott Amedure, against the producers of the Jenny Jones television show. The lawsuit sought to place legal responsibility on the television program for setting up the situation in which Jonathan Schmitz became motivated to murder Amedure, due to Amedure's public confession of sexual attraction to Schmitz. A jury awarded the plaintiffs \$25 million in May 1999. The denial of a new trial was rendered on March 24. *Detroit News*, March 26.

Brian Fernandez pled no contest to using force to threaten a person because of his sexual orientation, and was sentenced to 25 days in jail in Los Angeles County (California) Superior Court on March 22. According to the city attorney's office, Fernandez noticed a customer in a video store looking at a display of gay videos. He walked up to the victim and asked if he was gay. When the victim said yes, Fernandez said that he hated gays, threatened and assaulted the victim. The incident was caught on the liquor store's surveillance camera and Los Angeles police arrested Fernandez nine days later after identifying him from the videotape. *Los Angeles Times*, March 23.

Bell Atlantic Telephone Co. will be delayed in issues the new edition of its Yellow Pages directory by a court order issued by N.Y. County Supreme Court Justice Louis B. York in response to a lawsuit filed by Simone Peterson, a pre-operative transsexual whose advertisement for an escort service was rejected because Bell Atlantic considers the phrase "Platinum Class She Male Escorts" to be offensive. York issued an order from the bench on March 15, restraining publication of the book pending resolution of this dispute, over the fervent protests of the defendant's attorney. The plaintiff is represented by Thomas D. Shanahan, of Tratner & Molloy, who is a LeGaL member.

On March 2, the Texas Supreme Court refused to review the decision in *Littleton v. Prange*, 9 S.W.3d 223 (Tex.App. — San Antonio, 1999), in which the court of appeals ruled that a post-operative transsexual remains, for purposes of the wrongful death statute, a member of the gender in which the person was born, and thus, cannot maintain an action for wrongful death of her spouse because they had, in effect, an invalid same-sex marriage. This was a case crying out for resolution by the state's highest court, especially in light of the strong dissenting opinion at the court of appeals, but evidently the Texas justices (who are elected) did not want any part of this controversial issue.

A panel of the U.S. Court of Appeals for the 2nd Circuit has ruled in *Eglise v. Culpin*, 2000 WL 232798 (Feb. 28) (unpublished disposition) that a police department official in Connecticut was entitled to qualified immunity against a charge of invasion of privacy prompted by his 1995 inquiry of an applicant for a position on the police force as to her "sexual practices and preferences." "We agree with the district court that when the relevant conduct occurred in 1995, a reasonable official would not know that [his] conduct violated any clearly established right to privacy. In so holding, we do not decide whether such conduct would violate a clearly established right today."

In *Brown v. Youth Services International of South Dakota, Inc.*, 2000 WL 287512 (U.S. Dist. Ct., D. S. Dak., March 15), the defendant, a residential facility for wayward youth, is being sued by a group of inmates for alleged sexual abuse committed by one of the facility's former staff members, one James Johnson. In sup-

port of their claim of negligent retention of Johnson, the plaintiffs cite "abounding rumors and complaints about Johnson's sexual misconduct," but the court found that the only rumors revealed in the depositions taken during discovery are "rumors that Johnson was a homosexual. The mere fact that a man has engaged in homosexual conduct in no way indicates that he would commit a sexual assault," wrote the court. However, there was enough other evidence to justify trial of the negligence claim against the facility, resulting in a denial of summary judgment.

In the March *Law Notes*, we reported, based on a newspaper story, a case in which a federal court vacated an arbitration award due to the arbitrator's anti-gay bias. That case has now been published, under the name *Flexsys America, L.P. v. Local Union No. 12610*, 2000 WL 300529 (U.S. Dist. Ct., S.D. W. Va., Feb. 16). The arbitrator apparently granted the union's grievance based solely on the arbitrator's perception that the supervisor with whom the grievant had a dispute was gay. No evidence was introduced during the arbitration hearing about the sexual orientation of the supervisor. In an ex parte phone call to the company's attorney after the hearing, the arbitrator said he could detect homosexuals due to his World War II service when he worked for a government agency and his job was to detect homosexuals for expulsion from the military service. The arbitrator said he was inclined to issue a decision for the union without an explanation, but he had concluded that this was cowardly, and he advised that the company discharge the supervisor because he is gay. The union refused the company's request to have the arbitrator disqualified, and the arbitrator issued his decision for the union. The company sought to have the award vacated, and its request was granted by District Judge Goodwin, who said, "The only individual who raised homosexuality as an issue was the Arbitrator, and that was after the arbitration hearing during an inappropriate, arbitrator-solicited, ex parte conversation. Accordingly, the Court finds that a reasonable person would conclude that the Arbitrator was biased, and that arbitrator bias is also an appropriate ground for vacation of the arbitration award."

In an unpublished disposition, the U.S. Court of Appeals for the 4th Circuit found that it was harmless error for the government to cross-examine a defendant in a drug distribution case about the nature of a long-ago arrest for soliciting gay sex. *U.S. v. Person*, 2000 WL 223336 (Feb. 28). Marion Person presented his wife and daughter as character witnesses on his behalf, and they both testified about his high standing in the community, swearing that he had never been involved in illegal activity. On cross-examination, they admitted that he had been arrested for soliciting "crime against nature." Later, when Person was on the stand, he was confronted with this testimony by his character witnesses, and the prosecutor asked whether the charge involved solicit-

ing a man to have sex. On appeal of his conviction on the drug distribution charges, Person argued that this prejudicial evidence should not have been admitted and fatally tainted his trial. Ruling per curiam, the panel found that the character witnesses were properly cross-examined about their assertions that Persons never engaged in illegal activity. As to the prosecutor's questioning of Person suggesting he was engaging in homosexual activity, the panel characterized this as "an ugly tactic that is prohibited by Fed.R.Evid. 403," but concluded that it was a harmless error in light of the overwhelming evidence of Person's guilt on the drug charges.

On April 11, the Louisiana Supreme Court will hear oral arguments in *State v. Smith*, a case challenging the constitutionality of the Louisiana sodomy law. The law was declared unconstitutional by the state's 4th Circuit court of Appeal in a unanimous decision last year. See 729 So.2d 648 (4th Cir. Feb. 9, 1999). *Baton Rouge Advocate*, March 15.

Toni Peters of Columbus, Ohio, pled guilty to burning a gay-pride rainbow flag that was flying at the Ohio State House during gay pride month 1999, and was fined \$250. Charles Spingola had previously been convicted for having torn down the flag. *Cleveland Plain Dealer*, March 16.

The Kansas Supreme Court affirmed the murder conviction and life sentence of Michael L. Coyote for second-degree murder in the death of Ronald Hurlbut, an openly-gay man. *State of Kansas v. Coyote*, 2000 WL 263228 (March 10). Various versions of the events at issue were given by different witnesses at trial, but Coyote did not dispute that he caused Hurlbut's death. Coyote claimed that after having spoken with Hurlbut at a bar, he later stopped to offer Hurlbut a ride home, accepted Hurlbut's invitation to come in for a few beers, passed out after drinking two, awoke to find Hurlbut felling him, and beat Hurlbut to death in a fit of passion. Other witnesses indicated that he had told them similar stories shortly after the event, but with variations on how he came to be in the apartment and how Hurlbut had attempted to initiate sexual activity. On appeal, Coyote objected to the trial judge's having responded to the jury's question about the meaning of "intentional" in the murder statute without Coyote or his counsel being present, also suggesting that the judge's answer was incorrect. The court found that it was error for the answer to have been given in Coyote's absence, but since the answer was correct, it was harmless error. Coyote also objected to the admission in evidence of several photographs of Hurlbut's body, due to their gruesome nature, but the court concluded that the photos were relevant to showing the nature and extent of the injuries Coyote inflicted on Hurlbut.

We try to report on all cases in which sexual orientation is somehow significant in the decision of the case, but we can't bring ourselves to describe the terrible facts in *Tibbs v. Commonwealth of Virginia*, 2000 WL 250160 (Va. App. — Richmond,

March 7), in which a lovers' quarrel between two women escalated into capital murder in an outrageous and gruesome context. The dispute on appeal was over whether a robbery of the victim committed during the course of the events leading to the murder sufficed to bring the case within the capital murder statute, which covers a murder committed in the commission of a robbery. A majority of the panel held that proximity in time was sufficient for the statute to apply; the dissenter found that the evidence could support the alternative conclusion that the robbery was incidental to a murder resulting from the lovers' quarrel, and thus the capital murder provision at issue did not apply. The death sentence was affirmed.

A divided panel of the Iowa Court of Appeals affirmed the conviction of James V. Brown of sexual abuse in the second degree, rejecting his argument that the trial was unfairly prejudiced by the admission of gay pornography found on his computer. *State of Iowa v. Brown*, 2000 WL 278548 (March 15) (not officially reported). Brown, a gay man, was hired to provide childcare to B.C., a 9-year old boy suffering from Attention Deficit Disorder who was on medication, for the summer of 1997. A year later, B.C. told his mother that Brown had done "nasty things" to him. She brought B.C. to the doctor, who found anal scarring that could be consistent with sexual activity. A search warrant led police to find lots of gay male pornography on Brown's computer. The police transferred the pornography to videotape, and it was admitted at trial, over Brown's objection. The trial court, and a majority of the court of appeals, found that it was relevant as corroboration to B.C.'s testimony that Brown had him view pornography on the computer before committing sexual acts on him, and that its relevance outweighed its prejudicial effect. The trial court kept out any evidence about Brown's sexual orientation, and refused to admit other pornography found in Brown's apartment. Dissenting Judge Sackett argued that there was no evidence that the pornography tape compiled by the police from Brown's computer included any images viewed by B.C., and that the evidence was extremely prejudicial. Sackett also emphasized that Brown was convicted based on the testimony of a medicated young boy suffering from Attention Deficit Disorder, and a doctor's opinion that was equivocal, inasmuch as it included that the scarring could be due to causes other than forced anal sex. Brown denied ever having touched the boy sexually, and says the boy, resentful of discipline, had threatened from time to time to tell his mother that Brown was bad to him. The opinion does not specify the prison term to which Brown was sentenced.

On March 15, the Florida Supreme Court denied a petition for review by the defendants in *Hoch v. Rissman*, 742 So. 2d 451 (Fla.App., 5th Dist. 1999), a defamation case brought by an openly-gay judge against a law firm for remarks made about the judge during the law firm's marketing seminars. The court of appeal found that

the alleged statements could be found slanderous by a jury. A member of the firm reportedly advised, "Always send a young man in front of Judge Hoch as he prefers boys in shorts." The denial of review means that the case is now headed for trial, mediation, or settlement. A.S.L.

Vermont House Passes Civil Union Bill for Same-Sex Couples

The Civil Union Bill (H.847) passed by the Vermont House of Representatives on March 16 comes about as close as a state bill can come to establishing same-sex marriage without doing so. Unlike the much more limited versions of domestic partnership enacted in Hawaii and California, which pick and chose particular legal aspects of marriage to which same-sex couples will be entitled, the Vermont bill basically provides that same-sex couples who enter into civil unions be treated the same as married couples for all purposes of state law. The bill is expected to pass the Senate, but if it is amended in that process, there would have to be a conference committee, which could delay passage. Governor Howard Dean is considered likely to sign the bill if it passes in the form approved by the House. Whether the bill would pass muster before the Vermont Supreme Court is another story.

