New Jersey Supreme Court Adopts "Psychological Parent" Theory to Recognize Parental Rights of Same-Sex Co-Parents

In a landmark decision supporting the rights of non-biological parents, the New Jersey Supreme Court unanimously ruled that a natural or legal parent who allows a third party to become a co-parent to his or her child may not unilaterally terminate the relationship between the child and the de facto parent. In *V.C. v. M.J.B.*, 2000 WL 352404 (April 6), the court ruled that the best interest of the child, and not the wishes of the biological parent, would guide the determination of a psychological parent's right to custody and visitation after the relationship between the two parents breaks down. This opinion builds upon the 1999 decision in *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 429 Mass. 824, by the Massachusetts Supreme Judicial Court, and represents the strongest articulation to date of the importance of non-biological parents in the lives of many children, particularly in gay and lesbian families.

The parties in the case, V.C. and M.J.B., were two lesbian women who met in 1992 and began dating a year later. Prior to meeting V.C., M.J.B. had decided that she wanted to have children. At trial, the women disputed the extent to which the decision had been made solely by M.J.B., or had been made by them together as a couple. Nevertheless, after the women began dating, M.J.B. went to see a fertility specialist to begin artificial insemination procedures, occasionally accompanied by V.C., and within a year M.J.B. became pregnant with twins. V.C. went to Lamaze and pre-natal classes with M.J.B., and was with her when the twins were born on September 28, 1994. The nurses treated V.C. as though she were also a mother to the children, and took pictures of the four of them after the delivery.

The couple prepared a number of legal documents to reflect their status as a family, including wills, powers of attorney and insurance papers that named each other as beneficiaries. They also opened a joint bank account for household expenses, and savings accounts for the children, with V.C. as the trustee for one account and M.J.B. as trustee for the other. The couple raised the children as co-parents, with the twins calling M.J.B. "Mommy" and V.C. "Meema." As the court noted, "M.J.B. supported the notion, both publicly and privately, that during the twenty-three months after the children were born, the parties and the children functioned as a family unit." The women purchased a home together in February, 1995, and held a marriage ceremony that summer. All four of them attended most family functions together, including holidays and birthdays.

The couple considered formalizing V.C's relationship with the children, and M.J.B. consulted an adoption attorney in June 1996. Two months later, however, M.J.B. ended the relationship. Until November, the women took turns living in the house with the children, but V.C. moved out permanently in December. For the next few months, M.J.B. permitted V.C. to visit with the children regularly (every other weekend), and V.C. contributed money toward their household expenses. M.J.B. left the children with V.C. for two weeks in May, 1997, in order to go away on a business trip. After she returned, however, M.J.B. refused to let V.C. see the children and refused to accept V.C.'s money. M.J.B. alleged that she cut off contact between V.C. and the twins because V.C. "was not properly caring for the children, and that the children were suffering distress from continued contact" with her. V.C. eventually filed suit for joint legal custody of the children. Both V.C. and M.J.B. are now in new relationships.

At trial, M.J.B. insisted that, even though both women had cared for the children, she alone had made substantive decisions about their upbringing. M.J.B. testified that she had independently researched and made the final decision about which pediatrician and day care center she would use for the children. V.C. disputed this evidence, maintaining that she had been involved in these decisions. To support this claim, V.C. demonstrated, and M.J.B. conceded, that M.J.B. had brought V.C. to visit the day care center prior to making a final decision. Similarly, M.J.B. characterized V.C. as a "mere helper" and not a co-parent. M.J.B.'s claims were undermined by the fact that she had listed V.C. as the twins' "other mother" on documents with the day care center and pediatrician. Furthermore, numerous witnesses, including V.C.'s mother and M.J.B.'s friend and coworker, testified that M.J.B. freely acknowledged V.C.'s parental relationship with the children.

Two doctors testified as expert witnesses, one for each woman, but the court noted that the experts had arrived at similar conclusions. Both doctors concluded that V.C. shared a strong bond with the twins in a relationship that "benefited both children." V.C.'s doctor insisted that the breakup of the women's relationship should be considered akin to a heterosexual divorce, and therefore joint custody would be appropriate. Although M.J.B.'s expert did not go quite that far, he did admit that the children would benefit from ongoing contact with V.C.

Despite this testimony, the trial judge ruled that V.C. had failed to prove that her relationship with the children qualified as psychological or de facto parenthood. In so ruling, the court emphasized that the decision to have the children had been M.J.B.'s alone. Because V.C. was not a de facto or psychological parent, V.C. could not petition for custody unless she demonstrated that M.J.B. was an unfit parent. Because she could not do so, V.C.'s petition for joint legal custody was denied. The court also rejected V.C.'s request for visitation, on the grounds that M.J.B. harbored animosity toward V.C., and, therefore, visitation between V.C. and the twins would not be in the children's best interest. Furthermore, V.C. failed to prove any other equitable considerations to support a visitation decision. V.C. appealed both of these decisions.

On March 5, 1999, the Appellate Division, in a divided opinion, affirmed the order denying joint custody, but overruled the trial court's decision denying visitation to V.C. Judge Stern, writing for the majority, acknowledged that V.C. had established a parent-like relationship with the children and "stood in the shoes of a parent." Therefore, the court conducted a best interests analysis, and determined that even if joint custody was not in the best interests of the children, V.C. should be permitted to visit with them. The court noted that M.J.B. still held negative feelings toward V.C., but insisted that under a best interests test, those feelings alone were not sufficient to deprive V.C. or the children of visitation. Two judges dissented in part from Judge Stern's decision, with one judge insisting that both rulings should have been affirmed, and the other insisting that they both should have been overruled. Judge Braithwaite felt that V.C. did not qualify as a psychological parent, and would have denied both petitions. Judge Wecker, on the other hand, believed that V.C. did qualify as a psychological parent, and would have granted visitation and remanded on the issue of custody. Both women appealed the appellate court's ruling to the New Jersey Supreme Court.

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Associate Justice Long, writing for the court, first addressed M.J.B.'s contention that the court lacked jurisdiction to consider V.C.'s claims for lack of standing. While acknowledging that "no statutes explicitly address[] whether a former unmarried domestic partner has standing to seek custody and visitation with her former partner's biological children," the court looked to the current statutory scheme as a whole for guiding principles. Specifically, the court noted that the legislature had declared as a matter of public policy a desire "to assure minor children of frequent and continuing contact with both parents after the parents had separated or dissolved their marriage … and to encourage parents to share in the rights and responsibilities of child rearing in order to effect this policy." N.J.S.A. sec. 9:2–4. Furthermore, other statutory provisions defined "parent" broadly: "the word 'parent,' when not otherwise described by the context, means a natural parent or parent by previous adoption." N.J.S.A. sec. 9:2–13(f). Justice Long insisted that the language "when not otherwise described by the context" demonstrated "a legislative intent to leave open the possibility that individuals other than natural or adoptive parents may qualify as 'parents,' depending on the circumstances." Even if the legislature had not specifically envisioned the case of lesbian co-parents, Long was convinced that this case fell clearly within the scope of that catch-all provision.

The court then considered whether M.J.B. had a fundamental right to care for her child that would prevent an order of custody or visitation for V.C. The court conceded that parental rights are of a constitutional magnitude, but reiterated that those rights are not absolute. Specifically, if a parent endangers the welfare of a child, or is shown to be unfit, "a parent's right to custody of her child may be usurped." M.J.B. insisted that there had been no demonstration of unfitness, but, according to the court, the inquiry did not end there. An examination of New Jersey and sister states' case law revealed that an "exceptional circumstances" category also permitted a court to intervene pursuant to its *parens patriae* power, in order to protect a child. Citing cases from New Jersey, Alaska, Colorado, Kentucky, Massachusetts, Utah and Wisconsin, the court recognized that in some cases, individuals become psychological parents when they assume a role of legal parent to a child whose legal parents are no longer willing or able to fulfill their parental responsibilities. "At the heart of the psychological parent cases," Justice Long wrote, "is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life."

V.C.'s situation, the court acknowledged, was slightly different than the typical psychological parent case. Whereas other psychological parents "step into [the biological parent's] shoes," V.C. "labored alongside" M.J.B. in their family. However, this distinction was not sufficient to bring V.C. outside the purview of the psychological parent/exceptional circumstances doctrine. Therefore, despite any specific statutory justification, V.C. had standing to maintain her claims for custody and visitation.

After disposing of the standing issue, the court then explored how one would determine who qualified as a "psychological parent to the child of a fit and involved legal parent." The court acknowledged that some states, including Arizona, Minnesota, Texas and Nevada, had dealt with the issue by statute, whereas other states, including Massachusetts, Alaska and Wisconsin, had developed rules as a result of litigation. After reviewing the Massachusetts Supreme Judicial Court's standard in *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (1999), and the Alaska Supreme Court's decision in *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), Justice Long turned to the test articulated by the Wisconsin Supreme Court in *Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (1995), which she described as "[t]he most thoughtful and inclusive definition of de facto parenthood." Under the Wisconsin standard, one must prove four elements to qualify as a de facto parent: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Justice Long placed great emphasis on the first prong — the consent of the biological or adoptive parent. For the purposes of this test, a parent fostered a parental relationship between her child and a third party when "the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-…-vis the child that the third party's status would not otherwise warrant." The court emphasized that this requirement prevented a nanny or babysitter from qualifying as a psychological parent. Furthermore, it allowed the parent to decide whether she will jealously guard her parental relationship with her child and "maintain a zone of autonomous privacy for herself and that child," or whether she will invite a third party to assume the role of co-parent. Once a parent opens up the relationship to a third party, however, she loses the right to terminate unilaterally the connection between the psychological parent and the child when the relationship between the adults dissolves. Quoting the Pennsylvania Superior Court's decision in *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (1996), Justice Long reiterated: "[T]he right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." She concluded by insisting that although some will consider the court's decision to be an unacceptable incursion on parental rights, the opinion "addressed … a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party."

Justice Long also rejected the trial court's determination that V.C. could not be a psychological parent because she had not participated in the M.J.B.'s decision to have a child. Such a finding was "not a prerequisite to a finding that one has become a psychological parent to the child." Although the court acknowledged that V.C. could have solidified her legal rights to the children by adopting them, "the failure of the parties to pursue that option is not preclusive of a finding of psychological parenthood where all the other indicia of that status are present." The court noted as well that psychological parenthood did not depend upon financial contributions for the child's welfare. Financial contribution could be considered but "should not be given inordinate weight" when determining whether one qualified as a psychological parent. Instead, the court should examine the "nature, quality, and extent" of the third party's relationship to the child, and "the response of the child to that nurturance." Finally, the court emphasized the importance of a parent-child bond between the parties, and insisted that expert testimony will often be necessary to assess "the actuality and strength" of that bond. Satisfying these four factors would not be "an easy task" and the court insisted that "the standards we have adopted should be scrupulously applied in order to protect the legal parent-child relationship."

Once a third party qualifies as a psychological parent, the best interest of the child analysis takes hold. The court listed the numerous factors that should be considered in a best interest analysis, and reiterated that a person's status as legal parent would be given due respect: "[U]nder ordinary circumstances when evidence concerning the child's best interests (as between a legal parent and a psychological parent) is in equipoise, custody will be awarded to the legal parent." However, visitation for the non-custodial parent remains "the presumptive rule," and should be denied only where it is

clear that visitation will be physically or emotional harmful to the child.

Instead of remanding the case, the court found that it had a sufficient record before it to make a determination on the merits. According to the court, M.J.B. "fostered and cultivated, in every way, the development of a parent-child bond between V.C. and the twins." V.C.'s emotional, financial and child-rearing support, offered at the encouragement of M.J.B., satisfied the "psychological parent" standard. After conducting a best interests analysis, however, the court denied V.C.'s petition for joint legal custody, noting that she had not been involved in the twins' lives for nearly four years, and "interject[ing] her into the decisional realm at this point would be unnecessarily disruptive for all involved." However, the court ordered that V.C. be allowed continued visitation with the children on a regular basis, as it was clearly in the twins' best interests.

Although Justice Long wrote the decision of the court, she also authored a concurring opinion. She justified this practice as consistent with *Negron v. Llarena*, 716 A.2d 1158 (N.J. 1998), which noted that the author of majority opinion is free to add remarks in a concurring opinion. In her concurrence, Long insisted that while family law in many ways reflects the values traditional nuclear families are thought to embody, one should not assume that only the nuclear family is valued. "Although the nuclear family was merely the perceived repository of these valued characteristics, eventually it came to be viewed by many as though it represented a value on its own right." Long cautioned that "we should not be misled into thinking that any particular model of family life is the only one that embodies 'family values.'" Rather, the bond between parents and their children 69is borne out of the daily toil parents engage in to keep their children healthy and safe from harm .... When the bond exists, the parents and the children become a family — an entity greater than the sum of its parts." This case was about more than simply recognizing gay families that mimic the traditional (heterosexual) model. The court's determination in this case was an attempt to reflect the "reality and not merely legality that should dictate who can be denominated as a psychological parent."

Justice O'Hern also submitted a brief concurring opinion, to emphasize that a different standard should be employed following the death of a custodial parent, in order to prevent the disruption that results from removing a grieving child from her home.