The closeness of the Vermont civil union to marriage is apparent in light of the qualifications to become members of a civil union. This is available to any two adults (age 18 or over) of the same sex who are not either married to or civilly united with anybody else, or who would not be barred from marrying if they were of the opposite sex (such as siblings or first cousins). Unlike New York City's domestic partnership ordinance, which requires that the couple have been living together for some period of time before they can file their domestic partnership declaration, two men or two women could literally meet, fall in love, and go down to the town clerk to get their civil union license the same day and, if they can find an authorized person to perform the ceremony of union, do it without any waiting at all. (The bill provides that anybody authorized to perform a marriage is also authorized to certify a civil union, although religious bodies are entitled to decide for themselves whether their clergy will participate in such ceremonies.) The prospective partners do not have to be residents of Vermont. (A floor amendment to add a residency requirement was defeated, but might pop up again in the Senate.)

The legislative findings in Section 1 were clearly the subject of much negotiation, as they are carefully phrased to make it clear that the legislature is taking this action, which is not universally popular with Vermont voters, in order to comply with the Vermont Supreme Court's ruling in *Baker v. State* in December 1999. But the findings also set out a cogent argument in support of the bill. After pointing out the many ways that Ver-

mont has been a leader in lesbian and gay rights, by enacting a state anti-discrimination law, by specifically authorizing adoptions by same-sex couples, by extending domestic partnership benefits to state employees, the bill notes that “gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex,” and that such couples “suffer numerous obstacles and hardships” without the benefits of legal marriage. “The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple,” the bill asserts.

In its statement of purpose in Section 2, the bill identifies the purpose of the legislation as “to provide eligible same-sex couples the opportunity to receive the legal benefits and protections and be subject to the legal responsibilities that flow from civil marriage. Civil unions provide a legal status with the attributes and effects of civil marriage, so that state law conforms to the requirements of the Common Benefits Clause of the Vermont Constitution.” The bill also sets up a reciprocal beneficiary program for blood-relatives or relatives related by adoption who are barred from marrying each other but who want to designate each other as having certain decision-making and access rights, somewhat similar to the limited package of rights that domestic partners have under California’s recently-enacted law.

The law defines a civil union as meaning “that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.” Along with all the benefits, civil union partners will have all the legal responsibilities that spouses have for each other’s support, debts, and so forth. In another departure from the approach usually taken in domestic partnership ordinances, this bill provides that the same family courts that decide divorce cases will also decide on dissolution of civil unions, using the same principles for division of property and determination of child custody and visitation issues that are used in other divorce cases.

The bill includes a “nonexclusive” list of legal benefits, protections and responsibilities of spouses, which has twenty-four broad subject-matter items, but also makes clear that any other way in which state law or policy confers benefits, rights or recognition of marital spouses will also apply to same-sex civil union members. The list includes all the usual topics: joint ownership of property, inheritance rights, group insurance benefits for state employees, protection against discrimination based on marital status, victim compensation rights, spousal immunities and privileges in court and under tax laws, and so forth. (Significantly, because of federal preemption principles, Vermont may not require private employers to recognize civil union partners for purposes of employee benefit plans, but, at least theoretically, it might use its contracting power to

give private employers an incentive to adopt partnership benefit plans, along the lines of city contracting ordinances that have been adopted in San Francisco, Los Angeles and Seattle.) A.S.L.

Lesbian & Gay Marriage Notes

Colorado joins the states that have enacted express bans on same-sex marriage. Both houses passed H.B. 1249, which amends Colo. Rev. Stat. 14–2–104, by substantial margins, and Governor Bill Owens was a proponent of the legislation, which was approved in its final revised form on March 27. Addressing concerns that the new law, which only allows marriages “between one man and one woman,” would interfere with ongoing domestic partnership programs by private and public employers in the state, Senator Ed Perlmutter (D-Jefferson County) successfully added an amendment to rule out any such interpretation, which provides: “Nothing in this section shall be construed to impair or infringe upon rights and benefits conferred by contract, including but not limited to prenuptial and postnuptial agreements, or by laws or policies of the state of Colorado or any political subdivision thereof.”

South Dakota passed a law against same-sex marriages in 1996, as part of the first wave of reaction to the Hawaii same-sex marriage litigation, but State House Speaker Roger Hunt feared, in light of events in Vermont, that the law wasn’t sufficient to avoid having to recognize foreign same-sex marriages, and so H.B. 1163 was proposed, passed, and signed into law by Governor Janklow on February 28. It provides, in full: “25–1–38. Any marriage contracted outside the jurisdiction of this state, except a marriage contracted between two persons of the same gender, which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state.” On March 20, West Virginia’s legislature took final action on S.B. 146, limiting marriage to “one man and one woman,” and providing that any action by another state “respecting a relationship between persons of the same sex that is treated as a marriage under the laws of any other state, territory, possession or tribe or a right or claim arising from the relationship shall not be given effect by this state.” (See Code of W. Va., sec. 48–1–18a).

On March 29, the annual meeting of the Central Conference of American Rabbis (CCAR), the rabbinical association of Reform Judaism, the largest of the four movements of American Judaism, voted in favor of a resolution supporting the performance of religious ceremonies for same-sex couples. Although the resolution did not use the words “marriage” or “kiddushin” (the Hebrew term for the religious marriage blessing), the resolution was seen as giving a green light to Reform Rabbis who wish to perform marriage ceremonies for same-sex couples with the backing of the movement. The resolution also noted that it is up to individual rabbis to decide whether they will perform such ceremonies. Some of those voting

for the resolution said that they would not perform the ceremonies themselves, but supported the movement taking a position allowing rabbis freedom of choice in the matter. Reform Judaism, with 1.5 million members affiliated with its synagogues, is reportedly the largest religious movement to have approved the performance of same-sex ceremonies. The relatively tiny Reconstructionist Movement approved such ceremonies several years ago. *New York Times*, March 30.

Mayor Willie Brown of San Francisco conducted another mass same-sex marriage ceremony at City Hall on March 23, with almost 100 couples participating. This was the fourth such ceremony conducted by Brown, and turned at least in part into a demonstration responding to the recent passage of Proposition 22 by California voters. *San Francisco Examiner*, March 24. A.S.L.

Lesbian & Gay Legislative Notes: Adoption

The Connecticut House Judiciary Committee has approved a bill that would allow both partners in a same-sex couple to adopt children, by a vote of 27–13. A similar bill had significant support last year, but was killed by the addition of an amendment specifically outlawing gay marriage, thus making the bill unpalatable for many of its leading proponents. The bill responds to the Connecticut Supreme Court’s decision in *Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999), in which the court indicated that the courts could not authorize such adoptions without specific legislative authorization. *Hartford Courant*, March 20.

On March 14, Utah enacted amendments to the state’s child welfare law to take effect on May 1. Included in the amendments was the following provision: “78–30–9. Decree of adoption Best interest of child Legislative findings... (3)(a) The Legislature specifically finds that it is not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. Nothing in this section limits or prohibits the court’s placement of a child with a single adult who is not cohabiting as defined in Subsection (3)(b). (3)(b) For purposes of this section, ‘cohabiting’ means residing with another person and being involved in a sexual relationship with that person.” The primary purpose of this legislation, according to news reports, was to forbid adoptions by gay people who were living with a sexual partner, although by its gender-neutral terms it will also forbid adoptions by non-gay cohabiting couples as well. The legislative finding has no applicability to adoptions by single gay people who are not cohabiting. After Governor Mike Leavitt signed the bill into law, there were news reports about the likelihood that a lawsuit will be filed by the National Center for Youth Law, Utah Children, the American Civil Liberties Union and the National Center for Lesbian Rights challenging the constitutionality of the law. *Deseret News*, March 17.

On March 22, the Mississippi House of Representatives passed, with no debate, a bill that would forbid adoptions of children by gay couples. Ironically, gay groups had happily reported a week earlier that the bill had died in the House, despite being passed out of the House Judiciary Committee with a favorable recommendation. But they rejoiced too soon; the proponents organized a telephone campaign to get an identical bill quickly introduced. Another irony, according to an Associate Press report, "Bill opponents and supporters said they were unaware of adoptions in Mississippi involving gay couples." In other words, at present this legislation is entirely about "going on record," since it is unlikely that any gay couples would be foolhardy enough to present an adoption petition to a Mississippi court. *Memphis Commercial Appeal*, March 23. A.S.L.

Lesbian & Gay Legislative Notes: Hate Crimes

It had appeared that Georgia would pass a hate crimes law that would specifically mention sexual orientation, but when the Senate bill got to the state House, an amendment removed all classifications from the bill, replacing them with language authorizing sentence enhancement for all crimes motivated by "bias or prejudice" without mentioning specific types of such bias or prejudice. The Senate concurred with the House version in a vote on March 20. Arguably, the final version of the bill would ban anti-gay hate crimes by interpretation. *Atlanta Constitution*, March 21. A.S.L.

Lesbian & Gay Legislative Notes: Discrimination

The city council in Davenport, Iowa, voted 7-3 on March 1 to adopt an ordinance prohibiting discrimination on the basis of sexual orientation in employment, housing, public accommodations and credit. Other Iowa cities with such legislation include Iowa City (1977), Ames (1991), and Cedar Rapids (1999). Proposals to enact gay rights laws have failed in Des Moines (1998) and Dubuque (1999).

Utah Assistant Attorney General David C. Jones issued an opinion that the Eagle Forum Collegians, a student group at Utah Valley State College, must comply with a college policy forbidding discrimination on the basis of sexual orientation if it wants to be a campus-chartered organization. The president of the student group had written a letter to the attorney general protesting the policy, stating that the club upheld "Christian moral principles" and so should be entitled not to have gay members. However, Jones suggested that the school change its application form for student clubs to omit the list of prohibited forms of discrimination and, instead, state that club membership must be open to all students. *Chronicle of Higher Education*.

The Republican majority in the Iowa state Senate, upset by Governor Tom Vilsack's executive

order banning anti-gay discrimination in the state government, passed a bill on March 1, by a vote of 28-21, overturning the order, and sent the bill on to the House. Gov. Vilsack vowed to veto the measure if it passes, and the margin is probably not going to be high enough to overturn a veto. *Des Moines Register*, March 2. A.S.L.

Lesbian & Gay Domestic Partnership Notes

The California State Assembly Judiciary Committee approved three different domestic partnership bills on March 28. A.B. 1990 would give domestic partners standing to participate in medical decisions. A.B. 2047 would give domestic partners intestate succession rights and would entitle surviving domestic partners to be appointed as administrators in intestate estates. A.B. 2211 addresses a variety of issues, including revising the statutory will form to reflect California's recognition of the institution of domestic partners, provides conservatorship rights, allows registered surviving domestic partners to make funeral arrangements, authorizes domestic partners to bring actions for wrongful death and negligent infliction of emotional distress (bystander liability, limited under California law at present to close family members), and provides that those whose domestic partnership is registered in foreign jurisdictions would have these rights recognized in California. *San Francisco Chronicle*, March 29.

The Catholic Action League and the American Center for Law and Justice have filed suit challenging the domestic partnership benefits ordinance in Cambridge, Massachusetts, which authorizes partnership benefits for city employees. The same plaintiffs previously succeeded in winning judicial invalidation of a partnership benefits plan established by the mayor of Boston. The Cambridge City Council voted to vigorously defend the law in court. *Boston Globe*, March 22 & 23. A.S.L.

Law & Society Notes: Corporate Policies

Morgan Stanley Dean Witter & Co. announced to its staff last summer that it would extend eligibility for participation in the firm's medical, dental, supplemental life and voluntary accident plans to employees' domestic partners of either sex and their eligible dependent children, effective September 1, 1999. The policy defines a domestic partner as "an adult (either gender) with whom [the employee is] engaged in a spouse-like relationship and who meets the following criteria: You have shared a primary residence for at least six months and are responsible to each other for the direction and management of the household; You both are legally entitled to reside in your household under applicable immigration laws; You have a committed relationship of mutual caring which has existed for at least six months prior to enrollment in MSDW's benefit plans; Your relationship is expected to be long-term; You are both

age 18 or older; Neither of you is married or has another Domestic Partner; Neither of you is a blood relative of the other." The coverage for children is for those living at home, dependent on the domestic partner for support, and within the age range specified in particular benefit plans. The delay in reporting on this is because MSDW kept the announcement quiet, but we recently received a copy of the memo from an anonymous employee who was proud of what the company had done and wanted to share it with the world!

The Pride Foundation, a philanthropic group formed by Seattle, Washington, area lesbians and gay men, has begun to use its stock holdings to sponsor shareholder resolutions seeking non-discrimination policies from major corporations. The most recent reported success came at General Electric, where a sexual orientation discrimination non-discrimination policy was adopted after such a shareholder resolution, co-sponsored by the New York-based Equality Project, drew support from 8 percent of shareholders. The previous year, the Pride Foundation claimed credit for persuading McDonald's to adopt a sexual orientation non-discrimination policy. *Seattle Times*, March 23.

Cummins Engine Co., in Columbus, Indiana, followed the lead of Lincoln National Corp. in Ft. Wayne and the city of Bloomington by adopting a domestic partnership benefits plan for its employees, but local ministers were upset by the policy and organized a protest in front of the company's plant, which drew 1400 people to listen to minister rail against homosexuality. Cummins Chairman and CEO Ted Solso's statement announcing the policy emphasized that it had to do with attracting a good workforce during a time of low unemployment, and was not intended as a company statement about any lifestyle. *Chicago Tribune*, *Courier-Journal -Louisville*, March 27.

Whirlpool Corporation, which has 61,000 employees worldwide, has adopted a policy banning sexual orientation discrimination within its organization, and has approved the formation of an internal organization for lesbian and gay employees, but has decided not to adopt a domestic partnership benefits policy for now. *Grand Rapids Press*, March 19.

The University of Miami, a private school in Florida, has adopted a domestic partnership benefits program for faculty and staff members, covering health care, dental and life insurance, tuition reimbursement, retirement planning, discounted tickets to UM on-campus events, and use of the campus health center and library facilities. The plan was announced in a notice to staff in February, setting a March 15 deadline for initial sign-up, by which y 06o06o06o06o the benefits out of a total of 7500 staff members. *Miami Herald*, March 29.

Reuters reported March 20 that the International Association of Machinists and Continental Airlines have included domestic partnership benefits in their new collective bargaining agree-

ment, which covers the employee benefits of 8500 flight attendants, effective April 1. The domestic partnership plan applies to insurance coverage available under the labor contract. The new agreement also expands Continental's flying companion benefits, so that flight attendants can designate any person they choose to receive the same discounts and benefits they receive on flights as employees. A.S.L.

Law & Society Notes: Electoral Activities

The California primary elections on March 7 included a disappointing passage of Proposition 22 by a margin of 61 percent to 39 percent. The measure provides that California will not recognize same-sex marriages performed elsewhere. However, openly lesbian candidates did very well in the primary elections. Gerrie Schipske won the Democratic nomination to oppose Republican Congressman Steve Horn for re-election. Sheila Kuehl, a state Assemblywoman, won a hotly contested primary for the nomination to the State Senate and, if elected, will become California's first openly lesbian or gay state senator. Another lesbian candidate, L.A. Council member Jackie Goldberg, won the primary for Kuehl's assembly seat. *Schipske Campaign Press Release; Los Angeles Times*, March 9.

During the Florida primary on March 14, the city of Wilton Manors became the second municipality in the U.S. to be governed by a gay majority legislature. John Fiore was elected mayor, joining two other gay men as city council members, Gary Resnick and Craig Sheritt. *St. Petersburg Times*, March 16. The only other city with a gay majority on its council is West Hollywood, California. A.S.L.

Law & Society Notes: Other Developments

In a national poll commissioned by *Newsweek* in connection with a cover story on gay life in America published in March, the percentage of Americans who believe homosexuality is a sin has, apparently for the first time, fallen below 50%. Although a majority of respondents opposed same-sex marriages and adoption rights for gay partners, large majorities now support protection of gay civil rights in the workplace.

A research team from the University of California at Berkeley reported in *Nature* on March 30 that they had found a statistically significant link between the ratio of finger lengths, the number of older brothers, and hormones in the womb to the formation of human sexual orientation. As to finger lengths, it turns out that lesbians, according to this study, have second and fourth fingers in a length ratio more like men than like heterosexual women. The researchers also found that men with many older brothers were much more likely to be gay than men with fewer older brothers. "A mother's body appears to alter the foetal development of subsequent sons, increasing the likeli-

hood of homosexuality," according to the report. This is a surprise to us; in our experience, most of the gay men we know are oldest or only sons. We wonder who the researchers surveyed? *The Guardian, Scottish Daily Record*, March 30.

On March 1, the U.S. Interior Department announced that the Stonewall Inn has been designated a National Historic Landmark, a designation given to places that are meaningful to the history and culture of the United States. Stonewall had already been listed on the national Register of Historic Places in the spring of 1999, coinciding with the 30th anniversary of the "Stonewall Riots," during which bar patrons confronted police during a "routine" raid of the bar. The event is widely considered to mark the birth of the modern movement for lesbian and gay rights, even though more restrained gay rights organizing and political activity had been going on since the early 1950s. *Salt Lake Tribune*, March 17.

In November, the National Association of Elementary School Principals' resolution committee proposed to add "sexual orientation" to the criteria for which students should be guaranteed equal opportunity in schools. But at the association's national convention in New Orleans on March 21, the resolution was watered down to omit the list of protected categories, and merely guarantee equal treatment for everybody. The group's executive director explained that "you're bound to forget somebody" if you try to put such a list together, so the list was omitted to be more inclusive. Anyone who believes that is invited to purchase a certain bridge that is occasionally said to be for sale in the New York metropolitan area. *Baton Rouge Advocate*, March 22.

On March 24, the U.S. Defense Department released the results of an internal study on the issue of anti-gay harassment within the uniformed armed services. To nobody's surprise, the report documented that an overwhelming majority of the respondents had either been harassed, observed harassment taking place, or were aware of it happening, but fewer than half of the respondents recalled having received any training on the issue of anti-gay harassment under military policy. (Actually, in light of the overwhelming response, the biggest surprise was that some people reported never hearing of or observing any such harassment; a subsequent letter writer to the *MINew York Times* suggested that some negative respondents must have been lying.) Anticipating this result, Secretary Cohen announced earlier in the month that the Department would step up training to be sure that every uniformed member gets the message that anti-gay harassment violates Defense Department policies and will not be tolerated. But it is hard to understand how this message can be very effective when the official policy, legislated by Congress, is to mandate the discharge of any military member who is discovered to be gay, unless they can prove that they do not have a "propensity" to engage in gay sex. The

conclusion section of the study report was published in full in the *New York Times* on March 25.

The Gay Straight Alliance at El Modena, California, High School received an Orange County Human Relations Award for "building understanding among diverse people" on March 26. The Alliance is the subject of ongoing litigation, as the local school board is resisting granting official recognition and on-campus meeting rights to the group. (Preliminary relief was awarded by a federal judge, so the group has been able to meet on campus pending the outcome of the lawsuit on the merits, but there have been protests outside the school by various groups.) *Orange County Register*, March 7 (announcement of award).

As facts emerged about the gruesome murder and dismemberment of Steen Fenrich, a gay black man in Queens, New York, more public pressure built behind the stalled Hate Crimes bill in the New York State Senate. It is widely suspected that Fenrich was murdered by his stepfather, a white man who committed suicide after learning of the discovery of the corpse. Fenrich had been missing since last fall, but no missing-persons report was filed with police by his family. His skull was found in Alley Pond Park, with a racist, homophobic statement inscribed on it in black marking pen together with Fenrich's social security number. Fenrich had been discharged from the military for being gay. *New York Times, Newsday*, March 24; *N.Y. Daily News*, March 30.. A.S.L.

Developments in European, Canadian & South African Law

European Community. On March 13, the proposal by the Commission (executive) for a Directive banning sexual orientation discrimination in employment ([2000] LGLN 12, 38) was considered by the Council (main EC legislative body), consisting of employment ministers from each of the 15 member state governments. The Council's press release (<http://ue.eu.int/newsroom/main.cfm?LANG=1>; Council, Labour and Social Affairs, Meeting 2247) states that: "A number of delegations stressed the political importance they attached to speedy adoption of the package of measures and were pleased at the work already done under the Portuguese Presidency [of the Council, Jan.-June 2000]. In conclusion, the Presidency observed that the conditions for rapid progress were in place and expressed its determination to press ahead quickly with discussions on the package." The press agency Agence Europe reported that the Council "provid[ed] its agreement in principle to the 'anti-discrimination' package" and that "[m]inisters hope that it will be adopted ... in June."

On March 16, the European Parliament adopted a non-binding "Resolution on respect for human rights in the European Union (1998-1999)" (Document A5-0050/00, <http://www.eu-parl.eu.int/plenary/en/default.htm>, Texts

Adopted by Parliament). Under the heading *Life Styles and Types of Relationship*, the Parliament: "56. Calls on Member States to guarantee one-parent families, unmarried couples and same-sex couples rights equal to those enjoyed by traditional couples and families, particularly as regards tax law, pecuniary rights and social rights; 57. Notes with satisfaction that, in a very large number of Member States, there is growing legal recognition for extramarital cohabitation, irrespective of gender; calls on the Member States — if they have not already done so — to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women; calls on those States which have not yet granted legal recognition to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender; considers, therefore, that rapid progress should be made with mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU; 58. Notes, however, that European citizens continue to suffer discrimination and disadvantages in their personal and professional life as a result of their sexual orientation; calls therefore on the Member States and the EU institutions concerned to remedy such situations urgently; 59. Deplores the fact that some Member States still have a discriminatory age-of-consent provision for homosexual relations in their criminal codes as well as other forms of discrimination, in particular within the army, although various competent human rights bodies and Parliament itself have condemned these provisions; repeats its demand for such clauses to be repealed ..." The recommendation regarding legal recognition of same-sex couples is similar to one made in 1994.