Various organizations submitted amicus briefs in this case, including the ACLU of New Jersey, the ACLU Lesbian and Gay Rights Project, Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and Lambda Families of New Jersey. Leslie Cooper of the ACLU Lesbian and Gay Rights Project argued on behalf of these groups. In their amicus brief, the Concerned Women for America decried the appellate court ruling as evidence of a "heavy judicial hand favoring the homosexual agenda" and argued that the court "was misconstruing the law to reach a politically correct result." CWA insisted that this issue was more appropriately decided by the legislature. Justice Long acknowledged CWA's participation, but did not show any interest in refuting their arguments. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

Vermont Enacts Civil Union Law For Same-Sex Partners

By a vote of 79–68 on April 25, the Vermont House of Representatives approved the version of the Civil Union Bill, H.B. 847, that had been approved the previous week by the state Senate, 19–11, after some minor amendments were made, and Governor Howard Dean signed the measure into law the next day, April 26. The signing ceremony was held privately in Dean's office, amidst speculation that public unhappiness with the new law may result in major changes in the composition of Vermont's legislature in November, as well as imperiling Dean's own re-election chances.

The most significant change from the bill that had previously passed the House was to move up the effective date for some parts of the bill (including the date on which couples can begin to apply for civil union licenses) to July 1, from the previously approved date of September 1, and to add a religious exemption and stronger language affirming that marriage in Vermont is reserved for opposite-sex couples. Provisions related to insurance and taxes will not take effect until January 1, 2001, to give the state time to secure the necessary coverage and to simplify the implementation of the tax measures by having them coincide with the calendar year, which is the tax year for most individual taxpayers.

Significantly, the Senate had rejected proposals to limit eligibility for civil union ceremonies to couples of whom at least one was a Vermont resident, dismissing the argument that allowing out-of-state couples to become civilly united would create conflicts with laws of other states. The Senate had also rejected a proposal to send the issue of civil unions to a referendum, or to submit a constitutional amendment to voters overturning the Vermont Supreme Court's ruling in *Baker v. State of Vermont*,744 A.2d 864(Vt. Sup. Ct. 1999), which was the catalyst for enactment of the law.

With this enactment, Vermont becomes the first state to offer anything comparable to the registered partnerships that are available to same-sex couples in the Scandinavian countries, sometimes mistakenly referred to as same-sex marriage. Although the states of California and Hawaii have enacted legislation under which same-sex couples can achieve a recognized status through registration, and many counties and municipalities have adopted domestic partnership ordinances with registration features, only the Vermont law attempts to provide for registered couples all of the rights and responsibilities that the state confers on married couples. As such, it might provide a useful legislative model for other jurisdictions that are hesitant about opening up the institution of marriage to same-sex couples but that recognize the serious inequities suffered by same-sex couples who are deprived of a similar legal status.

Although the bill does not afford access to marriage to same-sex couples, it provides virtually all of the rights and responsibilities of marriage under state law. However, by avoiding labeling the result marriage, the state has deprived couples who are civilly united from being able to argue that other states are required to recognize their status under the settled principles of comity that states follow in recognizing out-of-state marriages, although there is nothing to stop civilly-united couples from attempting to gain recognition of their new status in other states by arguing that comity should apply to this situation. Also, the state has avoided giving such couples automatic standing to challenge the federal Defense of Marriage Act, which provides that for purposes of federal law only opposite-sex couple marriages will be recognized. *New York Times*, April 26 & 27.

In addition, because of federal employment benefits law preemption, the state could not order private employers to treat civilly-united couples as spouses for purposes of employment benefit plans. However, there is no legal reason why Vermont employers cannot decide to do so voluntarily, or through collective bargaining with unions representing their employees.

As soon as the new law was signed, some local town clerks (who will have the initial role of processing applications for licenses) vowed civil disobedience, stating that they would not in good conscience administer this program. It is clear, based on votes at several dozen town meetings in recent months, that the Vermont legislature was well out in front of the views of many state residents in approving the bill, so the next steps remain unclear. *Boston Globe*, April 28. A.S.L.

Virginia Supreme Court Invalidates Arlington County Domestic Partnership Benefits

Unanimous as to outcome but sharply divided as to methodology, the Virginia Supreme Court ruled April 21 in *Arlington County v. White*, 2000 WL 429453, that Arlington County's extension of health insurance eligibility to domestic partners of county employees is invalid.

In an opinion for the court, Justice Lawrence L. Koontz, Jr., reviewed the County's eligibility requirements for partner benefits and found that they did not constitute a reasonable interpretation of the state law authorizing municipalities to provide insurance benefits to employees. (In a prior decision, the court had ruled that the statute on municipal benefits also applied to county governments.)

The statute, sec. 51.1–801, provides that a "local governing body may, through self-funding... provide... sickness insurance coverage for officers and employees... and their dependents." The county argued that as the term "dependents" was undefined in the statute, it could interpret the term broadly to include persons who live together and are financially interdependent. The taxpayer group that filed suit challenging the policy premised their objection on the state's Dillon Rule, which provides that local governments do not have general legislative powers but rather are restricted to exercising those powers directly granted by the legislature or the state constitution. The taxpayers argued that the county legislature lacked authority to provide any recognition to unmarried partners, whether opposite-sex or same-sex, in light of Virginia's abolition of common-law marriage and prohibition of same-sex marriage (as well as continuing prohibitions under criminal law of fornication and sodomy).

Justice Koontz stated that it was unnecessary to decide the Dillon Rule issue. Even on the grounds advanced by the county, that it was merely adopting a reasonable interpretation of the undefined term "dependents" in the statute, the court found the county's definition to be "unreasonable," because dependency connotes a person who is reliant on another for support, and the county policy did not create a true dependency test for eligibility. Koontz also noted that in 1997 the Virginia Attorney General, responding to an inquiry from a state legislator, had issued a formal opinion letter stating that localities do not have the authority to extend insurance coverage to "domestic partners" of their employees. See 1997 Op. Va. Att'y Gen. 131.

The county argued that it extended benefits eligibility to employees' spouses without requiring a showing of dependency, even though the statute does not specifically mention spouses, merely dependents, but Koontz dismissed this argument on the ground that providing benefits to spouses was long-established and unquestioned, and thus clearly within the intent of the General Assembly when it passed the statute.

Koontz concluded that in light of the benefits statute and the Attorney General's opinion, "we are of opinion that the expanded definition of dependants eligible to receive coverage under the self-funded health insurance benefits plan adopted by the County is not a reasonable method of implementing its implied authority under those statutes and is, therefore, an ultra vires act." Justice Kinser concurred separately, mainly to explain why the dissent's call for a more broadly-based ruling rejecting domestic-partnership benefits need not be reached in this case.

Dissenting in part in an opinion by Justice Hassell, Hassell, Chief Justice Carrico and Senior Jusitce Compton agreed that the Arlington County benefits plan was invalid, but would have based the holding more broadly on a violation of the Dillon Rule rather than the majority's narrow holding that the eligibility requirements adopted by the county failed to constitute a reasonable definition of "dependent." As Hassell explained, under the majority's approach, the county could just go back and reenact its policy without the offending "interdependency" provision and the objecting taxpayers would be right back in court relitigating the issue, once again raising the Dillon Rule question that the majority fought shy of answering in this case.

"I think that a purpose of the appellate process is to render decisions that will adjudicate the primary principles of an appeal, thereby ending the litigation when possible. Unfortunately, because the majority has chosen to ignore the primary issue in this appeal, the taxpayers and the County may incur additional legal fees to relitigate an issue that is already before the Court," wrote Hassell.

Hassell's concern seems to reflect the experience of another southern state in which the Supreme Court rejected a municipality's domestic partnership benefits plan on grounds that eligibility was not limited to dependents, only to find that the municipality then adopted a new policy limited to dependents (defined to include opposite or same-sex domestic partners who were financially dependent upon their employee-partners). (See *City of Atlanta v. Moran*, 492 S.E.2d 193 (Ga. 1997).) So may it be done. A.S.L.

California Appeals Court Finds Gay Rights Protections Retroactive; Harassment Actionable Under Labor Code and Accompanying Emotional Distress Tort Claim

In an important decision on the scope of the 1999 amendment to the California Fair Employment and Housing Code that added "sexual orientation" to the list of protected categories, the California Court of Appeal, 4th District, ruled April 19 that the amendment was merely codifying existing law from the state's Labor Code, and thus a school teacher whose claim of sexual orientation harassment arose from incidents predating the 1999 amendments was nonetheless actionable, despite the school district's argument that such harassment was not covered by the prior Labor Code sexual orientation provisions. *Murray v. Oceanside Unified School District*, 2000 WL 419791. The court also found that allegations of sexual orientation work place harassment could support a claim for intentional infliction of emotional distress. The unanimous ruling was expressed in an opinion by Judge Huffman.

Dawn Murray, a biology teacher at Oceanside High School since 1983, claimed that she was the victim of several discriminatory or harassing incidents from the spring of 1993 through the spring of 1997. Her allegations included the following: in the spring of 1993, she was denied a promotion, even though she was the best qualified applicant, because of disapproval of her "lifestyle;" for a year beginning in September 1993, she was subjected to insults, criticism, sexually suggestive remarks, and rumormongering by co-workers based on her sexual orientation; in December 1994, January 1995 and February 1996 harassing and obscene graffiti was painted outside her classroom but school administrator failed to investigate the problem; in January 1995 an administrator "outed" her at a school in-service meeting, resulting in harassing comments by co-workers without any proper management or preventative action being taken by the school district; failure of the district to make any public acknowledgment of her receipt of a prestigious statewide teaching award in biology in June 1995; unfair cancellation of her classes in April 1996, September 1996, and June 1997 and unfair retaliatory measures against her, based on inappropriate complaints by a fellow teacher and a parent. Murray filed a series of government tort claims with the district, beginning in November 1995.

Murray's claims relied on Labor Code sections 1101, 1102 and 1002.1, which prohibit discriminatory employment actions based on employee's political activities, and which also included specific protection against discrimination on the basis of sexual orientation. The district moved to exclude all evidence on claims other than the promotion claim, arguing that the Labor Code provision covered discrimination but not harassment. The trial court bought the district's argument, and narrowed the case to the promotion claim, then found that the promotion claim was not timely. At the same time, the court found that Murray's claim of intentional infliction of emotional distress could not survive the dismissal of all her other claims.

First, Judge Huffman found that the Labor Code provisions (which were supplanted by the 1999 FEHC amendment) do extend to hostile environment harassment on the basis of sexual orientation. Indeed, the court found that there had been decisions, such as *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590 (1993), in which the court had upheld assertion of a cause of action for sexual orientation hostile environment harassment under the Labor Code provisions, and *Kovach v. California Casualty Management Co.*, 65 Cal. App. 4th 1256 (1998), in which the court had stated that somebody who was constructively discharged because of harassment based on actual or perceived sexual orientation could bring a claim under the Labor Code provisions.

Next, the court found that when the legislature enacted the 1999 amendment, it had intended merely to move the comprehensive prohibition on sexual orientation discrimination in the work place from the Labor Code to the Fair Employment and Housing Code. The FEHC makes explicit the prohibition on harassment, in addition to the more tradition prohibition on discrimination. The court then found that the changes in statutory language going from the Labor Code to the FEHC were made "in an effort only to clarify a statute's true meaning," and thus should be considered retroactive. "Oceanside had no vested right to conduct its employment affairs in a manner that violated established public policy," declared Huffman.

Proceeding to analyze Murray's allegations in light of this statutory interpretation, the court found that the trial judge erred in granting the defendant's motion in limine. The allegations of harassment should have been considered, and since Murray had been filing claims related to this harassment since November 1995, as it was occurring, those claims were clearly timely. The court also rejected the school district's argument that it could only be held liable for claims of tangible injury, finding that the statute specifically provides that "Loss of tangible job benefits shall not be necessary in order to establish harassment."

The court then considered various administrative and procedural issues, finding that Murray was not required to exhaust administrative remedies with the State Labor Department before filing her tort claims. The court also noted that although the FEHA has a one year statute of limitations, it also embodies a continuing violation theory under which complaints about a pattern of conduct may relate back to incidents more than a year prior to the complaint so long as the conduct continued into the year prior to the filing. In this case, Murray's promotion claim was still time-barred, but the court found that her allegations were sufficient to withstand a dismissal of the harassment claims, provided she can ultimately establish a continuing violation on this issue.

Turning to the emotional distress claim, the court found that an allegation of intentional hostile environment harassment based on sexual orientation can suffice to support a claim for intentional infliction of emotional distress. This is significant, because in most jurisdictions the threshold of misconduct necessary to ground such a tort claim is so high that it is rarely met by the plaintiff. The court rejected the district's argument that such a tort claim should be held to be barred by the workers compensation law, finding that California courts had held workers compensation no bar to actions for intentional torts of this type. In a prior case, this court had stated, "by its very nature, sexual harassment in the work place is outrageous conduct as it exceed all bounds of decency usually tolerated by a decent society. Accordingly, if properly pled, sexual harassment will constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress." The court then held that "the same is true of harassment based on sexual orientation." And the court found, based on her allegations, that Murray should be allowed to pursue the tort claim on trial if she could establish the continuing violations necessary to meet statute of limitations issues.

This emotional distress tort ruling is particularly significant, since the specter of punitive damages makes such a claim a powerful inducement to settlement by the employer.

Murray was represented on the appeal by Lambda Legal Defense Fund's West Coast office, with attorneys Myron Dean Quon, Jon W. Davidson, and Paula A. Brantner working on the case. A.S.L.

Federal Court Orders Salt Lake City District to Let Gay Club Meet

Ruling April 26 in *East High School Prism Club v. Seidel*, No. 2:00CB311C (U.S. Dist. Ct., D. Utah), U.S. District Judge Tena Campbell granted a preliminary injunction, finding that students who want to start a curriculum-related lesbian and gay-supportive student group at Salt Lake City's East High School, had demonstrated a high probably that they will prevail on the merits of their claim that School District Assistant Administrator Cynthia Seidel violated the Equal Access Act by refusing to approve their application to meet at the school.

The genesis of the lawsuit goes back several years, when a group of students sought to form a gay/straight student alliance at East High School where gay and non-gay students could meet and discuss issues of concern to gay students at the school. The city School Board reacted to news about this club by passing a policy against all extra-curricular student clubs in the city's schools, after being advised by their legal counsel that under the federal Equal Access Act, such a step would be necessary to maintain a ban against formation of a gay-supportive group. The Rainbow Club members sued in federal court, but the court concluded that with the exception of one narrow slip-up, the school district had managed to comply with the Equal Access Act and thus was not required to recognize the Rainbow Club. See *East High Gay/Straight Alliance v. Board of Education of Salt Lake City*, 81 F.Supp.2d 1166 (D. Utah 1999) .

Back to the drawing board went the students, this time proposing a new club that would specifically tie in to the curriculum by sponsoring discussions of American history, government, law and sociology, specifically addressing the issues of democracy, civil rights, equality, discrimination and diversity, which are all topics in the curriculum of those courses. In their application form, the students stated, "Our club is not about 'advocating homosexuality,' promoting a partisan platform, or discussing sexual behavior. We agree with the school district's nondiscrimination policies and with the United States Constitution that all students should have an equal voice and be treated with equal respect." The application, reflecting the proposed name for the club, states that these topics will be looked at through the "prism" or the "impact, experience and contributions of gays and lesbians." When the application came to the desk of Cynthia Seidel, the administrator responsible for passing on club applications, she determined that the club was not qualified as a curricular club under the district's guidelines, stating in her letter to the applicants: "the organizing subject matter of the club narrows to 'the impact, experience, and contributions of gays and lesbians' in historical and current events, institutions, and culture. This subject matter is not taught in the courses you cite. After careful review of your application, I am unable to approve this club as a curriculum-related club."

The students then filed suit, represented by the Utah Civil Liberties Union, Lambda Legal Defense Fund and the National Center for Lesbian Rights, and sought a preliminary injunction so that they could get their club launched while the lawsuit is pending. Judge Campbell faulted the school district for inconsistent application of the rather vague standards it had adopted for curriculum-related clubs. The students argued, persuasively in the court's view, that Seidel was applying, on an apparently ad hoc basis, an additional standard not articulated in the district's formal policy; i.e., that a student club would not be approved, even where its subject-matter related to issues addressed in the curriculum, when it sought to address those issues from the perspective of a particular group, and when that particular perspective was not itself addressed in any of the courses to which the subject-matter was related.

Campbell found that the subject matter to which the Prism application was addressed is taught in various courses, and that the district's contention that a club's approach to the subject matter would be too "narrow" if presented from the perspective of a particular group was illegitimate. Campbell rejected the District's argument that Prism was actually a political rather than a curricular club, noting that its application disavowed advocacy or promotion of a "partisan platform." Campbell also rejected the argument that the club was proposing to view the subject matter from only one viewpoint, finding instead that while the club proposed to view its subject matter in terms of the impact, experience and contributions of gays and lesbians, it was not necessarily embracing any single viewpoint of how that would play out. "Club membership is not limited to gays and lesbians," she observed, "and there is nothing in the club application that would even indicate that only pro-gay views would be tolerated in club meetings."

Campbell rejected the District's argument that a "no narrowing" of subject-matter rule was implicit in the formal policies the district had adopted, and found in the formal policy "no requirement (explicit or implicit) that the club address *the entire* subject matter of the class form every conceivable viewpoint." As to inconsistency of application, the court noted the approval of the East Polynesian Club and the CHARABANC Humanities Club, both of which seemed to present the same possibility of violating a "no narrowing" rule. And the court, quoting a Supreme Court statement that the loss of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury," found it easy to conclude that this important element of the test for preliminary injunctive relief had been met.

As to whether the potential damage to the defendant would outweigh the continuing injury to the student group, Campbell found that the only injury to the defendant is that it will have to comply with its own announced policies for approval of curricular clubs. Judge Campbell rejected the district's argument that forcing it to let the club meet would be adverse to the public interest, finding that in light of the strong First Amendment right of the students at stake, denying preliminary relief would be more harmful to the public interest.

The *Deseret News* reported April 28 that the School Board had hastily scheduled a meeting to consider whether to defy the court, appeal the case, or just cave in. Meanwhile, district officials picked up on another part of Campbell's opinion, suggesting that Seidel had also improperly rejected applications from two other groups of students seeking to form a Women's Studies Club and a Students Against Drunk Driving Club, and said they would reconsider those applications. A.S.L.

Ohio Appeals Court Finds Employment Discharge Stemming From Lesbian Workplace Affair Not Actionable Under State Law

Rejecting a sex discrimination by Robin Cooke, the Ohio 9th District Court of Appeals ruled April 26 that Cooke's discharge from employment after the termination of her affair with her supervisor, Charlene Harrison, was not actionable under Ohio's sex discrimination law, and also did not give rise to a claim for emotional distress damages. *Cooke v. SGS Tool Co.*, 2000 WL 487730 (unpublished disposition).

Cooke, a divorced woman with children, was hired into the shipping department of SGS in 1996. During her employment, she developed a relationship with Harrison. As other employees in the virtually all-female workforce figured out what was going on, Cooke became the subject of critical comments and other forms of harassment and charges of potential favoritism. She developed attendance problems stemming from depression evidently spurred by the tension between her relationships with Harrison and with her co-workers. Harrison told her they would have to terminate their affair, and also that her absenteeism was becoming unacceptable. Nevertheless, the two women subsequently spent a romantic weekend together, but shortly thereafter Cooke's "work team," chaired by Harrison, voted to recommend termination based on the attendance record, and SGS accepted the recommendation and terminated Cooke.

Cooke, maintaining that the real reason for her discharge was that Harrison "wanted her out" as a way of putting a real end to their affair and ending the workplace upset about it, sued on three grounds: she claimed she was discriminated against because of her disability, depression; she claimed she was subjected to sexual harassment and unlawful discharge based on her sex; she claimed that she suffered severe emotional distress for which the company should be held liable. She asserted all her claims under Ohio state law.

The Summit County Court of Common Pleas granted the company's motion for summary judgment, and the court of appeals, in a unanimous opinion written by Judge Slaby, affirmed. First, Slaby found that Cooke's claim of sex discrimination failed under the statute. "In her deposition, Appellant alleged that her coworkers ridiculed her because of her sexual orientation and tormented her because of her relationship with Ms. Harrison. Although same-sex harassment may be actionable under R.C. 4112.02 to the extent plaintiffs can demonstrate that the harassment occurred because of their sex, the prohibitions of R.C. 4112.02(A) do not extend to sexual orientation… Nothing in the record, including Appellant's own testimony, establishes a connection between her sex and any alleged harassment that occurred during her employment at SGS."

Furthermore, this case did not fit the usual model of quid pro quo harassment, i.e., where a supervisor makes acquiescence with her sexual advances a condition of employment. Cooke wasn't complaining about the relationship with Harrison, as such, which was "wholly consensual" and which she testified had "ended by mutual agreement" even though she "voluntarily spent a weekend, apart from work, with Ms. Harrison and that during that weekend the two engaged in sexual contact" after they had agreed to terminate their relationship. The point was that Harrison's advances were not "unwelcome" by Cooke, which the court saw as a necessary element in a quid pro quo harassment case.

As to the disability claim, while agreeing that disabling depression could qualify as a disability under Ohio law, the court did not find Cooke's depression sufficiently disabling, noting that in her deposition she had testified that it had not prevented her from carrying on everyday activities. Furthermore, relating to both statutory claims (sex discrimination and disability discrimination), the employer had a non-discriminatory justification for the discharge: Cooke's admittedly poor attendance record. Even though she had doctor's notes for her absences, there were just too many of them and an employer is not required to continue to employee somebody whose frequent absences impose a burden on the workplace.

As to the emotional distress claims, the court found that Cooke had failed to submit any substantive response to the defendant's arguments in support of its motion for summary judgment on these claims, and thus summary judgment was presumptively appropriate, since it is not enough for the plaintiff to rest on her pleading allegations in response to such a motion. A.S.L.

Minnesota Appeals Court Finds No Merit to Sexual Orientation Harassment Claim

The Court of Appeals of Minnesota has affirmed a grant of summary judgment in favor of the employer in a case of alleged sexual orientation harassment, finding that the factual allegations were insufficient to state a valid legal claim. *Thomas v. Coleman Enterprises*, 2000 WL 385479 (April 18) (unpublished opinion).

Veronica Thomas was hired as a telemarketer by the defendant in early May 1996. The defendant paid its telemarketer under a three-tiered plan: the highest level of compensation offers a guaranteed monthly base of $1800 plus a $6 commission for every sale in excessive of a minimum quota of 310 sales. For employees who normally make fewer than 310 sales in a month, there is a guaranteed monthly base of $1400 with a quota of 275 sales. For part-time employees or those who can reach the 275 quota, there is a commissions-only plan with no guaranteed monthly base. Thomas quickly ad-

vanced to the highest pay scale based on her outstanding production by August 1996. However, she began to encounter difficulties in meeting quota after an October automobile accident, and her difficulties were enhanced when she heard an anti-lesbian remark her supervisor had made during an off-duty social event. At a later time, after Thomas had revealed to the payroll supervisor that she was a lesbian, the payroll supervisor asked Thomas, in front of the "homophobic" supervisor, whether she was "still going out with Theresa," her former partner. The "homophobic" supervisor did not make any remark directly to Thomas about this. But at a later date, Thomas had a conversation with this supervisor in which the supervisor referred to another female employee as "probably a lesbian" and described her as a "freak."

When Thomas subsequently again fell short of her quota for several times, this supervisor offered her the option of going to the $1400 base or a commission-only plan. When Thomas protested being dropped to the $1400 base, she was put on a commission-only basis. Shortly thereafter, she submitted her resignation and filed a discrimination claim, alleging she was treated unfairly due to her sexual orientation and had been subjected to unlawful workplace harassment on that basis. The district court granted summary judgment to the employer.

Writing for the court of appeals panel, Judge Kalitkowski found that the district court did not err in concluding that Thomas's factual allegations were insufficient to make out a cause of action under the state's employment discrimination statute, which includes "sexual orientation." For one thing, the district court had decided that the supervisor's off-duty homophobic comment had to be excluded from evidence as not relevant to the issue of workplace harassment. Second, the other homophobic comment attributed to this supervisor was not directed at Thomas, and the court found that Thomas's allegations would not support a conclusion that the supervisor necessary knew Thomas was a lesbian, concluding that the "outing" incident recounted by Thomas does not appear to have had any particular significance for the supervisor.

The court also stated some doubt whether the Wisconsin statute forbids harassment on the basis of sexual orientation in the workplace, noting that only sexual harassment is specifically mentioned in the statute, not sexual orientation harassment. But even if it assumed for purposes of discussion that sexual orientation harassment would be actionable, the court found that Thomas's allegations did not cross the threshold of severe and pervasive harassment necessary to alter terms and conditions of employment on a discriminatory basis. The court found that even though Thomas was offended by the two homophobic comments of her supervisor (both times characterizing lesbians as "freaks"), on neither occasion was the comment directed at her, and the first comment was inadmissable.

The court also upheld rejection of Thomas's retaliation claim. She had complained to the payroll supervisor about her direct supervisor's homophobic comment about another employee, and the payroll supervisor had then cautioned Thomas's supervisor not to discuss lesbians, because somebody had heard her remark and had been offended by it. The payroll supervisor, at Thomas's request, did not reveal that Thomas was the source of the complaint. Consequently, Judge Kalitkowski concluded, the retaliation claim had to fail because there was no credible allegation that the supervisor knew that Thomas was the complainant, or even that Thomas was gay (the court having concluded, as noted above, that the supervisor would not necessarily have formed this conclusion as a result of the alleged "outing" incident). A.S.L.

ACLU Federal Court Challenge to Florida Adoption Ban Survives First Hurdle

U.S. District Judge James L. King concluded that Steven Lofton, a gay man seeking to adopt the child (identified in court papers as John Doe) who has been living with him since birth in a foster care placement, has standing to bring a federal constitutional challenge to Florida's state law ban against adoption by gay people. *Lofton v. Butterworth*, No. 99–10058–CIV (S.D. Fla., April 21, 1999). At the same time, King found that the other named plaintiffs, who had not formally applied for approval to be adoptive parents even though they swore they were interested in doing so, would have to go through the futile application process in order to have standing, and dismissed them from the case. However, King left open the possibility of allowing them to rejoin the litigation if they made their applications and were rejected.

Perhaps most significantly, King reserved judgment entirely on the merits of the case, even though the parties on both sides had thoroughly briefed the substantive constitutional issues concerning the Florida ban. King offered no explanation for this other than stating that "because" the plaintiffs other than Lofton and John Doe were being dismissed, he was reserving judgment on the constitutional claims (other than standing).