Council of Europe. On Feb. 25, the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the 41-nation Council of Europe published its Report on "Situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe" (<http://stars.coe.fr/doc/doc00/edoc8654.htm>). Paragraph 7 of the committee's draft Recommendation (which the Assembly will debate in June) urges member states: "(a) to re-examine refugee status determination procedures and policies with a view to recognising as refugees those homosexuals whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Geneva Convention and 1967 Protocol relating to the Status of Refugees; ... (d) to review their policies in the field of social rights and assistance in respect to migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnership and families; (e) to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the

same residence rights as bi-national heterosexual couples ..."

English/Welsh Section 28 Compromise Defeated, Scottish Repeal Advances:

On March 23, the UK Government failed in its second attempt to get the House of Lords to support the repeal of Section 28 of the Local Government Act 1988 on "promotion of homosexuality" in England and Wales (for the first attempt, see [2000] LGLN 39). The unelected upper house of the UK Parliament rejected by 190 to 175 a compromise amendment to the Learning and Skills Bill which the government had negotiated with bishops of the Church of England and other religious leaders. (In the UK, entanglement of government and religion is not seen as a problem! For the debate, see <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/allddays.htm>, Column 431.) The compromise amendment (<http://www.dfee.gov.uk/sre-guidance/amend.htm>) would have provided: "(1) The Secretary of State must issue guidance designed to secure that the following general objectives are met when sex education is given to registered pupils at maintained schools. (2) The general objectives are that the pupils — (a) learn about the nature of marriage and its importance for family life and for the bringing up of children; (b) learn the significance of marriage and stable relationships as key building blocks of community and society; (c) learn to respect themselves and others; (d) are given accurate information for the purposes of enabling them to understand difference and of preventing or removing prejudice; (e) are protected from inappropriate teaching and materials. ... (5) The Secretary of State's guidance must also be designed to secure that sex education given to registered pupils at maintained schools contributes to — (a) promoting the spiritual, moral, cultural, mental and physical development of the pupils and of society; ... (7) Local education authorities, governing bodies and head teachers must ... have regard to the Secretary of State's guidance." The draft guidance (<http://www.dfee.gov.uk/sre-guidance/index.htm>) is not much of an improvement on Section 28: "(Introduction, 10) [Sex and relationship education] is not about the promotion of sexual orientation or sexual activity — this would be inappropriate teaching. ... (Section 1, 1.30) ... There should be no direct promotion of sexual orientation." Many people are likely to read sexual orientation as meaning homosexuality. At least Section 28 paid the UK's lesbian and gay minority the compliment of acknowledging their existence. The draft guidance does not use the words homosexual, gay or lesbian, which seem to be unmentionable.

The Ethical Standards in Public Life etc. (Scotland) Bill has been introduced in the Scottish Parliament (http://www.scottish.parliament.uk/parl_bus/legis.html). It provides simply (in clause 25) that Section 28 is repealed for Scotland, and imposes a duty on local governments (in

clause 26) "to have regard to (a) the value of stable family life in a child's development; and (b) the need to ensure that the content of instruction ... is appropriate, having regard to each child's age, understanding and stage of development."

Canadian Same-Sex Marriage Bans: Alberta Ban Passed, Federal Ban Proposed

It is generally accepted in Canada that there is a common law rule that marriage is male-female only (in Qu,bec, Article 365 of the Civil Code contains a similar statutory definition), that the federal Parliament has jurisdiction over capacity to marry (and divorce), and that the provincial legislatures have jurisdiction only over the formalities of the solemnization of marriage (and other family law matters). Notwithstanding the absence of any provincial power to permit or prohibit same-sex marriage, the Legislative Assembly of Alberta (Canada's most conservative province) has passed the Marriage Amendment Act, 2000 (Bill 202, <http://www.assembly.ab.ca/pro/bills/ba-main.asp>), which became law on March 23, and defines marriage as "between a man and a woman." The definition is constitutionally invalid, but is interesting because the legislative majority felt so threatened by the possibility of same-sex marriages in Alberta that it invoked the "override" provision of the Canadian Charter of Rights and Freedoms (Section 33(1)). This means that the definition cannot be challenged under certain sections of the Charter, especially Section 15 on discrimination. Since the Charter came into force in 1982, the override power has only been used on one significant occasion, by the Qu,bec legislature in 1988 to protect a law prohibiting the use of any language but French on a commercial sign. An override expires after five years but can be renewed.

Of greater significance is the federal, statutory, male-female definition of marriage that was inserted into the Modernization of Benefits and Obligations Act ([2000] LGLN 39) on March 23 by the Standing Committee on Justice and Human Rights of the House of Commons of the federal Parliament: "For greater certainty, the amendments made by this Act [extending rights and obligations to same-sex partners] do not affect the meaning of the word 'marriage', that is, the lawful union of one man and one woman to the exclusion of all others." If this definition remains in the final version of the Act, it will not change the current legal situation, but will provide a clear, federal, statutory target for the same-sex marriage case under the Charter that will inevitably reach the Supreme Court of Canada, perhaps within the next five years.

Religious Printer in Ontario Cannot Reject Lesbian and Gay Clients

On Feb. 24 in *Brillinger & Canadian Lesbian & Gay Archives v. Brookie & Imaging Excellence Inc.*, File No. BI-0179-98, Decision No. 00-003-R, a Board of Inquiry appointed by the Ontario Human Rights Commission ordered the respondents to pay C\$5000 in damages to the

complainants for refusing to provide a printing service to them on the ground of their sexual orientation, contrary to the Ontario Human Rights Code. The Board also ordered the respondents "to provide the printing services that they provide to others, to lesbians and gays and to organizations in existence for their benefit." The decision addressed the respondents' reliance on their constitutional right to freedom of religion as exempting them from any remedy for breach of the Code. The parties agreed that "compelling [Brockie] to provide a service to members of the lesbian and gay community, and to their organizations ... would cause him to act against his religious convictions and his understanding of the teachings of the Christian Bible," a prima facie violation of Section 2(a) of the Canadian Charter of Rights and Freedoms. The issue was whether this infringement could be justified under Section 1 of the Charter, which required the Board to "balance the competing rights of [the complainants] to be free from discrimination based on sexual orientation, and Brockie's freedom of conscience and religion as guaranteed by the Charter."

After noting both Brockie's belief "that homosexuality is detestable," and his providing printing services to "a company called Body Wear which produces underwear marketed to the gay male population," the Board concluded that "it is reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community, and their organizations, by the denial of services because of their sexual orientation ... [E]ven in large centers, there is nothing to prevent a ripple effect, with increasing numbers of services being denied on the basis of religious freedom, until society is left with fewer and fewer services available to members of marginalized groups. ... [N]othing in [the] order will prevent Brockie from continuing to hold, and practice, his religious beliefs ... in his home, and in his Christian community. He is free to espouse those beliefs and to educate others as to them. He remains free to try to persuade elected representatives ... that the Code protections currently granted to the lesbian and gay community, are wrong. What he is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice those beliefs in a manner that discriminates against lesbians and gays by denying them a service available to everyone else. He must respect the publicly-arrived-at community standards embodied in the Code." Brockie plans to appeal.

South Africa Outlaws Anti-Gay and Lesbian Hate Speech and Harassment

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000, <http://www.parliament.gov.za/acts/2000/index.htm>), signed by President Thabo Mbeki on Feb. 2, provides in s. 10(1) that "[s]ubject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the

prohibited grounds [defined in s. 1(1)(xxii)(a) as including sexual orientation], against any person, that could reasonably be construed to demonstrate a clear intention to — (a) be hurtful; (b) be harmful or incite harm; (c) promote or propagate hatred." Under s. 12, "bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution [freedom of expression, excluding propaganda for war, incitement of imminent violence, and advocacy of hatred based on race, ethnicity, gender or religion constituting incitement to cause harm], is not precluded by this section." Under s. 11, "[n]o person may subject any person to harassment," which is defined in section 1(1)(xiii) as "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission to actual or threatened adverse consequences and which is related to — (a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group." The 2000 Act supplements the Employment Equity Act, 1998 (Act No. 55 of 1998), which prohibits sexual orientation discrimination in employment, and does not apply where the 1998 Act applies. *Robert Wintemute*

Other International Notes

Do we really want to claim this one? *The Guardian* (Manchester, England) reported March 24 that German and Austrian newspapers have "outed" Jorg Haider, the leader of the far-right Freedom Party in Austria, as being a gay man with a particular fondness for teenage boys. The *Guardian* article noted a report published in *Berlin Tageszeitung* headlined "Jorg simply wants a cuddle," and a report in *Der Standard*, an Austrian daily, that some gay community leaders in Austria have known for some time that Haider is gay. In a statement responding to these publications, Homosexual Initiative, the largest gay rights group in Austria, said: "We've known about Haider's homosexuality for about ten years. On the one hand we think it's positive that the rumors are no longer capable of ruining a political career, on the other hand an earlier outing of Haider would have been justified." Later newspaper reports stated that Gerald Mikscha, 28, a male official of Haider's Freedom Party is also his lover. Mikscha's resignation as manager of the Freedom Party was announced March 25. The press reports sparked a fierce debate about "outing" within the Austrian gay community, some observing that Haider deserved to be exposed because of his anti-gay voting record as a legislator. *The Observer*, March 26.

The Scottish Parliament will accord gay partners equal rights with heterosexual partners in the

Incapable Adults Bill, currently pending, and Scottish ministers are considering adopting a sweeping partnership bill under which same-sex couples could be united in local registrar offices and would have many of the same rights as married couples. *Aberdeen Press & Journal*, March 16.

A gay Namibian man has been granted refugee status in Canada based on his demonstration of fear of oppression from the Namibian government and police. Identified in press reports as Johan, he testified that in June 1998 he was subjected to a gang-rape by three police officers and a cabinet minister, and he suffers from chronic post-traumatic stress disorder. The immigration board concluded that he "was subjected to degrading and violent treatment. His life is at risk as he was targeted by police." Namibia criminalizes all homosexual activity. *Toronto Sun*, March 27.

The press described it as Britain's first same-sex wedding when Diane (born David) Maddox and Clair Ward-Jackson tied the knot in the public registrar's office in Aldershot, Hampshire, recently. The two women met at a rehabilitation clinic where both were being treated for depression. David Maddox was a married father at one time, but his wife understood his gender identity issues and the marriage was terminated. Because Britain refuses to change the birth certificates of post-operative transsexuals, Maddox remains a man in the eyes of the law, and thus was able to marry Ward-Jackson, who will now take Maddox as her surname. The two consider themselves to be a lesbian married couple. *Daily Mail*, March 24; *The Independent* — London, March 23.

The *Los Angeles Times* reported March 25 that Norway has "broken new ground in its acceptance of homosexuality by appointing a gay couple to senior political posts." The new Labor government has installed Vidar Ovesen as deputy finance minister, and his domestic partner, Anders Hornslien, to fill Ovesen's parliamentary seat. The two men are registered under Norway's partnership law, under which same-sex couples have almost all of the same legal rights as married opposite-sex couples.

Sweden's Justice Ministry has proposed an amendment to the country's registered partnership law that will allow gay non-Swedes to register their partnership, if at least one has been a resident of Sweden for at least two years. Previously, registration was open only to couples of whom at least one was a citizen of Sweden. *Deseret News*, March 16.