In explaining why the other plaintiffs could not proceed, King noted that standing doctrine requires that one's injury be "imminent," especially when "the acts necessary to make the injury happen are at least partly within the plaintiff's overall control." In this case, if the other plaintiffs never actually applied to be adoptive parents, they would suffer no injury, at least in King's view, rejecting the argument that the existence of the statutory categorical ban would deter anybody who knew of it from applying, and so the injury would have already occurred. King observed that none of the plaintiffs, other than Lofton, could show that they "are presently ready, willing, and able to adopt," because they had never applied.

"Requiring these plaintiffs to apply to adopt is not an exercise in futility," wrote King. "Filing an adoption application establishes that a plaintiff not only have a 'desire to adopt,' but will in fact actually adopt a child," and in this case King found some doubt on that score, since their allegations did not reflect an immediate intention to adopt, but rather merely an inclination to do so in the future.

Having rejected the motion to dismiss as to Lofton, King directed the state defendants to answer the complaint within 30 days, and dismissed the attorney general as a named defendant in the case, thus leaving as defendants the secretary of Florida's Department of Children and Families, Kathleen Kearney, and two local administrators. The ACLU Lesbian & Gay Rights Project represents the plaintiffs. A.S.L.

N.Y. High Court Rejects Challenge to Statute Aimed at Internet Pedophiles

In a unanimous ruling issued April 11, the New York Court of Appeals rejected all constitutional challenges to a state law penalizing using the Internet to solicit intergenerational sex. *People of the State of New York v. Foley*, 2000 WL 375547.

Thomas R. Foley, Sr., was arrested in his home when police officers, executing a no-knock search warrant, found him typing at his computer. Foley was engaged in the fifth of a series of on-line chat sessions with a person known to him as "Aimee," a 15–year-old girl, hanging out in a chatroom titled "KidsofFamily-Sex." During this series of conversations, Foley engaged in sexually explicit chat with "Aimee" using the screen name "JustMee," and also transmitted sexually-explicit graphics files showing intergenerational sex. In a previous chat session, "JustMee" and "Aimee" discussed setting up a date, and when the police broke in during the fifth conversation, they were specifically chatting on this subject.

Foley was indicted on charges of promoting an obscene sexual performance by a child, promoting a sexual performance by a child, and obscenity, as well as violation of section 235.22, attempted disseminating indecent material to minors in the first degree. Section 235.22, despite its name, is actually concerned with adults using the Internet to entice minors into meeting for the purposes of engaging in intergenerational sex. Or, as summarized by Judge Wesley for the court, the statute "criminalizes the use of sexually explicit communications designed to lure children into harmful conduct."

Foley moved to have the indictment dismissed, but was unsuccessful and was convicted at trial of two counts of promoting a sexual performance by a child and two counts of attempted disseminating indecent material to minors in the first degree. His conviction was affirmed by the Appellate Division in a unanimous decision.

On appeal to the Court of Appeals, Foley reiterated his argument that both statutes under which he was convicted are unconstitutional, raising claims of overbreadth, vagueness, content-based prohibition of speech, and commercial clause violations with regard to the "dissemination" statute. Foley sought to paint the state law has having the same flaws as the federal Communications Decency Act, which has been struck down by the Supreme Court.

The problem Foley encountered was that Section 235.22 is much more specific than the Communications Decency Act in specifying what kind of communications come within its scope, thus avoiding overbreadth and vagueness problems, and also adds a specific intent requirement that narrows its scope to focus on the specific problem of attempts by adults to entice minors into having sex, as to which it would not be difficult to find a compelling state interest provided one agrees with the Supreme Court's oft-expressed views on sex and children.

The statute defines as indecent material that which "in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors," requires that the sender intended to send the material to "a person who is a minor," and who "by means of such communication… importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit." Thus, as tightly drafted, the statute specifically focuses on the pedophile who seeks to use Internet access to make contact with minors and entice them to engage in sexual activity by means of transmitting messages to them.

Judge Wesley found that, unlike the Communications Decency Act, this statute's addition of the "luring" requirement means that it is aimed at conduct, not just speech, and thus traditional First Amendment overbreadth analysis would not apply. The court also rejected any idea that the statute was too vague for a person of reasonable intelligence to understand, and found that the state's compelling interest in protecting children overcame any First Amendment problem that might be posed by the content-based nature of the regulation. "The speech-conduct sought to be prohibited by Penal Law sec. 235.22 the endangerment of children through the dissemination of sexually graphic material over the Internet does not merit First Amendment protection," Wesley affirmed. "In any event, the statute does not effectuate a total ban on the dissemination of sexual content communication, but merely limits its use. Although the statute may incidentally burden some protected expression in carrying out its objective, Penal Law sec. 235.22 serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose."

The court was no more encouraging towards Foley's challenge to the other provision under which he was convicted, sec. 263.15, prohibiting promoting a sexual performance by a child. The statute had previously been upheld in *New York v. Ferber*, 458 U.S. 747, but Foley tried to argue that the issue had to be considered anew in light of new technology, pointing out that it is possible now to manufacture a sexually-explicit graphic file using computer technology such that no actual sexual performance had to take place in order to produce the graphic. Foley argued that the trial court erred by failing to instruct the jury that the state had to prove "the actual use of children in the prohibited performances," and that trying him under the statute without such an instruction rendered it fatally overbroad.

Wesley found Foley's reading of the statute to be "speculative and broad," and found that the statutory scheme "allows the fact-finder to make a determination on the evidence submitted whether the performance involves an individual under the age of 16," thus meeting constitutional requirements. In this case, Foley had been allowed to produce an expert who testified on the question whether digital splicing had been used to manufacture the sexual graphics, but Foley's expert could only point to one image that appeared to have been digitally altered from among the many Foley sent. The court concluded that the statute could not be found unconstitutionally overbroad as applied to Foley. The opinion does not specify the penalty imposed on Foley. A.S.L.

Federal Court Upholds Discharge of Evangelizing Nurse

In *Knight v. State of Connecticut Dept. of Health*, 2000 WL 306447 (U.S.Dist.Ct., D. Conn., Feb. 22), the court granted the state's motion for summary judgment on constitutional and Title VII claims asserted by an employee who was discharged for making anti-gay religious remarks in a work-related context.

Plaintiff Jo Ann Knight, a nurse consultant for Connecticut State Department of Public Health, was responsible for making home visits to individuals receiving home health services through Connecticut's public health system. As part of her job, she interviewed a same-sex couple about the nursing care one of them received (he had an advanced case of AIDS) and the services provided by the home health agency. They engaged in a discussion concerning the men's professional and volunteer work, and feelings of isolation. During the conversation, Knight, a born-again Christian, inquired about their religious beliefs. The clients professed having religious beliefs and one of them stated that he did not believe that he would be punished for his gay lifestyle. Knight responded that "although G-d created and loves us, He doesn't like the homosexual lifestyle." In response, the men filed a complaint and a lawsuit against the state, alleging discrimination on the basis of sexual orientation. Knight's employer suspended her for two weeks and removed home visits from her job responsibilities. She filed a lawsuit in federal court based on the First and Fourteenth Amendments and Title VII, claiming that the disciplinary action violated her constitutional rights to free speech and equal protection as well as her Title VII rights.

The state claimed that plaintiff Knight's speech was not constitutionally protected because it was made in her role as a public employee, and the action was proper because her speech needed to be restricted in order for the State to fulfill its responsibilities to the public. She argued that the defendant's policy was not narrowly tailored and her rights to free speech and free exercise of religion outweigh the State's interest in running an efficient workplace. Judge Squatrito cited cases to the effect that a state employee's speech is protected under the Constitution only if it touches on matters of public concern and his or her motive is not private and personal. If the speech is protected by the First Amendment, the state must then balance the employee's interests in commenting about matters of public concern against the state's interests in promoting the efficient delivery of public services (this is the "Pickering test," which was established by *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

The court, assuming arguendo that the plaintiff's speech was constitutionally protected, applied the Pickering test and found that the employer did not violate her First Amendment rights. "While performing her duties as a state employee, the plaintiff felt compelled to share her religious beliefs By challenging her clients' beliefs, she caused them concern and distress the clients lodged various complaints and lawsuits against the State of Connecticut. Knight's actions, based on her personal religious belief that she must share the Word of G-d, interfered in her performance of her duties." Judge Squatrito held that while employers may not discriminate on the basis of their employee's religious beliefs, they are not required to tolerate speech that interferes with the proper performance of their job.

The court briefly disposed of Knight's claim that she was denied the equal protection of the law under the Fourteenth Amendment by noting

that she failed to present any evidence that she was intentionally discriminated against or treated differently than any other similarly situated individual in her position. Such evidence is necessary under well-established precedents in order for an equal protection claim to withstand a summary judgment motion.

Plaintiff Knight also alleged that her employer violated Title VII by disciplining her for her religious beliefs. Title VII forbids an employer to discriminate against an employee on the basis of religion and requires the employer to make reasonable accommodations to employees' religious practices, short of undue hardship. The court found that the state had made reasonable accommodations for Knight by allowing her to practice her religious beliefs at work, and even allowed her to pray at staff meetings. But Squatrito stated that allowing Knight to express her religious views to clients would inevitably offend some of them and compromise the purpose of her visit, not to mention possibly result in litigation against the state. "To require accommodation of the employee's desire to evangelize to clients of differing beliefs and lifestyles would put the employer between a rock and a hard place," wrote Squatrito. On that basis, the court dismissed the Title VII claim and granted the state's motion for summary judgment. *Elaine Chapnik*

Domestic Partner Unsuccessfully Challenges Taxpayer Classification

A gay Chicago man, domestically partnered for seven years, unsuccessfully challenged the constitutionality of the Federal tax code's marital classifications, eliciting some thoughtful comments from the Tax Court. *Mueller v. Commissioner of Internal Revenue*, 2000 WL 371545 (U.S.Tax Ct., April 12). Pro se petitioner Robert Mueller resided and shared assets and income with an "economic partner." Mueller argued that denying him the opportunity to file a joint tax return with his partner, based on the tax code's unequal or differential treatment between married taxpayers and unmarried taxpayers in an economic partnership, violates due process and equal protection standards under the Fifth and Fourteenth Amendments.

The opinion by Judge Laro notes that married treatment is not always more favorable than single status under the code, and that courts have consistently denied constitutional challenges to the marital classifications. The court evaluated the equal protection claim using the rational basis standard, rather than a higher standard, because the tax code does not itself create an obstacle to the taxpayer's fundamental right to marry. Further, the marital classifications at issue are not seen to affect petitioner as a member of a suspect class (homosexual), but rather "as a person who shares assets and income with someone who is not his legal spouse." "Petitioner therefore places himself in a class that includes non-married couples of the opposite sex, family members, and friends." Mueller advanced the claim that Federal tax laws specifically began to target homosexuals as a group after the enactment of the Defense of Marriage Act. However DOMA was not effective for the years at issue, thus the court declined to examine DOMA's constitutionality.

Judge Laro cites authority holding that the martial classification of taxpayers rationally addresses the legitimate governmental "attempt to account for the greater financial burdens of married taxpayers." In response to Mueller's observation that additional classifications could be made, the court acknowledged that inequalities persist between marrieds and economic partners. "Whether policy considerations warrant narrowing of the gap between the tax treatment of married taxpayers and homosexual ... partners is for Congress to determine," Laro concluded. *Mark Major*

Gay Priest May Sue Catholic College for Breach of Contract After Being Dismissed From Faculty

An openly gay Roman Catholic priest who alleges that he was terminated as a professor from a religiously-affiliated college because of his sexual orientation may proceed with his lawsuit against the school and its president. *Hartwig v. Albertus Magnus College*, 2000 WL 345910 (U.S.Dist.Ct., D. Conn., March 13). District Court Judge Droney ruled that the Free Exercise and Establishment clauses of the First Amendment did not bar the court from adjudicating the plaintiff's breach of contract and emotional distress claims. Judge Droney denied the defendants' summary judgment motion as to those causes of action, but dismissed the plaintiff's defamation and libel claims since they would require the court to choose between two conflicting religious definitions of the term "priest."

Michael Hartwig was ordained a Roman Catholic priest and assigned to the diocese of Dallas, Texas, in 1979. Eight years later, after informing his superiors that he was gay, Hartwig was placed on "a permanent leave of absence from the active ministry." Hartwig relocated to Connecticut and was hired by Albertus Magnus College as an associate professor in the college's Department of Religious Studies and Philosophy. From 1991 to 1997, Hartwig taught various courses in the traditional day, continuing education and Master of Arts in Liberal Studies programs, and served as the Associate Dean for Continuing Education. During the 1991–1992 academic year, Hartwig introduced his "life partner," Don Baker, to faculty and members of the college administration without incident.

In June and August of 1997, the school's president was sent copies of two articles from *The Wanderer,* a national newspaper that focuses on issues involving the Roman Catholic Church in the United States. The articles, which discussed a trial against the Dallas Diocese concerning allegations of sexual abuse by a local priest (not the plaintiff), identified Hartwig as an "ex-priest" from the Dallas Diocese who taught at Albertus Magnus and who was "married to another man." Hartwig wrote an opinion-editorial piece that was published in the *Dallas Morning News* concerning the articles and the trial, in which he described himself as "a priest of the Dallas Diocese (now on leave)." Shortly thereafter, Hartwig was advised that he was being relieved of all his administrative and teaching duties for falsely "publicly representing himself as a priest of the Roman Catholic Church." The college alleged that under the rules of the Roman Catholic Church, Hartwig was no longer a priest because he had been placed on a permanent leave of absence.