On March 16, the Supreme Court of Canada heard arguments in a case challenging the conduct of Canadian customs agents in seizing materials being sent into the country to gay bookstores from the U.S. and other places. Little Sisters Book and Art Emporium, which has taken on the Customs Service in several cases, argues that the Service's interpretation of the obscenity definition previously adopted by the Canadian Supreme Court has had a discriminatory impact on gays in

Canada by depriving them of a wide range of gay-oriented literature and other materials. *Toronto Star*, March 17.

New Zealand's Court of Appeal has overturned the harassment conviction of a 36-year-old lesbian who was charged with being a "stalker" by a young bisexual woman. The names of the women were suppressed in reports of the case. Upon conviction in the District Court, the defendant had been sentenced to six months in jail, suspended for 12 months, and three months of period detention. A High Court judge had later quashed the periodic detention part of the sentence, but allowed the conviction to stand. The Court of Appeals said that the record did not contain proof that the defendant knew her actions were likely to cause the victim to reasonably fear for her safety, which is required for a conviction under the relevant statute, and decided that the fault law in the District Court judge's improper limitation of cross-examination of the victim. However, the Court of Appeals decided not to send the case back for a new hearing, finding that this would likely cause renewed emotional distress for the victim. *The Press — Wellington*, March 29.

Zimbabwe's former president, Canaan Banana, who was convicted and sentenced to prison for gay sex offences, has appealed to the Zimbabwe Supreme Court, arguing that privacy guarantees in that country's constitution make his convictions for consensual sex invalid. Defense lawyer told the court on March 6, "Perhaps the majority of our people regard such conduct as abhorrent, but that is not the issue. The issue is whether it is unlawful." *Salt Lake Tribune*, March 7.

Walter Gray, mayor of the Canadian town of Okanagan in British Columbia, has been found guilty of violating British Columbia's human rights code by refusing to issue a lesbian and gay pride day proclamation in the form requested by pride day sponsors. Gray issued a proclamation for Lesbian and Gay Day, pointedly omitting the word "pride" because he said he did not approve of homosexuality. The Tribunal issued a 28-page decision by member Carol Roberts, finding that the mayor had been guilty of sexual orientation discrimination against the lesbian and gay citizens of the town. The mayor's reaction: he will not issue any more ceremonial proclamations. "If I don't do it for anyone, then I can never again be put in a position of discrimination," said Gray. *Globe and Mail*, March 24.

In Germany the governing coalition of the Social Democrats and the Greens has introduced a bill in the parliament to compel government acknowledgment of the Nazi persecution of gay men, and calling on the government to annual convictions under Paragraph 175, the infamous anti-gay law of the Nazi era which remained on the books until 1969. A spokesperson for the Lesbian and Gay Association of Germany hailed the bill as an "important and correct first step in the right direction," but suggested that the government should go further by including Paragraph 175 with the list of Nazi laws that were "so criminal" that all convictions under them should be automatically lifted. *Arizona Republic*, March 23 (from Associated Press report). A.S.L.

Professional Notes

We sadly note the death of *James R. Hyde*, who was a member of the board of directors of the Bar Association for Human Rights of Greater New York during the 1980s, and was in charge of arrangements for the organization's first two annual dinners. Mr. Hyde retired from law practice several years ago, and was living in Providence, R.I., at the time of his death from AIDS. He is survived by his life-partner, Marcus (Marcio) Villa. A memorial service will be held in New York City on April 15 at 10:30 am at St. Joseph's Church in Greenwich Village (371 6th Ave.).

At its annual dinner on March 23, the Lesbian & Gay Law Association of Greater New York honored attorneys *Paula Eitelbrick* and *Peter Sherwin* with public service awards, and *Dr. Barbara Warren* and the law firm of *Cleary Gottlieb Steen & Hamilton* with community service awards. Eitelbrick, former legal director of Lambda Legal Defense & Education Fund, has held a variety of positions in lesbian and gay rights advocacy. Sherwin is chair of the Committee on Lesbian & Gay Rights at the Association of the Bar of the City of New York. Warren is Director of Mental Health & Social Services at the New York City Lesbian & Gay Community Services Center. Cleary Gottlieb was honored for its pro bono activities, most particularly in assisting Lambda Legal Defense Fund in representing the plaintiff in the case of *Dale v. Boy Scouts of America*, now pending before the U.S. Supreme Court.

Longtime LeGaL member Christopher R. Lynn, former N.Y. City Taxi Commissioner and

Transportation Commissioner during the first term of Mayor Rudolph Giuliani, has been appointed to head the District of Columbia Taxi Commission by Mayor Anthony Williams. Mr. Lynn has been serving as a member of the N.Y. C. Tax Appeals Board. The *Washington Times* reported March 10 that there is controversy about the nomination, stemming largely from Mr. Lynn's past law practice as a criminal defense lawyer, which included representing defendants in drug cases. A.S.L.

Assistance Sought for Discrimination Research

Rod Colvin, from the Department of Public Administration and Policy at the State University of New York in Albany, has undertaken a research study about the experience in administering laws and policies banning sexual orientation discrimination, with the final paper to be co-authored with Norma Riccucci. Their preliminary research has suggested two conclusions: 1. That gay men and lesbians are not filing claims in significant number, and 2. That gay and lesbian employees have not been very successful in their claims of discrimination. They have prepared a research questionnaire and are seeking participation from any lawyers who have represented lesbian or gay clients in employment discrimination cases. For a copy of the questionnaire, contact Rod Colvin at the following email address: rc0348@cnsvox.albany.edu. A.S.L.

Lesbian/Gay Immigration Task Force Seeks Student Interns

The NYC chapter of the Lesbian/Gay Immigration Rights Task Force is seeking qualified volunteer law student interns for the summer of 2000. Weekly hours and length of the internship may vary based on student availability and LGIRTF needs. Because LGIRTF is a non-profit agency, student volunteers may be able to use this opportunity to fulfill work-study obligations or perhaps to earn academic credit, depending on their schools' policies. Applicants should submit a cover letter stating why you would like to do this and what you hope to gain from the internship, what you can contribute to the work of the office and what your availability is; a resume; a writing sample. Please submit as soon as possible to: LGIRTF, Inc., Law Student Intern Search, 230 Park Avenue, Suite 904, New York NY 10169.

AIDS & RELATED LEGAL NOTES

6th Circuit Revives HIV Discrimination Claim by Police Applicant

A unanimous panel of the U.S. Court of Appeals for the 6th Circuit has revived an HIV discrimination claim by Louis Holiday, an experienced police officer who claims his application was rejected by the police force in Chattanooga,

Tennessee, solely because of his HIV status. *Holiday v. City of Chattanooga*, 2000 Fed. App. 0087P, 2000 WL 263350 (March 10). The decision, in an opinion by Circuit Judge Clay, reverses a grant of summary judgment issued by Chief Judge R. Allan Edgar of the Eastern District of Tennessee.

Holiday had worked as a police officer for the forces in Springfield, Murfreesboro, Nashville and at Tennessee State University. In April 1993, he applied to the Chattanooga Police Force. He passed the written test and the physical agility test, had his interviews with the Chief of Police and the Administration of the City's Department

of Safety, and received a job offer conditioned on passing a medical exam.

The city contracted its exam to various doctors, and sent Holiday to Dr. Steve Dowlen for his physical. Responding to Dowlen's routine questioning about medical history, Holiday disclosed that he had been HIV+ for several years but was asymptomatic. At the end of the examination, Dowlen told him that he had "passed," but subsequently somebody from Dowlen's office (not specified in the court's opinion) telephoned Donna Kelley, the city's personnel director, and told her that Holiday flunked the physical. Kelley was told that Holiday was HIV+ and suffered from an AIDS-related health problem. On the medical exam form, Dowlen had answered "no" to the question whether Holiday was "physically fit to perform strenuous activity that may be necessary in police work." In the "comment" section, he wrote: "anemia with lymphocytosis, lymph nodes in both axillae needs further evaluation by his physician since history by patient of HIV+ 3-4 years."

Kelley discussed this result with the public safety administrator, and they decided to revoke Holiday's job offer. When Holiday asked Kelley why the offer was being revoked, she said that she could not "put other employees and the public at risk by hiring you." In the trial court, Judge Edgar granted summary judgment on the city's motion, finding that the doctor's opinion meant that Holiday was not qualified for the job he sought. (After being turned down by the city, Holiday obtained employment with the State Capitol Police Force, passing the same physical standards that are required for the Chattanooga city police job.) In effect, Edgar's ruling meant that the doctor's conclusory statement regarding Holiday's fitness was determinative of his standing to sue under sec. 504 of the Rehabilitation Act and Title I of the ADA.

The Circuit court disagreed, finding that by disputing the doctor's conclusion and presenting factual allegations as to his health status and job history, Holiday presented a factual dispute as to his qualifications. Judge Clay noted that the city had disclaimed reliance on the "direct threat" defense, which was implicit in the reason stated by Kelley when she told Holiday he would not be hired, and was now relying solely on qualifications. Clay concluded that, "in this case, Holiday has presented sufficient evidence that would allow a jury to conclude that Dr. Dowlen failed to undertake the individualized determination that the ADA requires and instead disqualified Holiday because of his HIV status without any indication that Holiday's condition actually impeded his ability to perform as a police officer."

Clay also found it significant that although Holiday contended he was asymptomatic, Dowlen had evidently given Kelley the impression that Holiday suffered from an AIDS-related health problem. Further, there was no evidence in the record that Dowlen extended his examination to

determine whether Holiday suffered from any AIDS-related conditions that would actually impede his performance of police functions. Thus, Dowlen's conclusions were "at odds with the objective evidence on record." Clay rejected the argument that it was entitled to rely on Dowlen's "unsubstantiated and cursory medical opinion," stating: "Employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties... Courts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence."

Finally, Clay concluded that Holiday had presented sufficient evidence to raise a factual issues about whether his employment offer was withdrawn because of his disability. Kelley's statement to him was crucial on that point. Thus, the district court's summary judgment was reversed.

Holiday was represented by Chip Rowan, a prominent Atlanta attorney who has specialized in HIV and gay-related legal issues. A.S.L.

5th Circuit Finds AIDS-Caps in Insurance Not Discriminatory

On February 24, the U.S. Court of Appeals for the 5th Circuit affirmed a decision by the U.S. District Court for the Northern District of Texas granting partial summary judgment and, after a bench trial, judgment on the merits to an insurer that had paid only the \$10,000 cap toward the health care costs of an insured man who was diagnosed and treated for AIDS within the policy's two year pre-existing condition coverage limitation for HIV-related claims. *McNeil v. Time Insurance Company*, 2000 WL 217500. Plaintiff's father and executor continued the suit after plaintiff's death, only to be met with further loss when the 5th Circuit ruled that all claims were properly dismissed and adjudicated by the district court.

In the spring of 1994, Dr. Michael McNeil, a Texas optometrist, did not know that he would die from AIDS within the year. He thus routinely sought to cover himself and his sole employee in his practice under a general health care plan purchased from Time Insurance Company. The plan he selected contained no limitation on pre-existing conditions except HIV, as to which the policy limited coverage to \$10,000 during the first two years of the policy, but provided maximum benefits thereafter of \$2 million. McNeil began the plan naming himself and his secretary as employees, and paid the premiums for his secretary and himself, later reimbursing the practice for his own coverage. (McNeil had a partner in the practice who already had his own health insurance.) Six months later, McNeil was diagnosed with AIDS and was treated for pneumonia. Pursuant to the terms of the policy, Time played the first \$10,000 of his more than \$400,000 in medical costs. He died on March 1, 1995.

Before his death, McNeil sued in a Texas state court. After his death, his father and his executor took over the suit. Time removed the case to federal court based on the federal claims, ERISA preemption, and diversity. The final amended complaint asserted a host of common law causes of action including breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, common law discrimination, waiver, estoppel, and ratification. Also alleged was that Time violated a host of state and federal statutes including the Texas Deceptive Trade Practices Act (DTPA), the Texas Insurance Code, the Texas Commission on Human Rights Act (TCHRA), the Americans with Disabilities Act (ADA) and ERISA.

The district court dismissed the claims that were based upon alleged violation of Texas insurance law, held that provision of insurance did not constitute a "public accommodation" under the ADA, and held that Title III of the ADA only applied to physical use and services of a place of public accommodation, not to the content of services uniformly provided to all patrons.. Since McNeil could point to nothing that prevented him from making physical use of Time's services, the district court dismissed the ADA claim. Lastly, the court held that ERISA preempted the remaining state law claims. McNeil's father appealed.

Writing for the panel, Judge E. Grady Jolly began by affirming the district court's ruling that Time did not violate the Texas Insurance Code because AIDS was not a "handicap" for purposes of the statute, relying on *Hilton v. Southwestern Bell Telephone Co.*, 936 F.2d 823 (5th Cir. 1991). Jolly went further with an academic exercise explaining that even if AIDS were considered a handicap under the statute, McNeil would still not succeed. The statute prohibits discrimination against persons "because of handicap," indicating that the insurer must know that the applicant is handicapped and that the insurer limits coverage to that individual for that reason. McNeil was not handicapped when Time issued the policy, or at the least, Time did not know that he was. Thus, the limitation by Time could not have been "because of handicap." Jolly added that even if Time did know that he was handicapped, the result would still not change because Time offered this general policy without distinguishing between individual applicants based upon their AIDS status. As long as Time offered McNeil the same policy it offered to everyone else, Time had not violated the statute even assuming it knew that McNeil had AIDS. Therefore, the violation must be committed by the insurer, not by a term of the policy, a policy offered to everyone regardless of whether or not they had AIDS.

The court then turned to the allegations of unfair and deceptive practices by insurers. Although this count was summarily dismissed by the district court and not addressed, the appellate court quickly reviewed the issue, preferring to address it rather than to remand and await its likely ap-

peal. The court ruled that McNeil failed to state a claim for discrimination under this law because McNeil did not define the class to which he belonged at the time of the policy's execution and did not allege that others in that class were charged rates or provided benefits different from those charged and provided to him.

The court then affirmed the district court's ruling that Time did not violate the ADA provision prohibiting discrimination in places of public accommodation by offering a policy that limited AIDS coverage. The trial court reasoned that Time's provision of coverage is not a "public accommodation" under the ADA, and that Title III of the ADA only applied to physical use of the services of a place of public accommodation. On appeal, McNeil argued that any limitation of enjoyment of the goods and services of a place of public accommodation violates the statute. The court disagreed, reading Title III to mean that it prohibits the owner, operator, lessee or lessor from denying the disabled access to, or interfering with their enjoyment of, the goods and services of a place of public accommodation. "Title III does not, however, regulate the content of goods and services that are offered," Jolly concluded. The court gave examples that the statute could ensure that blind people could have access to cinemas and tennis matches, but could not ensure that the blind person could enjoy the event to the full extent as a sighted person. "[S]uch a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand."

Lastly, the court affirmed the lower court's ERISA decision, finding, as the district court did, that this health insurance plan did qualify as an ERISA plan because the employer contributed to the plan. Therefore, McNeil's list of state common-law claims against the insurer were correctly dismissed as being preempted by ERISA. *K. Jacob Ruppert*

Delaware Supreme Court Finds Blood Bank Not a "Health Care Provider" Under State Malpractice Statute

Affirming two separate pretrial rulings of the New Castle County Superior Court in an HIV transfusion case, the Delaware Supreme Court ruled on Feb. 28 that a blood bank is not a "health care provider" under the Delaware Malpractice Statute, and that in the state of knowledge about HIV in 1984, the plaintiff's physician could not be considered a "learned intermediary" for purposes of analyzing the duty of the blood bank towards the patient under tort law. *Blood Bank of Delaware, Inc. v. Price*, 2000 WL 275540 (unpublished disposition).

Nathaniel Price contracted HIV-infection during a blood transfusion procedure at Wilmington Medical Center on Oct. 5, 1984 (about 6 months before the HIV screening test was licensed by the FDA for use by blood banks). Price subsequently died from AIDS. His executor sued the Blood

Bank for negligence in failing to adopt donor screening procedures, failing to test donors for HIV, and failing to warn the decedent that he could contract HIV through a transfusion. After discovery, the Blood Bank moved for summary judgment, arguing that the plaintiff's failure to identify an expert witness on the standard of care of a professional health care provider was fatal to his case, and that Price's doctor's role as a learned intermediary relieved the blood bank of any duty to warn the patient. The superior court rejected both arguments.

Affirming in a per curiam opinion, the court found that a "health care provider" under the malpractice law consisted of "those professionals in direct personal contact with the patient and whose insurance malpractice premiums were of dominant concern to the General Assembly" when it enacted the Malpractice law. However, the court emphasized that it was affirming on the narrow question of whether the plaintiff's suit is governed under the Malpractice law, and was not holding that plaintiff can prevail at trial without an expert witness. The main precedent on which Price is relying in this case, *Snyder v. American Association of Blood Banks*, 676 A.2d 1036 (1996), prominently featured expert testimony on the appropriate standard of care for a blood bank with respect to HIV in 1984.

The court also stated its agreement with the superior court on the learned intermediary issue. In light of the uncertainty about HIV in 1984, held the court, it would be "unrealistic to assume that Dr. Turner, a general practitioner, had any greater or more sophisticated knowledge than Blood Bank, an organization specializing in the securing of donors and the supply of blood. The extent of Dr. Turner's knowledge and his duty to advise the decedent of the risk of HIV infection through blood transfusions raise fact questions which preclude the grant of summary judgment." A.S.L.

New Jersey Supreme Court Finds Abbott Not Liable for Failure of Blood Test to Detect HIV

An appeal brought by a woman who became infected with HIV from a transfusion of blood that was screened with the first commercially available HIV test, alleging violations of state product liability law by the manufacturer of the test, was dismissed by the New Jersey Supreme Court on the grounds of federal preemption. *R.F. and R.F. v. Abbott Laboratories*, 2000 WL 230299 (Feb. 29).

Plaintiffs R.F. and her husband claim that the HIV blood test used by the Bergen Community Blood Center was defective under New Jersey state law because its package insert failed to provide adequate warnings of the limitations of Abbott's first generation test (known as the ELISA test). Plaintiffs contend that since Abbott knew the test was not 100% accurate, it should have told the blood banks to retest samples that were borderline negative. Plaintiffs also asserted claims for breach of implied and express warran-

ties, strict products liability, and wanton disregard for the rights and safety of others. The jury found that Abbott had provided adequate warnings and the test was not defective. The NJ Appellate Division held that the plaintiffs' state law claims were pre-empted by the FDA's extensive scrutiny of the development of the test and monitoring of Abbott's use of the test, and because the FDA virtually dictated the text of the product insert. The main issue raised on appeal is whether such regulation and oversight pre-empted the plaintiffs' state law causes of action.

Justice Marie Garibaldi, writing for the majority, began her opinion describing the history of HIV in the U.S., including how the federal government went about soliciting pharmaceutical companies to develop a blood test for the presence of HIV. It was undisputed at trial that the FDA was intimately and actively involved in the development, clinical trials and licensure of the test at issue. The FDA understood the limitations of the ELISA test, due to a window period during which an infected individual's antibodies are not at detectable levels, causing the test to produce false negatives. Testimony showed that Abbott's original draft of the package insert recommended that certain borderline negative blood samples be retested to confirm the initial results. The FDA told Abbott to delete that part of the insert. The FDA had determined that it did not want to change the cutoff for what would be designated a negative blood sample, because this could result in an abundance of false-positive results, thus limiting the amount of donated blood available to be used. Further testimony adduced that the FDA virtually dictated whole portions of Abbott's package inserts, as well as those of other test manufacturers. These portions did not mention the possibility of borderline test results, nor did they tell the blood banks to retest borderline negative samples.

21 U.S.C. 360k(a) provides that no state may establish a requirement with respect to a medical device that is different from or in addition to any requirement established by the federal government which relates to the safety or effectiveness of the device. Judge Garibaldi stated that the question of whether state law is pre-empted in this case turns on the facts. In the court's view, the facts that support implied pre-emption are (1) the FDA's tight control over the test's development and monitoring of field performance; (2) the FDA's active direction of Abbott with respect to the design of the test and designation of the appropriate cutoff for a negative sample, and dictation of the exact wording of the package insert; (3) the FDA told Abbott not to instruct blood banks to retest samples below the cutoff point; and (4) the unique circumstances surrounding the development of the test, i.e., the onset of the AIDS epidemic which precipitated a health crisis and the loss of a safe blood supply. Garibaldi noted that, had the FDA believed that Abbott's test was defective or that the warnings were inadequate, the FDA would have required Abbott to change the

warnings or the product, or withdrawn it from the market. The FDA was aware that the test was not 100% accurate and it very carefully considered the warnings. Yet, it allowed the test to be on the market without any changes in labeling. The court concluded that the extensive control and scrutiny by the FDA left no room for the states to supplement it. Secondly, requiring blood banks to retest borderline samples and to warn that borderline results were dangerous would have conflicted with FDA mandates to balance the risk of some false negatives with the need for an adequate blood supply. Garibaldi said: “The FDA’s mandate directing Abbott not to provide for re-testing of samples near the cutoff — the concept on which plaintiffs base their warnings claim — remained in force as part of a conscious ongoing risk-benefit analysis by the FDA in managing a public health crisis. Plaintiffs’ state law claims would directly contradict the FDA’s requirements and interfere with the FDA’s objectives, and therefore are preempted.”

Justice Gary Stein dissented, arguing that imposing a requirement on Abbott to inform users about the possible inaccuracies of the test would not impose a conflict with federal law. *Elaine Chapnik*

South Carolina Appeals Court Holds Health Department Must Give Defendant’s HIV Records to Prosecutor

The South Carolina Court of Appeals has ruled

notification programs, or remain indefinitely exposed to lawsuits brought by HIV+ patients, and even the estates of former patients who died from HIV-related illnesses. Roberta Ann Sherwood was represented by Carey B. Reilly. Danbury Hospital was represented by Donald W. O'Brien. *Ian Chesir-Teran*

Federal Court Grants Summary Judgment on HIV-Transmission Claim Against Baxter Pharmaceutical

In an opinion delivered March 14, Judge Berrigan of the U.S. District Court for the Eastern District of Louisiana shot down all counts against two blood protein manufacturers in a suit calling for their liability for the AIDS death of a hemophiliac boy who allegedly contracted HIV by their blood infusion product called Factor VIII. *Cross vs. Alpha Therapeutic Corp.*, 2000 WL 282787. Written as a detailed academic and instructive exercise that goes far beyond its minimal duty, this summary judgment decision in favor of defendant pharmaceutical companies involved several substantive issues that the court troublesomely described as "close calls." The court ruled on all issues including their alternatives to have a complete record for purposes of possible appeal.