Hartwig alleged that he was fired because he is gay and because of the media attention of his teaching at the college which resulted from the *Wanderer* articles and the op-ed piece in *The Dallas Morning News*. He sued the college and its president in Connecticut state court for breach of contract based on various provisions of the college faculty handbook, including a section which states that the college would not discrimination against employees on the basis of sexual orientation. He also pled causes of action for defamation, libel, tortious interference with contract, and intentional infliction of emotional distress. The defendants removed the case to federal court and moved for summary judgment, arguing that the plaintiff's suit is barred by the Free Exercise and Establishment clauses of the 1st Amendment to the U.S. Constitution.

Under the 1st Amendment, Congress is barred from making any law "prohibiting the free exercise" of religion, and this prohibition has been broadly interpreted to constrain all government action, including judicial action. The college argued that its selection and dismissal of faculty members such as Hartwig are ecclesiastical matters that are shielded from court inquiry. After analyzing various cases addressing the intersection of the Free Exercise Clause and employment discrimination claims against religious institutions, Judge Droney explained that not all employment disputes involving religious institutions are barred by the 1st Amendment. According to the court, "The Free Exercise Clause does not bar court adjudication of such disputes where the religious affiliation of the institution or business is not pervasive, or where the duties of the aggrieved employee are more fairly characterized as secular, rather than ministerial or pastoral."

In the present case, Droney ruled that Albertus Magnus College is sufficiently affiliated with the Roman Catholic Church to invoke the protections of the Free Exercise Clause. The court based its decision principally on the fact that the school is sponsored by a Dominican Order of nuns, is named after a Roman Catholic saint, and is listed as a Catholic college in a definitive compilation of Roman Catholic schools. However, the court concluded that a question of fact exists as to whether Hartwig's duties and responsibilities were primarily religious for purposes of Free Exercise Clause analysis. "The Free Exercise Clause only shields from Court inquiry employment decisions made by churches and religiously-affiliated entities with respect to employees who perform ministerial functions such as teaching church doctrine and canon law, spreading the faith, governing the church, supervising a religious order, or supervising or participating in religious ritual or worship," Judge Droney noted. Since the defendants did not offer evidence showing that the plaintiff's duties were ministerial, the court concluded that the Free Exercise Clause did not bar it from continuing to exercise jurisdiction over the action.

Under the 1st Amendment, Congress is also prohibited from making any law "respecting the establishment of religion." As is the case concerning Free Exercise challenges, the Establishment Clause does not bar the adjudication of all employment-related cases. Judge Droney wrote: "This Court is barred from adjudicating an employment dispute between a religiously-affiliated institution and one of its employees only where resolution of the dispute will require the Court or a jury to choose between competing religious views or interpretations of church doctrine or dogma in order to resolve the dispute."

Based on the foregoing test, the court concluded that the Establishment Clause was not implicated concerning the majority of the plaintiff's claims. Although Hartwig disagreed with the school's belief that he was no longer a priest, the heart of Hartwig's case against the defendants was that the school's focus on his priestly status was a pretext for his termination, and that he had actually been fired because of his sexual orientation. According to the court, this position would not flout the Establishment Clause as long as the Hartwig did not "offer a conflicting interpretation of the teachings of the Roman Catholic Church or canon law to rebut the College's proffered religious reason for not renewing his contract."

However, based on the same test, the court dismissed the plaintiff's defamation claims. Hartwig alleged in his complaint that the defendants had defamed him by publicly stating that he was terminated because he had misrepresented his priestly status. Judge Droney ruled that "unlike Hartwig's other causes of action, these claims will require a trier of fact to choose between two conflicting ecclesiastical definitions of the term 'priest' and thus would violate the Establishment Clause."

Michael Hartwig is represented by Maureen M. Murphy, while Updike, Kelly & Spellacy, P.C., represent the College.

(Hartwig's family is no stranger to litigation. His life partner/husband, Don Baker, was the plaintiff in *Baker v. Wade*, a test case from the early 1980s challenging the Texas sodomy law. Although the federal district court ruled that the sodomy law was unconstitutional, that decision was reversed by the 5th Circuit. The United States Supreme Court denied certiorari in 1986, right after the *Hardwick* decision was announced. See *Baker v. Wade*, 553 F.Supp. 1121 (N.D.Tex. 1982), rev. en banc, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986).) *Ian Chesir-Teran*

District Court Dismisses Transsexual Harassment Claim Under Title VII

In *Cox v. Denny's, Inc.*, 1999 WL 1317785 (U.S.D.C., M.D. Fla., Dec. 22), U.S. District Judge Moore granted summary judgment for the employer in a sexual harassment case brought by a transsexual employee. Mark Cox, known as M. Toni Cox, is a preoperative transsexual who has been undergoing hormonal treatments to diminish his male sex characteristics and emphasize his secondary female characteristics. Cox presents herself as a woman, although she still has male genitalia.

Cox began working for Denny's in 1994 as a cook, and contends she was harassed on a daily basis by a male co-worker, Randy Frazier, from February until July 1997. Cox alleges that Frazier made sexual advances by feeling Cox's breasts and groping Cox's crotch on the cook line, and stating "I gonna get me some of that." Cox claims she rebuffed Frazier's advances. Cox also claims Frazier brushed against her in a sexual manner and called her derogatory names, such as "fag," "punk bitch," "whore bitch," and "freak mother fucker." Cox also claims Frazier frequently complained to Cox about her failure to complete work assignments properly. Cox says she complained to Denny's management frequently about the harassment, but management did nothing in response. Cox filed this case pro se after exhausting administrative remedies, claiming harassment on the basis of sex in violation of Title VII, naming both Denny's and Frazier as defendants. The defendants filed a joint motion for summary judgment.

Moore rejected the defendants' argument that Cox could not bring a Title VII suit as a transsexual. Although there is ample federal appellate precedent supporting the conclusion that discrimination on the basis of transsexual status does not come within Title VII, Moore found that Cox was not alleging discrimination based on transsexual status. Rather, Cox presents herself as a woman, and claims she was being subjected to harassment as a woman. Moore found it consistent with the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998) to conclude that the viability of a Title VII sexual harassment claim turns not on the sexuality or gender of the plaintiff, but rather on the reason why the plaintiff is being subjected to harassment.

"Viewing the evidence in Cox's favor [as required on a motion for summary judgment] and taking Cox's allegations that Frazier made an implicit proposal of sexual activity to him [the court consistently refers to Cox as "he"] as true, an inference can be made that the alleged harassment was motivate by Cox's sex… Indeed, no evidence has been presented that the alleged proposal was based on anything other than Cox's sex." Thus, the court found that Cox's complaint satisfied the "because of sex" part of the prima facie case requirement.

However, Moore found that Cox's allegations, even if taken as true, did not describe the kind of severe, pervasive harassment necessary to ground a Title VII complaint. The problem here was that some of the harassing activity Cox alleged was not really sexual in nature, and Cox had admitted as much. Moore characterized as [a]the most serious incident among Cox's allegations" the instance when Frazier groped Cox's breasts as part of a sexual come-on, but found that as serious as this was, it was an isolated, unrepeated incident, and that once Cox rebuffed Frazier, Frazier did not try to make any further sexual advance. This is insufficient to support a finding that Cox's terms and conditions of employment were affected. Thus, the court entered judgment for Denny's on Cox's Title VII claim, and Moore refused to continue exercising jurisdiction over supplemental state law claims that Cox had filed now that the federal question was gone from the case, finding that "these claims are better resolved in state court." A.S.L.

Texas Man Loses Same-Sex Sexual Harassment Claim And Unwittingly Becomes Defendant in Malicious Prosecution Case.

On March 24, the United States District Court for the Eastern District of Texas delivered several repeated blows to a Tyler, Texas, man's same-sex sexual harassment suit against a nationally known air conditioning corporation. *Mims vs. Carrier Corporation*, 2000 WL 340435. In a good academic decision detailing the status of sexual harassment law in the Fifth Circuit, summary judgment was granted to the defendant corporation on all claims including hostile work environment, discrimination and emotional distress.

Quentin Mims has been employed by Carrier Air Conditioning since 1984. Carrier employees, including Mims, are governed by a collective bargaining agreement for purposes of compensation and terms of employment. In May of 1996, a female employee accused Mims of sexual harassment and, after an investigation by a supervisor, Mims was suspended without pay for one week. Mims now contends that beginning that same year, two male employees began to make offensive and unwelcome sexual comments and gestures toward him. Specifically, he alleges comments that he is a practicing homosexual. These remarks were made in Mims' presence and that of fellow co-workers at times accompanied by graphic and offensive body gestures. Carrier and other named defendants assert that any remarks allegedly made were initiated by jokes made by Mims. The remarks allegedly caused Mims to seek medical attention. Mims reported this behavior to his supervisors including named defendant Bob Chauvin. Despite his complaints, the harassing and offensive conduct continued unabated. Mims believes that his supervisors intentionally allowed the offensive conduct and refused to stop it.

Mims further alleged that due to his complaint, Chauvin began to retaliate against him by "generating and participating in unreasonable reprimands" of him including Mims' aggressive physical removal from a Carrier facility by Chauvin resulting in bruising. Chauvin avers characterizing the removal as an escorting of Mims out of the building because he was disturbing other workers. Mims contends that this retaliation resulted in a denial by Chauvin to Mims' request for light-duty work, Mims' suspension for one week without pay on one occasion and Chauvin's refusal to permit Mims to work in the Tyler, Texas facility for five months in 1999. Mims later filed an EEOC complaint against Chauvin and an HR director as well as a criminal complaint against Chauvin for criminal assault.

Mims filed this case in July 1999 seeking damages, costs and attorney's fees for sexual harassment/hostile work environment, discrimination and emotional distress. Chauvin counter-sued alleging malicious prosecution and slander. Carrier and defendant Chauvin moved for summary judgment on all of Mims' claims and Chauvin's counterclaim, respectively.

District Judge Steger methodically explained why he found no genuine issue as to any material fact and granted Carrier's summary judgment motion. Steger found that Mims failed to state a prima facie case of sexual harassment because he made no allegations as to discrimination based upon his sex as male. Mims states the harassment was because of his perceived sexual preference which is, as with actual sexual preference, not a protected class under Title VII of the Civil Rights Act. The court accepted arguendo that the harassment was unwelcome, but found the harassment, although concerning sex or being of a sexual nature, was not because of Mims being male. Carrier correctly and successfully defended with the ultimate same-sex sexual harassment case, *Oncale vs. Sundowner Offshore Services, Inc.*, where the Supreme Court ruled that same-sex sexual harassment is possible if the harasser is homosexual and exhibited sexual desire towards the victim, that a general hostility toward the presence of members of the gender in the workplace is motivating the harasser, and the comparative evidence of how the harasser treated members of both sexes. Here, Mims states that he is not a homosexual, and he believes that his harassers are not, either, and makes no allegations to support an *Oncale*-type sexual harassment claim.

For the sake of argument, Steger further explains that Mims fails to meet the other elements to a prima facie case of discrimination under Title VII by finding that the harassment was not sufficiently severe to alter the terms and conditions of Mims' employment. "The teasing was in bad taste. However, Title VII is not a guardian of bad taste...[b]ut the teasing could not reasonably be perceived as severely offensive or abusive, especially considering that plaintiff himself participated in the 'joke.'" Steger ruled there was no evidence showing that the harassment was anything more than isolated incidents of simple teasing and offhand comments. Moreover, Mims offered no allegation that any term or condition was affected by the harassment. As a sympathetic bone thrown to the plaintiff, the court did say that if Mims did satisfy the other elements for sexual harassment, it could find Carrier vicariously liable for the harassment because there was no evidence support that Carrier made efforts to stop it or reprimand the aggressors.

Turning to the Title VII retaliation claim, the court found no prima facie case because Mims suffered no adverse ultimate employment decision and no causal connection between statutorily-protected activity and any alleged adverse employment action. Such a decision must meet a high Fifth Circuit standard which would be impossible under the collective bargaining agreement under which plaintiff and defendants operate. Also, many of the retaliatory actions of which Mims complains occurred before Mims filed his EEOC complaint and offered nothing to show Chauvin and others knew of the EEOC charges for those actions alleged to have occurred later. Most specifically (and surely most embarrassing), the suspension without pay of which Mims complains as being retaliatory was successfully and easily characterized by Carrier as being legitimate and nondiscriminatory: Mims was suspended for sexually harassing another employee. Mims proffered no evidence that such suspension was pretextual discrimination.

Turning to the last of Mims' claims, the court ruled that defendants' actions did not rise to the level of intentional infliction of emotional distress under Texas law because Defendants' alleged acts, if assumed true, were not "atrocious" and did not "shock the conscience" under Fifth Circuit precedents.

As the coup-de-gras of this courtroom spanking of Mr. Mims (and at a time when he surely wished he could walk away and forget this mess), the court found genuine issues of material fact regarding Mims' probable cause to sue, Chauvin's innocence and Mims' malice as to allow Chauvin's malicious prosecution state law claim to go forward. *K. Jacob Ruppert*

Federal Court Find Homophobic Harassment Claim Not Actionable Under Title VII, But Finds Merit to Retaliation Claim

Edward Dandan, a bartender at the Radisson Hotel in Lisle, Illinois, was not protected from homophobic harassment under Title VII, but was protected from retaliatory action against him for protesting the homophobic harassment, according to a decision by U.S. District Judge Manning in *Dandan v. Radisson Hotel Lisle*, 2000 WL 336528 (N.D. Ill, E.Div., March 28).

Dandan alleged that he was subjected to blatant, sustained harassment of a homophobic nature by his supervisor and then by the kitchen staff at the hotel. He complained about the continuing harassment to a variety of supervisory personnel without obtaining any particular relief, until he finally complained to the Human Resources Department, resulting in a written warning to the supervisor, who then changed his shift away from Dandan. Similarly, when Dandan complained about homophobic harassment by the kitchen staff, the intervention of Human Resources resulted in the harassment stopping. Before Dandan complained about harassment, he had received average performance appraisals, but after he made the complaints, the restaurant manager suspended him for two weeks, allegedly for failing to follow a request not to chew gum on the job. The normal suspension for such an infraction would have been 3–5 days. At around that time, the Human Resources manager had become suspicious that Dandan was planning to file an EEOC complaint against Radisson.

While acknowledging that under the Supreme Court's *Oncale* decision, same-sex harassment could be actionable, Judge Manning observed that Dandan had a burden to allege facts supporting the proposition that he was harassed because of his sex, and Manning found the burden was not met. "While the comments he was subjected to are vulgar and offensive, there is no evidence that they were directed at Dandan because he is male. Rather,

the only reasonable inference is that the derogatory and bigoted comments inflicted upon Dandan were due to his co-workers' perception of his sexual orientation. Dandan contends that none of his co-workers actually knew his sexual orientation, but only speculated that he is homosexual. Therefore, he argues, if the co-workers do not know his sexual orientation, the verbal abuse can only be attributed to the fact that he is a man. In fact, whether Dandan's co-workers knew or only suspected what his sexual orientation is makes no difference where Title VII is concerned."

Manning also found no "precedential underpinning" for Dandan's further contention that he was harassed because "he does not match-up to his co-workers' expectations of what a man should be or how he should life his life," and therefore should be considered sex-based harassment. "The comments directed at Dandan do not reflect that his co-workers' bore any hostility against him because he is male."

However, on the retaliation claim, Manning rejected Radisson's argument that because the direct Title VII claim had failed, this derivative claim must fail as well. Manning found that there is precedent to support the contention that so long as Dandan had a good faith belief that the harassment directed against him violated his rights under Title VII, his filing of a Title VII claim was protected activity and the company could not retaliate against him for filing the claim. "The critical inquiry in reviewing a retaliation claim 'is good faith and reasonableness, not the fact of discrimination,'" wrote Manning, quoting a 7th Circuit opinion. "Here, the constant vulgar and offensive language directed at Dandan created a reasonable basis for his allegations. Accordingly, Dandan's claim was in good faith and, therefore, was statutorily protected."

Further, Dandan's showing that he was given an unduly long suspension for a trivial offense "sufficiently alleges an adverse employment action. Dandan has also shown a causal link between his complaints of harassment and his suspension… A jury could reasonably infer that the length of the suspension was related to Dandan's complaint to the EEOC." Thus, the court granted the employer's motion for summary judgment as to the harassment charge, but denied the motion as to the retaliation charge. A.S.L.

Procedural Flaws Block Consideration of Novel Title VII Claim

Finding no abuse of discretion by U.S. District Judge Paul E. Riley, a 7th Circuit panel affirmed the denial of a new trial for Jeffrey Cash, who claimed he was subject to hostile environment harassment because his co-workers thought he was a closeted gay man. *Cash v. Illinois Division of Mental Health*, 2000 WL 355679 (April 7).

Jeffrey Cash was hired as a nurse's aid in the Murray Development Center, a home for developmentally disabled people in Centralia, Illinois. For seven years, there were no problems with his employment or his life; he owned his own home, where he lived with his wife and children, owned several cars and had a power boat that he used for lake fishing in Southern Illinois. In the summer of 1995, he invited a fellow employee, Donny Hodge, for a Saturday fishing trip on his boat. They spent the entire day fishing, then returned to Hodge's house. Since Cash's wife and children were away visiting grandparents for the weekend, Hodge invited Cash to stay overnight, and they continued their fishing trip on Sunday. Hodge is an openly-gay man, and was known as being gay in their workplace. When people at work found out that Cash had stayed over Saturday night at Hodge's place, rumors began to fly that the two men were having an affair.

"Interestingly," wrote District Judge Evans for the panel, "the story did not cause the kind of trouble one might expect. Rather than enduring verbal abuse about his alleged homosexuality from insecure, macho male colleagues, Cash began to take flak from a group of female co-workers about his perceived failure to emerge from the closet and embrace his homosexuality. While this scenario might not fit neatly into an established cannon of bigotry a pack of women berating a man for not coming out of the closet is a distinctly modern phenomenon Cash's tormentors made the next year of his life at work rather miserable. They laughed at Cash while simulating fellatio or male masturbation, called him a 'he/she' or 'the evil one,' and bared their breasts and shook them at him while laughing. One woman even rubbed her bare breasts against Cash's arm following a union meeting. Over time, Cash became short-tempered, paranoid, and depressed. He eventually sought psychiatric counseling, which both he and his therapists say stemmed from his stressful working conditions." And he filed suit for hostile environment harassment under Title VII.

After trial, District Judge Riley ruled against Cash, finding that the employer acted appropriately in response to Cash's complaints about harassment, that the harassment in any event was insufficiently pervasive to state a Title VII claim, and that it was not directed at Cash because of sex. In his untimely motion for a new trial, Cash alleged that the trial court had erroneously excluded key evidence and had failed to consider a sexual stereotyping theory. Although Cash's motion was late, the trial judge evaluated it under Rule 59 but found no basis for granting a new trial.

The 7th Circuit panel held that the denial should be evaluated under Rule 60(b), using the abuse of discretion standard, and found that Cash's arguments "cannot be shoe-horned into grounds for Rule 60(b) relief. The rule is not an alternate route for correcting simple legal errors." In this case, Cash "simply tripped over the time clock and wants to be able to appeal as if he did not." (He also missed the deadline for filing an appeal on the merits of the case.)

The procedural slip-ups are unfortunate, not least because they mean there is no ruling on the merits of this factually distinctive case. A.S.L.

Lesbian & Gay Litigation Notes: Civil

The U.S. Supreme Court heard oral argument on April 26 in *Boy Scouts of America v. Dale*, an appeal of the New Jersey Supreme Court's ruling finding that the Boy Scouts of America violated the state's public accommodations law by dismissing James Dale as an assistant scoutmaster solely on the basis of his sexual orientation. (The N.J. ruling is reported at 734 A.2d 1196, and is unanimous.) In its opinion, the New Jersey court found that applying the state's law to the Scouts did not violate any constitutional rights of free association of the Scouts. The Supreme Court granted certiorari on this constitutional question. Evan Wolfson, senior staff attorney and Marriage Project Director at Lambda Legal Defense Fund is lead counsel for Dale, and argued the case in the Supreme Court. Reports of the oral argument suggested that many of the Justices find this a difficult case; the bench was hot and fully engaged, and it appeared that several members of the Court had not yet made up their minds how to conceptualize this case in terms of analogies to prior First Amendment expressive association precedents. The heart of Dale's argument is that the Scouts, as a large national organization heavily entangled with government entities, including public schools, cannot hide behind the fiction that it is merely a "private club" in order to avoid the strong public policy concerns of New Jersey's anti-discrimination statute, and that an anti-gay "message" is not an intrinsic part of the Scouts' organizing principles. The Scouts argue that under the First Amendment they have a strong right as a private, non-commercial membership organization to define their organizing principles and to base membership decisions on congruence with those principles. Nationwide press coverage of the argument was detailed and intense. An edited version of the transcript was promptly posted to the N.Y. Times website, and the full transcript should be available soon on Westlaw and Lexis. ••• In an ironic commentary on the controversy, the London *Daily Telegraph* (April 28) noted that the British Scout Association, the precursor of the U.S. organization, does not ban gay men and boys from participating or serving as leaders. "In fact," observed the newspaper, "there is only one bar to involvement in the

British Scout Association - paedophilia; and only one to promotion to a leadership position - 'the avowed absence of religious belief' (though any kind of religious belief will do)."

Parting company from several other judges in the Southern District of N.Y., U.S. District Judge Charles Brieant ruled on March 21 in *McCavitt v. Swiss Reinsurance America Corp.*, 2000 WL 306710, that N.Y.'s off-duty conduct law, which protects employees from discrimination for engaging in off-duty recreational conduct, does not apply to an employee's dating activities. In this case, the plaintiff claims to have been denied a promotion and then terminated because he was dating another employee in the company, and alleges a violation of the law. While noting that two other district judges had found dating activities to be encompassed within the protected activity, Judge Brieant decided that he was bound by a New York Appellate Division ruling, *State of N.Y. v. Wal-Mart Stores*, 621 N.Y.S.2d 158 (3rd Dept. 1995), which held that an employer's policy against cohabitation of employees was not against the law. Brieant observed that a district court does not have authority to certify questions to the New York Court of Appeals, and also mentioned that if the case were appealed, he would expect the 2nd Circuit to certify the question for an authoritative ruling from the state's high court.

The Montana Supreme Court upheld the grant of a petition for temporary investigative authority and protection services for two children on evidence of the mother's unfitness in *Matter of B.P. and A.P., Youths in Need of Care*, 995 P.2d 982 (Feb. 15, 2000). Among the litany of problems cited by the court as justifying granting the petition, one was that the mother had emotionally abused the children by her "attempts to sabotage their visits with their father and to continue to denigrate the father's homosexuality to the children." The court does not discuss this issue in any further detail.

Lambda Legal Defense announced April 14 that it had reached a settlement in *Beaton v. Vinje Realty Corp., F.J. Kazeroid Realty Group, Inc.*, a matter pending in New York Supreme Court, Kings County, concerning alleged sexual orientation discrimination by a landlord and a real estate broker. The broker allegedly refused to rent an apartment to Lambda's client, a gay male couple, because the owner of the apartment didn't want to rent to gays. The broker backed out of the rental deal after accepting the men's deposit, assertedly on instructions from the owner of the building. Lambda's settlement is with the real estate broker. The exact terms are confidential, but they include a monetary settlement with Lambda's clients, the institution of non-discrimination workshops for its employees by the real estate firm, and a requirement that all employees of the firm sign a statement attesting to their knowledge and understanding of the non-discrimination requirements under New York City law. The case against the landlord will continue, as it is not part of the settlement agreement. Lambda staff attorney Marvin Peguese represents plaintiffs Gabriel Beaton and Philip Alberti. *Lambda press release*, April 14.

U.S. District Judge Denny Chin (S.D.N.Y.) has issued a discovery ruling in *Curry v. Morgan Stanley & Co.*, 2000 WL 436702 (April 22), the notorious case in which a former Morgan Stanley associate (who is avowedly heterosexual) claims he was discriminatorily discharged after nude photos taken of him in college appeared on the cover and inside a gay male sex magazine. Morgan Stanley's defense for the discharge centers on evidence that Christian Curry engaged in repeated expense account fraud. The case is now in discovery, and Curry has requested expense account records for each of the individual named defendants, all of whom are senior executives of Morgan Stanley, in order to show that what he is alleged to have done is not out of the ordinary within the firm. Judge Chin had previously ruled that Curry could get expense account records for Morgan Stanley associates who were employed at his level, and if he could show based on those records that there was a "corporate culture" of expense account fraud being tolerated for others at his level, he might then be able to get the senior executives' records as well. In this opinion, Chin finds that Curry failed to establish that his own pattern of fraud was typical or tolerated for other associates at his level, and denied Curry's renewed demand for the executive records. Chin's opinion describes in details the incidents of alleged fraud and the explanations provided by counsel for Morgan Stanley as to why apparently fraudulent expense reimbursements were not. The whole thing makes fascinating reading.

Patricia Kutteles, the mother of the late Barry Winchell, a gay soldier who was beaten to death by other soldiers in a hate crime that has resulted in court martial convictions of the soldiers involved, has now filed a $1.8 million tort claim against the Army, alleging that it improperly ignored underage drinking on base and harassment of her son. Her attorney, Adam Pachter, told the Associated Press that the claim was filed under a federal law that allows reimbursement from the military for injury or death. *Los Angeles Times*, April 27. A.S.L.

Lesbian & Gay Litigation Notes: Criminal

A California appeals court has substantially affirmed a decision by Los Angeles County Superior Court Judge Kathryne A. Stoltz requiring the state's Board of Prison Terms to reconsider its decision that Robert Rosenkrantz should be denied parole from the balance of his 15 year to life prison sentence for second degree murder. *In re Robert Rosenkrantz*, 2000 WL 490787 (Cal. App., 2nd Dist., April 27). Rosenkrantz shot and killed Steven Redman who, together with Rosenkrantz's brother, had "outed" him at a high school graduation party, leading to Rosenkrantz's then-homophobic father banning the teen from his home. Rosenkrantz had tried to get the two older teens to disavow their statements about his homosexuality in order to achieve a reconciliation with his father, but Redman refused, even when Rosenkrantz confronted him with an Uzi automatic weapon. Laughing, Redman called Rosenkrantz a faggot, and died in a blast of gunfire. Rosenkrantz later turned himself in, and was convicted by a jury. The parole board has taken the position that the deliberate nature of his cold-blooded murder of Redman makes him ineligible for parole, but Rosenkrantz points out that he has been a model prisoner, has pursued higher education while in prison, is reconciled with his family, and committed the crime under severe emotional strain provoked in part by Redman. The courts are now siding with Rosenkrantz, but he will still face the ultimate hurdle of California Governor Davis who has vowed to reject all parole applications by convicted murderers, according to an April 28 report in the *Los Angeles Times*.