Brad Cross was born in 1975 with hemophilia. He was treated with a plasma derivative known as factor concentrate. Four main manufacturers produced these concentrates: Baxter, Armour Pharmaceuticals, Cutter Biological and Alpha Therapeutics. In October of 1979, Cross' parents began to keep an infusion log in which they recorded the manufacturers' brand names of the factor concentrates used and the dates in which he infused them. This log was maintained until January 1988. According to these logs, Cross last used Baxter's factor concentrate in April of 1981.

A sample of Cross' blood drawn in December of 1981 tested negative for HIV. Thereafter, samples of his blood drawn in December of 1982 and June of 1984 tested positive for HIV. In June of 1985, Cross' parents learned of their son's HIV+ status. Brad Cross died of AIDS on April 16, 1993.

On May 21, 1991, Cross' parents filed their first suit on Cross' behalf naming only Cutter and Armour as defendants. After Brad's death, his parents amended their suit to include survival and wrongful death actions. Under Louisiana law, a decedent's statutory survivor may bring a survival action, i.e. an action for damages the injured person would have had, had he lived. A beneficiary may also bring a wrongful death action for the damages the beneficiaries sustained as a result of the death. They are considered two separate causes of action under Louisiana law. Armour was granted a directed verdict on all claims. Cutter prevailed by a jury verdict. Both verdicts were affirmed at the appellate level and were denied certiorari by the Louisiana Supreme Court.

In February of 1994, plaintiffs filed this diversity suit in federal court, naming Alpha and Bax-

ter for the first time, alleging that as a direct and proximate result of dangerous defects in defendants' factor concentrate (contaminated with HIV and other pathogens) and their failure to warn of the risks of factor concentrate use, that Brad was exposed to and infected with HIV as well as other viruses. Plaintiffs further alleged that after the initial exposure to HIV and other viruses, Brad's medical condition was aggravated and/or worsened by subsequent exposure to HIV and viruses and pathogens from additionally infused factor concentrate and that the concentrate suppressed his immune system, making him more susceptible to HIV infection. Lastly, plaintiffs alleged conspiracy claims making defendants jointly and severally liable. The liability claims were premised on negligence and strict liability.

Judge Berrigan began his search for genuine issues of fact regarding prescription, the Louisiana term for statute of limitations. Defendants argued that the prescriptive period of one year for both the survival and wrongful death actions had passed. The court then explored whether the prescriptive period of one year for both causes of action were either preemptive (not subject to interruption or suspension) or prescriptive (subject to interruption or suspension). The court ruled that based on past judicial treatment, a survival action was preemptive, and thus not subject to plaintiff's defense of *contra non valentem non currit praescriptio* (a prescriptive period does not run against a person who could not bring its suit, in this case, plaintiffs' lack of knowledge that a cause of action existed) or any other exception to a statute of limitations. Brad died in April of 1993 and plaintiffs brought this suit in March of 1996, clearly outside the prescriptive window.

As for the wrongful death action, the court found judicial treatment of a prescriptive nature, thereby entertained plaintiff's defense that a class action filed in September of 1993, within one year of Brad's death, tolled the prescriptive period. This class action was brought against defendants, including Baxter, by hemophilic patients infected with HIV and other pathogens from the use of defendants' factor concentrates. Baxter argued that the prescriptive period never tolled because the commencement of the present action equated to an opting-out of that class action and in the alternative, that if it is not an opting-out, the class action was met with a class decertification on appeal. The court disagreed with Baxter, reasoning that plaintiffs were never notified that they were putative class members, that their suit was brought before the class action was filed, thereby making opting out impossible, that the class action was filed a few months before plaintiffs were to go to trial, making it unreasonable for them to abandon the action for a then uncertified class action and, lastly, that plaintiffs have the benefit of the Louisiana rule that prescriptive statutes should be construed against the party claiming prescription. However, the court was not shy about being in doubt as to whether the plaintiffs

had in fact opted out by maintaining this action, stating that plaintiffs and their counsel were aware of the claims against the concentrate manufacturers as well as the class action. The court rested on it being a close call.

In a hairsplitting analysis of when the statute of limitations commenced to run anew vis a vis the class action, the court said it began in October of 1995 when the US Supreme Court denied certiorari, and not when the Seventh Circuit decertified the class in March 1996. The former makes the plaintiffs' case timely and the latter prescribes it by 7 days. In its reasoning, the court made note that the case did not reach the Seventh Circuit by appeal, but by the rare use of a writ of mandamus, a mere declaration that the lower court change its decision. Thus, the lower court's certification remained in effect until the US Supreme Court denied cert in October of 1995. The court also ruled that plaintiffs' case is not sufficiently similar to the class action against Baxter to constitute adequate notice of that claim.

Next the court opined that even if the class action suit did make this case untimely, the defense of *contra non valentem* would not apply because plaintiffs knew of their cause of action for 11 years after learning of Brad's HIV+ status, for five years after he came down with AIDS and for 3 years after Brad's death. However, in a footnote that moots the entire case, plaintiffs' state court suit, later amended to include wrongful death, interrupted prescription against other possible tortfeasors (here, Baxter and Alpha). Since they were found not liable, there is no interruption of prescription, thus making this case untimely.

Turning to causation, the court dismissed all counts against defendants. Plaintiffs began arguing that the defendants should have the burden of proof citing joint tortfeasor law (defendants must exonerate each other and prove "the other guy did it"), which the court dismissed for lack of precedence in a case such as this. After resolving the factual dispute in plaintiffs' favor of how long an HIV+ test result can occur after infection, the court dismissed the count of Baxter causing Brad's HIV infection, finding that from the eight months prior to Brad's negative HIV test in December 1981 and through the additional 12 months to his positive test for HIV in December 1982, he had not used Baxter concentrate at all, but concentrate from other manufacturers. "Plaintiffs are not entitled to any inference that the infection happened more than eight months earlier, and even if it could have, that it is hardly proof that it did." Allegations that the concentrate had suppressed Brad's immune system and that the concentrate aggravated and/or worsened Brad's injuries after testing positive by further exposure to HIV and other pathogens were likewise dismissed for lack of evidence. However, the court's analysis on the admissibility of medical theory versus technique of scientific knowledge and how HIV reinfection should be classified is well noted here. The court again resolved the is-

sue in Plaintiffs' favor, citing that for purposes of this summary judgment motion, it is one of technique. Nonetheless, the claim was dismissed for lack of evidence that Brad was in fact reinfected.

Plaintiffs' "failure to warn" claims were also dismissed for lack of evidence that such failure to warn was both a cause in fact and proximate cause of Brad's injuries. Charges of conspiracy were dismissed for lack of proof of intent to harm Brad or the plaintiffs. At most, the evidence shows that "the factor concentrate manufacturers acted in concert in the early 1980's to mitigate the significance of the AIDS crisis in their dealings with governmental authorities. This in and of itself is not enough to show a conspiracy to commit an unlawful act." *K. Jacob Ruppert*

Prisoner HIV Privacy Rights Covered by 8th Amendment

Federal Magistrate Peck has submitted a report to U.S. District Judge Rakoff (S.D.N.Y.) recommending denial of a motion for summary judgment by prison officials in an inmate case challenging violation of his privacy rights regarding HIV medical records. *Gill v. DeFrank*, 2000 WL 270854 (March 9). Prisoner Gill protested his assignment to a work detail at a time when he was heading to attend a religious service; among other things, he argued that he was medically restricted from performing the work in question due to asthma and a back problem. When he persisted in refusing the assignment, the guard took him to the infirmary and got a nurse to let the guard page through Gill's medical records, which included an indication that Gill was HIV+. The nurse and the guard both made statements about this, including telephoning to others with the information. Gill asserted a variety of constitutional claims in his suit, but we will report only on the HIV privacy claim.

Magistrate Peck found that a prisoner's constitutional right of privacy may be violated by inappropriate disclosure of confidential medical information. Peck found that there was no need for the prison guard, not a member of the medical staff, to look "page by page" through Gill's medical records, when nurses were available to read and interpret the information. Furthermore, Peck rejected the assertion that once having raised medical concerns to attempt to get out of a work assignment, Gill had waived any confidentiality rights in his medical records. Peck found that the issue of Gill's HIV-status was not relevant to the reasons why he was objecting to the work detail.

Peck also rejected a claim of qualified immunity by the defendants, finding that there was adequate caselaw by May 1997 in the Second Circuit from which no reasonable prison guard could have believed that prisoners do not have any confidentiality rights with respect to their medical records, citing a 2nd Circuit case specifically on AIDS confidentiality, and several district court decisions discussing HIV confidentiality in the context of prisoners. A.S.L.

AIDS Litigation Notes

It looked like the Supreme Court was going to take up the question whether state employees can sue their employers under the Americans With Disabilities Act for disability-related discrimination, having granted certiorari in two cases presenting that question, but the parties settled their cases and the Court dismissed the grants of certiorari. *Florida Dep't of Corrections v. Dickson*, No. 98-829, cert. granted, 120 S.Ct. 976 (2000), cert. dismissed after settlement by parties, 2000 WL 215674 (2000); *Alsbrook v. Maumelle*, Arkansas, No. 99-423, cert. granted, 120 S.Ct. 1003 (2000), cert. dismissed after settlement by parties, 2000 WL 230234 (2000). However, there is a certiorari petition pending in another case presenting the same question, so the issue may come up against for next term. Over the past year, the Court has used 11th Amendment sovereignty arguments to deny state employees the right to sue their employers under federal statutes for Fair Labor Standards Act overtime claims and for Age Discrimination in Employment Act claims. A denial of the right to sue under the ADA would have obvious implications for state employees with HIV/AIDS.

Yet another federal circuit court of appeals has ruled that Title I of the American With Disabilities Act, which forbids, inter alia, discrimination with respect to employee benefits against qualified individuals with disabilities, does not forbid employers from providing different levels of coverage for different disabilities. In *EEOC v. Staten Island Savings Bank*, Nos. 99-6011 & 99-6035, the U.S. Court of Appeals for the 2nd Circuit lined up with six other circuits to find that so long as all employees are offered the same benefits plan, the contents of the plan is beyond judicial scrutiny under the ADA. This accumulated circuit precedent weighs heavily against people with HIV/AIDS challenging HIV-related benefits caps in their employee benefits plans.

In *France v. Apfel*, 2000 WL 301776 (U.S. Dist.Ct., D. Md., March 13), Magistrate Grimm dealt with an HIV+ social security disability claimant's contention that the Social Security Administration improperly denied her claim for benefits. Although Grimm found that the Administration had improperly failed to take proper individual account of the impact of claimant's age on her employability, Grimm rejected the argument that the Administration did not properly evaluate the impact of HIV-infection on her condition, noting that her doctor's testimony indicated that she was well and alert, and that weight loss, malaise and other factors were due to her drug use rather than her HIV+ status.