The Associated Press reported that Matthew Rogers, 20, of Franklin, Tennessee, was sentenced to three years of probation by Franklin County Superior Court Judge Bertha Josephson for carving the word "HOMO" on the back of a 17–year-old man who was a student at the prep school Rogers was attending. Rogers confessed to having used a knife, but said he did not consider the victim to be gay and was only doing it as "hazing." In addition to the probation sentence, Rogers was given a suspended two-year jail term conditioned on his performing 144 hours of community service. The sentencing took place on April 18. *Providence Journal*, April 20.

Rejecting a "homosexual panic" defense, a Roanoke, Virginia, jury convicted Michael E. Harris of first-degree murder for stabbing a man whom he claimed made a sexual pass at him. The jury recommended a life sentence, which was imposed by the Roanoke Circuit Court. Harris had testified that after breaking up with his wife, he went to the home of his friend Paul Wright for a place to stay. Wright allowed him to sleep on the couch. Harris claims he awoke to find Wright groping him, and reacted by stabbing him to death. The prosecuting attorney, Donald Caldwell, argued that this story was invented, and said that the jury had repudiated "the homophobia defense: He's a homosexual, he touched me, and I had to defend myself." *Roanoke Times & World News*, April 7. A.S.L.

Domestic Partnership Notes

Albuquerque, New Mexico, Mayor Jim Baca signed an executive order on March 8 extending eligibility for medical benefits coverage to domestic partners and dependents of city employees. The order was not publicly announced at the time, and was first reported in the *Albuquerque Journal* on April 12, stirring some controversy in the city council. Baca told the *Journal*, "It will give insurance coverage to many people and children who don't have it. Why would anybody not want those folks to have insurance?" *Washington Blade*, April 21.

On April 13, the Arizona Senate gave final approval to Senate Bill 1173 by a vote of 24–4, after the bill had previously passed the House by 47–8. The bill is intended to protect victims of domestic violence from discrimination by insurance companies, which have been known to cancel or deny property or liability coverage to individuals who have been victims of domestic violence. After some controversy, the House had added language to include violence within same-sex couples as coming within the scope of definition of domestic violence. A Republican sponsor of the original bill had threatened to kill his own bill after the House passed it in this amended form, and there was a heated debate on the Senate floor in which openly-gay Sen. Steve May confronted Scott Bundgaard, the reluctant sponsor. Bundgaard backed down the House bill passed intact. *Arizona Republic*, April 14.

A long-running lawsuit seeking domestic partnership benefits at the University of Pittsburgh hit a major snag on April 20 when the trial judge, Robert Gallo, ruled that the University's health plan did not discriminate on the basis of sexual orientation because all unmarried couples, whether opposite-sex or same-sex, were similarly disqualified from benefits eligibility. The judge also ruled that the Pittsburgh Commission on Human Relations has no jurisdiction over the case, because of a law enacted last November exempting state universities and colleges from being required to provide domestic partnership benefits under local laws. In an April 23 article reporting on the decision, the *Harrisburg Sunday Patriot-News* noted that three other universities in Pennsylvania — the University of Pennsylvania, Swarthmore College, and Dickinson College — provide domestic partnership benefits plans for their employees. *Pittsburgh Post-Gazette*, April 21.

Domestic partnership benefits for state employees became a sticking point as Washington state budget negotiators attempted to put together a final budget agreement late in April. Noting that the Public Employee Benefits Board was considering a proposal to extend domestic partnership coverage to state employees, Republican legislators wanted to include a proviso to ban benefits for unmarried partners of state employees, whether same-sex or opposite-sex, but did not prevail. However, the Republican co-chair of the House budget negotiation team pointed out that the new budget will not include any money for such benefits, so if the Board did decide to expand eligibility, the plan would have to require the employees to pay for the benefit. *The Columbian*, April 26. A.S.L.

Legislative Notes

The Atlanta, Georgia, City Council has amended the city's antidiscrimination policy to add "gender identity" to the protected classes under the policy. Mayor Bill Campbell signed the amended ordinance, which passed the council by a 13–0 vote on March 6, on March 14. *Washington Blade*, April 7.

Maine will again conduct a state-wide vote on gay rights, but this time gay rights supporters will be urging a "Yes" vote instead of a "No" vote. The state legislature approved a bill, supported by the governor, that will enact a law banning sexual orientation discrimination provided the voters approve at the general election in November. The final vote in the House of Representatives on April 4 was 82–62; on April 3, the Senate had approved the measure by a vote of 28–7. *Portland Press Herald*, April 5. The legislature had passed a gay rights measure a few years ago, which was repealed in a special election prompted by an anti-gay initiative campaign. The election was held in the middle of the winter of 1998 at a stormy time when it was the only question on the ballot, and was barely repealed by a small fraction of the electorate. Supporters of the gay rights law are hoping that in a general election with a larger turnout, in a positively phrased referendum question, that the results will more closely mirror public opinion polls that show a majority of the public believes that gays should be protected from discrimination. Their belief is bolstered by the result of a 1995 referendum held during a general election when the voters decisively defeated a measure that would have banned localities from passing gay rights ordinances.

On April 4, the Iowa House of Representatives voted 55–43 in a straight party-line vote to repeal Governor Tom Vilsack's executive order banning discrimination on the basis of sexual orientation or gender identity by the executive branch of the Iowa government. The measure had previously been passed by the Senate by a 28–21 vote. According to the *Des Moines Register* (April 5), "Moments after the House vote was recorded, Vilsack made good on his promise to kill the legislation, delivering a stinging veto message before the red neon vote tally had even been cleared in the House chamber. Supporters do not have enough votes to override the veto." Republican leaders purported to base their opposition to the executive order on a principled ground of separation of powers, disclaiming that they were engaging in gay-bashing. Vilsack said, "I am profoundly disappointed that the Legislature has chosen to invest valuable state resources to draft, debate and pass this bill." The actual veto didn't take effect until the legislature formally presented the bill to the Governor, so this was a sort of preemptive veto.

Salt Lake City Mayor Rocky Anderson signed an executive order April 4 banning sexual orientation discrimination in city employment. In a separate order, Anderson required city managers to consider diversity when hiring staff. The order was immediately controversial, because the city council had passed an ordinance banning such discrimination and then rescinded it when the council membership changed after an election. *Salt Lake Tribune*, April 5.

On April 4, West Virginia Governor Cecil Underwood signed into law a measure that he had proposed banning recognition of same-sex marriages in the state. The bill had been approved unanimously by the Senate and 96–3 by the House. Underwood said the law was necessary because West Virginia could be "forced into recognizing same-sex marriages from other states" without such a law. Since no other states authorize same-sex marriages, his fears seem a bit premature. *Charleston Daily Mail*, April 5.

In a small but significant sign of progress, the New York State Senate Investigations, Taxation and Government Operations Committee, chaired by Senator Roy Goodman (R.-Manhattan), voted 9–1–2 on the Sexual Orientation Non-Discrimination bill, which has been pending in some form or other for 28 years. For the last several sessions of the legislature, the Assembly, Democrat-controlled, has passed the bill by comfortable margins, but the Senate, Republican-controlled, has resisted bringing the measure to a vote. The vote in the Senate committee was bipartisan, with two Republican members voting "without recommendation" an one voting against. The positive committee action does not guarantee a vote on the floor, however. *Empire State Pride Agenda Press Release*, April 20.

The Massachusetts State Board of Education voted on April 25 to adopt a regulation implementing a state law banning anti-gay discrimination in public schools, but included a last-minute amendment that alarmed some gay rights advocates. The original draft of the regulation provided that educators should take steps to "counteract" anti-gay stereotypes; in its place, the board placed a provision requiring educators to deal with the issue in such a way as to "provide balance and context." Critics of the amendment argue that it appears to mandate allowing anti-gay views to be presented whenever pro-gay views are presented. *Patriot Ledger*, Quincy, Mass., April 27.

Mississippi's Senate voted April 19 to approve a bill that bans adoptions of children by same-sex couples. The measure had previously been passed by the House, and Governor Ronnie Musgrove had already said he would sign the bill if it passed. Signing was expected during the first week of May. Mississippi thus follows Utah in formally legislating against adoptions by same-sex couples, although neither state technically bans individuals from adopting based on their sexual orientation. The only state to maintain such a categorical ban is Florida. *New Orleans Times-Picayune* (Associated Press Report), April 20; *Baton Rouge Advocate*, April 21. The Utah statute was recently adopted to codify some administrative regulations; the regulations are already the target of a lawsuit, *Utah Children v. Utah State Board of Child and Family Services*, Civ. No. 990910881, now pending before District Judge Glenn Iwasaki in the Utah 3rd Judicial District Court in Salt Lake County. The complaint will likely be amended to attack the statute as well as the rules it codifies.

When the Royal Oak, Michigan, city commission focused on the problem of overcrowding and rowdy behavior at two bars in the city, they discovered in a review of legislative records that there was still on the books a city ordinance prohibiting licensed liquor establishments from allowing homosexuals to meet on their premises. Although nobody had heard of this law for many years and it wasn't being enforced, its mere existence was an embarrassment, and on April 19, the commission voted to repeal it. The 1965 measure had been copied directly from the then-current state liquor code, which was, unfortunately, typical of such measures across the country. Some landmark gay rights litigation in New York and California had involved challenges (ultimately successful) to the constitutionality of such ordinances. *Detroit News*, April 20.

Georgia Governor Roy Barnes signed into law a new hate crimes statute on March 30. Although the original version of the bill included sexual orientation on a list of enumerated grounds of bias in this penalty enhancement bill, controversy over protection for gays led to a legislative compromise under which all enumerated categories were removed and the bill instead defines a hate crime as one in which the victim or his or her property are targeted because of bias or prejudice, leaving it to the jury to determine whether this prerequisite is met. It seems likely that defendants represented by counsel who are convicted under this law will raise due process vagueness arguments when seeking judicial review of their sentence enhancements. *Augusta Chronicle* (Associated Press story), March 31.

The Colorado Supreme Court has rejected challenges to the title and summary of two ballot initiatives that would amend the Colorado constitution to provide that only opposite-sex marriages can be legally recognized in the state. The Court found that the titles and summaries were accurate and not misleading, and that the subject matter of the two initiative questions (which were virtually identical) did not violate the rule against multiple subjects for initiatives. *Sarchet v. Hobbes*, 2000 WL 361666 (Colo. Sup. Ct., En Banc, April 10).

Anti-gay groups seeking a referendum to repeal the gay rights law passed in Miami-Dade County, Florida, in 1998, have fallen short in their efforts to get petition signatures by the deadline for this year's election. *Sun Sentinel*, April 11. A.S.L.

Law & Society Notes

The *Washington Blade* reported that District of Columbia Superintendent of Schools Arlene Ackerman has signed a policy directive banning harassment of students by other students based on race, national origin, sexual orientation and other categories. The March 31 order had originally been drafted to deal only with sexual harassment, by the Gay and Lesbian Activists Alliance of D.C. requested the Superintendent to consider expanding it to all forms of harassment.

In March, Arizona State Representative Steve May received a letter from the Army asking him to resign his commission in the Army Reserve on grounds of homosexuality, and attaching a resignation letter for him to sign and return. Ironically, the letter came one day after May participated in a training session on chemical weapons defense for soldiers headed to assignment in Kosovo. May, according to an April 28 article in the *Arizona Republic*, "repeatedly has been ranked as one of the Army's top young officers in his service as a chemical weapons defense officer," and his commanding officer wrote that he has "unlimited potential to be an outstanding asset as a future officer and leader." The Republican legislator has vowed not to quit, and to contest the Army's position that his speaking of his sexual orientation during a debate on the floor of the Arizona House constitutes a violation of the "don't ask, don't tell" policy. May contends that he has never spoken about his sexual orientation while on active duty in the Reserves, and that it would be unconstitutional for the Army to require him to refrain from speaking about it while off-duty (and certainly while participating as an elected official in a legislative debate). Although it was generally known that May was gay when he was running for the legislature, he did not make it an issue or speak about it as part of his campaign. An Army Reserve spokesperson stated that a board will be convened sometime in the future to determine May's fate.

On April 18, voters elected Patty Sheehan as the first openly gay member of the city council in Orlando, Florida. *Washington Blade*, April 21.

Responding to a request from Senate sponsors of the pending Employment Non-Discrimination bill, the General Accounting Office, the investigative agency of Congress, submitted a report showing that enactment of bans on sexual orientation discrimination does not lead to a heavy administrative burden for those jurisdictions who have done so. Studying the caseloads of enforcement agencies in the eleven states and the District of Columbia that have banned employment discrimination based on sexual orientation, the GAO concluded that there was "no indication that these laws have generated a significant amount of litigation." The report actually cuts two ways: while it provides evidence to reject the argument that the law would impose an undue burden on enforcement agencies, it may be used to undermine the argument that there is a pressing need to pass such a law. *Raleigh News & Observer*, April 28. A.S.L.