The Court of Appeals of Michigan has revived a challenge to the Michigan Department of Corrections' policy of denying prisoners placement in community residence programs because of their HIV+ status. In a prior decision, a panel of the court held that the Michigan Civil Rights Act and

the Persons With Disabilities Rights Act did not apply to prison policies. However, a subsequent decision of a different panel of the court held otherwise, and a special panel was convened to decide the position of the court overall on this issue. In a per curiam ruling, *Doe & Roe v. Dept. of Corrections*, 2000 WL 253625 (March 3), the court held that the plain meaning of the statute applies to state programs for prisoners, and that "if it is the intent of the Legislature not to have these statutes applied to prisoners and prisons, then it is incumbent on the Legislature to draft and enact statutes that so provide." The opinion drew a lengthy dissent, arguing that programs for prisoners are not "public services."

The U.S. Court of Appeals for the 6th Circuit found in *Doe v. Great-West Life & Annuity Insurance Co.*, 2000 WL 282452 (March 7) (unpublished disposition), that a "social disability" may suffice to trigger the award of disability benefits. In this case, a dentist who learned he was infected with two different strains of hepatitis decided to sell his practice and go on disability benefits. He had been advised that he was under an ethical obligation to disclose his hepatitis-infected condition in order to obtain informed consent from his patients, which would effectively put an end to his practice. Nonetheless, the insurer denied disability benefits, pointing out that the dentist was asymptomatic and physically able to work. The court of appeals found that being hepatitis-infected, like being HIV-infected, is a "social disability" because of the reactions of others, and held that the dentist should be awarded benefits. The court pointed out that the insurer had paid disability benefits to HIV+ positive dentists under similar circumstances, even though HIV is much less contagious than hepatitis.

The old hypodermic in the jeans routine did not yield riches for Stephanie Baird or her personal injury lawyer. Baird claims she bought a pair of Levis from Mervyn's Department Store in Mesquite, Texas, on April 12, 1997, took them home, put them on, and suffered a puncture wound in her leg from a hypodermic needle hidden in one of the pockets. She immediately got HIV prevention treatment, and has repeatedly tested negative ever since, but didn't have the presence of mind to get the hypodermic needle inspected and tested for HIV. She sued Mervyn's in federal court for negligence, strict products liability, and breach of implied warranty, citing her severe emotional distress and the pains of her medical treatment. Magistrate Kaplan granted summary judgment against her in *Baird v. Mervyn's, Inc.*, 2000 WL 295616 (N.D. Tex. March 21). Her emotional distress claims under Texas law required a hearing, but she tried to litigate implied Mag

results, there was virtually no chance that Baird was actually infected in this incident.

The Missouri Court of Appeals, Eastern Division, upheld the conviction and life sentence of Brian Stewart for deliberately injecting an infant with HIV-infected blood in order to escape child support obligations. *State of Missouri v. Stewart*, 2000 WL 309306 (March 28). According to the opinion by Judge Richard B. Teitelman, Stewart was a phlebotomist at Barnes-Jewish Hospital in St. Louis who had an affair with the woman who bore B.S.J., the victim in this case. The woman claimed that Stewart was the father, but he denied paternity and refused to take any responsibility for the child. Testimony at trial showed that Stewart had stated, in various contexts, that he would dispose of enemies by injecting them with something. When the child was diagnosed with AIDS, investigation showed that the child had not been infected at birth, and a suspicious chain of events suggested that the child was injected with HIV-tainted blood by Stewart. Appealing his conviction, Stewart raised objections to a variety of evidentiary rulings by the court, as well as the prosecutor's comments during closing arguments alluding to Stewart's failure to testify in his own defense. The court of appeals meticulously reviewed all the evidentiary objections and found most of them to lack merit, or to be harmless error in a few cases. Similarly, the court disposed of the issue of the prosecutor's remarks by treating them a harmless error. It is hard to know from the court's characterization of the case whether Stewart was being railroaded or was actually proved guilty beyond a reasonable doubt, but this court of appeals panel seemed willing to tolerate a lot of cumulative "harmless error" for a case involving a life sentence.

Justin Keene, 24, of Dubuque, Iowa, pled guilty to criminal transmission of HIV, for exposing a mentally handicapped woman through sexual intercourse, and was sentenced by Judge Alan Pearson under a plea agreement to a 25-year suspended sentence and confinement in a residential facility for at least one year. *Omaha World-Herald*, March 25.

A Colorado Springs, Colorado, jury convicted Anthony Demby, 30, of reckless endangerment and sexual assault on charges that he had unprotected sex with a 12-year old boy. Demby is HIV+. The boy has tested negative for the virus, repeatedly. The jury rejected the original charge of attempted manslaughter. Under a Colorado law that took effect in November 1998, Demby received an indeterminate sentence on March 13, because he was convicted of a sex crime. (The actual sentence imposed was 20 years to life; the Department of Corrections will not release him until 2019.)

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LACATL, 503-23-23942, Odir_Miranda@ads.org.sv.

The South African Human Rights Commission ruled March 23 that a blood bank in Western Cape was violating the law by categorically refusing to accept blood donations from gay men. Andrew Barnes, a gay man who was turned away when he responded to an urgent public appeal for blood donations, filed a complaint with the Commission. The Commission noted that gay men are not

the largest risk group for HIV in South Africa. The director of the blood bank stated disagreement with the decision and is considering appealing to the courts to maintain the policy. *Salt Lake Tribune*, March 25.

In Auckland, New Zealand, a man who bought a house unaware that it had previously been owned by a person with AIDS who had died in the house, has sued for \$85,000 damages from the trust that sold him the house, including \$50,000

to compensate for loss of market value, \$25,000 for the cost of "sanitising" the house, \$10,000 for emotional distress, and \$1400 for the cost of a new dishwasher. (No, the dishwasher has nothing to do with the AIDS claim. The new owner alleges that the sellers made off with the old dishwasher...) The defendant trust has moved to dismiss, attaching an affidavit from an AIDS doctor asserting that the prior occupancy should be of no concern to the current owners. *The Dominion*, March 24. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Ball, Carlos A., *Communitarianism and Gay Rights*, 85 Cornell L. Rev. 443 (Jan. 2000).

Bavis, Craig, *Vriend v. Alberta*, Law v. Canada, Ontario v. M. and H.: *The Latest Steps on the Winding Path to Substantive Equality*, 37 Alberta L. Rev. 683 (1999).

Calvert, Clay, and Robert D. Richards, *Defending Larry Flynt: Why Attacking Flynt's "Outing" of Sexual Affairs Is Misguided*, 21 Hastings Comm. & Ent. L. J. 687 (Summer 1999).

Damiano, Christin M., *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under "Don't Ask, Don't Tell, Don't Pursue"*, 7 Am. U. J. Gender, Soc. Pol. & L. 499 (1999).

Doering, Shannon L., *Treading on the Constitution to Get a Foot in the Clubhouse Door*, 78 Neb. L. Rev. 644 (1999) (argues N.J. Supreme Court erred in finding no 1st Amendment impediment to applying state public accommodations law to Boy Scouts of America).

Dolgin, Janet L., *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 Conn. L. Rev. 523 (Winter 2000).

Freshman, Clark, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 Cornell L. Rev. 313 (Jan. 2000).

Gallanis, T.P., *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 Ohio St. L. J. 1513 (1999).

Harel, Alon, and Gideon Parchomovsky, *Essay: On Hate and Equality*, 109 Yale L. J. 507 (December 1999) (proposes alternative victim-centered theory to justify bias crime penalty enhancement laws).

Katz, Pamela S., *The Case For Legal Recognition of Same-Sex Marriage*, 8 J. L. & Policy 61 (1999).

Lester, Toni, *Protecting the Gender Nonconformist from the Gender Police Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N. Mex. L. Rev. 89 (Winter 1999).

Loue, Sana, *Intimate Partner Violence: Bridging the Gap Between Law and Science*, 21 J. Legal Med. 1 (March 2000).

Olchowy, James R., *Inside McClung J.A.'s "Closet" in Vriend v. Alberta: The Indignity of Misrecognition, the Tool of Oppressive Privacy, and an Ideology of Equality*, 37 Alberta L. Rev. 648 (1999).

Rennie, Elizabeth, *Access to Donor Insemination: Canadian Ideals UK Law and Practice*, 4 Medical L. Int'l 23 (1999).

Thomas, George C., III, *On Trial: Laws Against Hate Crimes*, 36 Crim. L. Bull. 3 (2000).

Velte, Kyle C., *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 Am. U. J. Gender, Soc. Pol. & L. 431 (1999).

Yoshino, Kenji, *The Epistemic Contract of Bisexual Erasure*, 52 Stanford L. Rev. 353 (Jan. 2000).

Student Notes & Comments:

Chen, Allison J., *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 Hofstra Lab. & Emp. L. J. 165 (Fall 1999).

Floyd, Christie I., *Admissibility of Prior Acts Evidence in Sexual Assault and Child Molestation Cases in Kentucky: A Proposed Solution That Recognizes Cultural Context*, 38 Brandeis L.J. 133 (1999-2000).

Frank, David E., *First Amendment Protection from Mandatory Subsidization of Political Speech in Public Colleges and Universities: The Market-place Just Got a Lot Less Expensive*, 48 Drake L. Rev. 359 (2000). [Revision needed in light of *Southworth?*]

Heyman, Barry J., *The National Endowment for the Arts v. Finley: The Supreme Court's Artful Yet Indecent Proposal*, 16 N.Y.L.S. J. Hum. Rts. 439 (1999).

Louw, Ronald, *Langemaat v. Minister of Safety and Security: A Gay and Lesbian Victory but a Constitutional Travesty*, 15 S. African J. Hum. Rts. 393 (1999).

Mayo, Celena R., *The Road Not Taken: Able v. United States, Equal Protection, Due Deference, and Rational Basis Review*, 16 N.Y.L.S. J. Hum. Rts. 407 (1999).

Specially Noted:

Professor Carlos A. Ball of the University of Illinois College of Law has written a witty commen-

tary on the "Want to Marry a Millionaire" controversy and same-sex marriage, which was published on Feb. 25 by the *St. Louis Post-Dispatch*. ••• Daniel Borrillo, a leading gay legal scholar in France, has published an article (in French) analyzing the homophobic arguments that were made by some legislators during the French parliamentary debate on same-sex unions. Titled *L'homophobie dans le discours des juristes autour du debat sur l'union entre personnes de meme sexe*, it appears in the book *Homosexualites, expression/repression*, edited by Louis-Georges Tin and Genevieve Pastre. ••• The 1999 volume of the *University of Chicago Legal Forum* is devoted to a symposium titled "The Law of Sex Discrimination." The titles of the articles suggest that none is directly on sexual orientation discrimination issues, but many of them may relate to the topic at least incidentally or theoretically, so the issue is worth noting here. ••• The European Court of Human Rights decision in *Smith and Grady v. The United Kingdom* is reported in 39 Int'l Legal Materials No. 1, at 69 (Jan. 2000). ••• Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Univ. of Toronto Press, Jan. 2000), explores the impact of the Canadian Supreme Court's opinions on lesbian and gay issues on Canadian society. Direct order from the publisher: 1-800-565-9523.

AIDS & RELATED LEGAL ISSUES:

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