International Notes

Lest we in the English-speaking world become complacent about the freedoms we have won, it bears noting that a court in Qunfuda, Saudi Arabia, has sentenced nine young Saudi men to more than 2,000 lashes and at least five years in prison for "deviant sexual behavior," according to a report in the *Globe & Mail* (April 17), a Canadian national newspaper. There was no clarification in the report about what was meant by "deviant sexual behavior," but past reports from Saudi Arabia suggests that it probably involved homosexual conduct. [Of course, we must recall that 17 U.S. states still impose criminal penalties for "deviant sexual behavior" as well, so we shouldn't be too smug about this report, but we haven't heard any reports lately of lashings as a form of punishment in the U.S.]

Controversy broke out late in April in Canada over a $185,000 (Canadian dollars) government-funded survey of gay people in Canada to document gays and lesbians as a "cultural community." The *Ottawa Sun* (April 27) reported that a lawsuit between Equality for Gays and Lesbians Everywhere (EGALE), Canada's national gay rights organization, and two researchers, Stephen Samis and Sandra Goundry, over the continuation of the study had recently been resolved. But editorialist and electronic news commentators raised a hullabaloo over whether government funds should go towards such research when it came to light that EGALE had applied for additional funding for the work.

A bill that would extend to same-sex couples the same rights that are enjoyed by unmarried opposite-sex couples in Canada (a status akin to common law marriage for most legal pur-

poses) has passed its third reading in the Canadian Parliament's House of Commons, and will now move to the upper house for consideration. Bill C–23 still preserves some grounds of distinction between same-sex couples and married couples, but will open up benefits, entitlements and rights under dozens of laws. *London Free Press*, April 13. However, the Ontario lesbian, identified in Court papers only as "M," who brought the case to the Canadian Supreme Court that inspired the passage of this law, contends that the law preserves enough distinctions to defeat the Court's mandate of full-equality, and announced through her attorney, Martha McCarthy, that she will apply to the Supreme Court to reopen the case in order to consider her equality challenge to the new law. *Globe and Mail*, April 8.

An English Employment Appeal Tribunal ruled in *Pearce v. Governing Body of Mayfield School*, published in *The Times of London* on April 19, that homophobic abuse is not sex bias under current British law. (This may change, of course, when the U.K. puts in place its compliance with new European community treaties on human rights.)

An anti-gay group led by Rev. Ken Campbell published an advertisement in the *Globe and Mail* protesting the Canadian Supreme Court's latest gay rights decision. Philip Shea, a Toronto man who found the ad to be an offensive incitement against gays, filed a complaint against the newspaper with the Ontario Human Rights Commission. The Commission rejected the complaint, with Commissioner Keith Norton stating that although the ad "is highly offensive, it is nevertheless an expression of opinion that does not fall within the purview of the Code." *Toronto Star*, April 7.

A bill to lower the age of consent for gay male sex from 18 to 16 (and thus attaining age parity with heterosexual sex) has finally survived a reading in the House of Lords in London. After the Blair government made clear that it would invoke the rarely-used Parliament Act, under which a bill that has passed the Commons repeatedly and been stymied several times in the Lords can become law without the Lords' assent, opponents called off their campaign to oppose enactment. *Daily Mail*, April 12.

In Australia, openly-gay Supreme Court Justice Michael Kirby generated a new round of headlines with an April 27 speech to the Australia and New Zealand Association of Psychiatry, Psychology and Law, meeting in Melbourne, in which he warned of the dangers of continued research on genetic causes of homosexuality. Kirby warned that such research might be used to the disadvantage of gay people, and urged acceptance of the view that homosexuality is "indelible" and "not a lifestyle choice." At the same time, Kirby revealed that media reports about his past public comments on homosexuality have made him the target of a hate mail campaign, which he described as "strange, disturbed letters… contorted by rage and spitting contempt." Kirby pointed out that the letters, rather than gay people, needed the help of his audience of psychiatrists and psychologists. *Australian Financial Review*, *The Age*, April 28. A.S.L.

Professional Notes

At its May 5 annual dinner, the Massachusetts Lesbian & Gay Bar Association honors Susan M. Murray and Beth Robinson, plaintiffs' attorneys in the Vermont marriage case, and David A. Mills. The keynote speaker for the event is the Honorable Suzanne V. DelVecchio, Chief Justice of the Massachusetts Superior Court.

AIDS & RELATED LEGAL NOTES

9th Circuit Revives Sec. 1983 Claim by Arrestee Deprived of AIDS Meds

A unanimous panel of the U.S. Court of Appeals for the 9th Circuit ruled that District Judge Robert J. Bryan (W.D. Wash.) erred when granting summary judgment to Pierce County and various county officials in a lawsuit challenging the failure to provide appropriate AIDS medications to a newly-arrested person for a period of two days. *Sullivan v. County of Pierce*, 2000 WL 432368 (April 21) (unpublished disposition). Distressingly, the court designated this as an unpublished opinion, despite its importance as possibly the first federal appellate decision to hold that a PWA who is arrested has a constitutional right not to have his medication interrupted. The Circuit Judges on the panel are Reinhardt, Thompson, and T.G. Nelson.

Robert Sullivan, who suffers from AIDS, was arrested on an outstanding bench warrant on March 8, 1996. At the time, he was on a protease cocktail regimen, and so informed the jail personnel, requesting continued access to his medications. Jail health officials were aware that a gap in administration of this medication can lead to development of drug resistance causing permanent harm to an HIV+ individual, but nothing was done for a period of two days, allegedly because the particular combination of drugs Sullivan was taking was not available in the jail's pharmacy, and it took two days for the screwed-up system in Pierce County to authorize someone to pick up Sullivan's medication and get it to him. Sullivan alleged that his viral load "skyrocketed" and that the cocktail he was taking became ineffective as a result of the gap in treatment. He sued under 42 U.S.C. sec. 1983, claiming a violation of his constitutional rights. (As a pre-trial detainee, his rights would be derived from the 14th amendment due process clause rather than the 8th Amendment's ban on cruel and unusual punishment, but according to the court the same standard is used for both types of claims.)

The district court granted summary judgment to the county, finding that Sullivan's allegations could not support a finding of deliberate indifference to his health needs by the county officials, and also could not give rise to an inference of a county policy of deliberate indifference. Reversing this determination, the court of appeals panel found that there was evidence that the jail officials were aware of Sullivan's "dire need" for uninterrupted medication, that "strict compliance" with his treatment regimen was essential, and that the health officials, knowing that these drugs were not in their pharmacy and that, on that ground, they had the authority to "turn him away" from being jailed, nonetheless admitted him to the jail.

Noting that jail physicians have "wide discretion in determining what constitutes appropriate treatment," the court found that nonetheless "the treatment Sullivan received was far from the medical norm." Specifically, the court found that the County's Attending Physician had stated, contrary to common knowledge about the urgency of treatment, that there was "no urgent problem" and had taken "no further action to make sure that Sullivan received appropriate treatment." Indeed, it was two days before another jail official sought and obtained permission for Sullivan's family to bring his medications to the jail. Finding that a genuine issue of material fact exists as to the harm resulting from this delay, the panel held that summary judgment was inappropriate on this record.

Further, the panel rejected the district court's ruling on the issue of qualified immunity, finding that if "deliberate indiffference" to a jail inmate's medical needs is found, then qualified immunity would be precluded, quoting a 1992 9th Circuit opinion to the effect that "prison officials who deliberately ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law."

Finally, the county had argued that it as distinguished from individual county employees could not be held liable to Sullivan in the absence of a showing of an official policy or custom to deprive jail inmates of their medication. The court of appeals rejected the district court's conclusion that Sullivan's evidentiary allegations fell short here. The court observed that the County had stipulated in settling a class action

suit that the correctional facility's policies violated the constitutional rights of inmates. "Those facts were all a part of the record before the District Court in this case," wrote the appeals panel, so summary judgment on this issue was also inappropriate.

In light of the potential importance of this opinion, the panel's decision to designate it as unpublished and thus subject to restrictions on citation as precedent within the 9th Circuit is inexplicable. A.S.L.

6th Circuit Revives HIV-Discrimination Claim by Discharge Airline Employee

In an unofficially published opinion, the U.S. Court of Appeals for the 6th Circuit ruled on April 3 that a district court in the Eastern District of Michigan erred by granting summary judgment to the employer in an HIV-discrimination claim, as there was an issue of material fact concerning the employer's justification for the discharge. *Archer v. Mesaba Aviation Inc.*, 2000 WL 376677 (not officially published).

Paul Archer, an openly gay man, began working as a part-time customer service representative for Mesaba Aviation at the Wayne County Airport in February 1991. He later obtained a full-time position, and on January 16, 1994, was promoted to a customer service supervisor position, in which he received only favorable performance reviews. Archer was diagnosed HIV+ in February 1995, and subsequently informed his employer and his co-worker about his diagnosis. His employment with Mesaba continued incident-free until May 1996, when he was a passenger on a Mesaba plane and a flight attendant on the plane reported that he had ordered a drink before take-off against company rules and had told gay jokes during the flight. Archer denied these allegations, and an investigation could not substantiate them. Shortly after this, Archer was the subject of complaints by co-workers about leaving work early, receiving lengthy visits from friends while on duty, and working out of uniform. He accepted a disciplinary suspension and promotion, but contested some of the details of these allegations.

In January 1997, Archer and a travel companion flew on Mesaba on a vacation trip. The flight attendant claims that while the lights were out in the plane, Archer's companion was performing oral sex on him. The flight attendant reported this to the captain, who decided not to take any action, since the flight attendant had only said he thought that was what was going on. The flight attendant subsequently filed a written report, and Archer was discharged after a perfunctory investigation.

Archer claimed that the company wanted to get rid of him because he was HIV+, filing suit under the Americans With Disabilities Act, the Vocational Rehabilitation Act, and Michigan's disability discrimination law. The district judge granted summary judgment to the employer without producing a written opinion.

Writing for the court, Judge Clay found that Archer had alleged all the requisites of a prima facie case of disability discrimination, and the employer had articulated a non-discriminatory reason for the discharge, the oral sex incident on the flight. However, Archer staunchly denied that he and his companion had engaged in oral sex during the flight, and also pointed out various factual discrepancies in the flight attendant's report. Furthermore, it appeared that the company had prepared its termination letter to him before confronting him with any charges. The court found that Archer had "raised a genuine issue of material fact as to the basis upon which he was terminated," and thus made a sufficient showing that the employer's articulated reason for the discharge was pretextual at least, sufficient to withstand a motion for summary judgment.

The court rejected Mesaba's argument that even if the charges were not true, it could not be held liable because it acted based on an honest belief that they were true. Clay asserted that in order to have an "honest belief," the employer "must establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Here, the employer prepared its discharge letter before giving Archer a chance to respond to the charges, and at the time the documents in the employer's possession included conflicting statements on various details by the flight attendant, the captain and the first officer. "Mesaba's acts are all the more questionable in light of the fact that Plaintiff was never informed of the allegations of which he was accused… While an employer is not required to turn over every stone, we do not believe that Mesaba demonstrated its reasonable reliance on particularized facts."

Thus, it was error to grant summary judgment. In making its remand, the court noted that the district court still needed to inquire into jurisdictional issues under the Rehabilitation Act (i.e., whether Mesaba received any federal money), and ordered the court to reconsider whether any of Archer's supplemental state law claims should also be reinstated. In a concurring opinion, District Judge Bell (sitting by designation) expressed some discomfort at having to review a summary judgment decision when the trial court did not produce a written opinion with factual findings.

The 6th Circuit recommended against publication of the full text of this case, without explanation. Perhaps the court wishes to spare Archer the public exposure, but then one would question why it released the opinion to LEXIS and Westlaw. Perhaps this is an example of the 6th Circuit's squeamishness about full-text official publication of cases involving gay people, which has reared its head in the past (see, e.g., *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992) (table), unofficially reported at 58 Fair Emp. Prac. Dec. (BNA) 144). One never knows. A.S.L.

Tennessee Appeals Court Rules on Complicated Transfusion-Related Tort Claims

In *Estate of Amos v. Vanderbilt University, Inc.*, 2000 WL 336733 (Tenn Ct. App., March 31), a case that arose from an initial claim of medical malpractice that caused the birth of a child with HIV who died shortly thereafter, the Tennessee Court of Appeals made two significant decisions limiting a hospital's liability to remote third parties and for patients' suffering . First, while a hospital may have a duty to warn the recipient of a blood transfusion made before the advent of reliable HIV tests of the possibility of HIV infection later on, this duty would not flow to all third parties with whom the transfusion recipient might have intimate contact later in life. Second, in circumstances where claims of negligent infliction of emotional distress were advanced in a medical malpractice case, no damages for emotional distress could be awarded absent expert testimony on the distress inflicted.

This case of almost mind-numbing complexity (remand back and forth between state and federal courts *four* times, and at least one prior appeal) resulted from the infection of Julie Story Amos with HIV as the result of a blood transfusion during surgery at Vanderbilt University Medical Center in 1984, before the advent of a reliable HIV test. Despite the subsequent discovery of reliable HIV tests, Vanderbilt chose not to advise or warn prior transfusion recipients of the dangers they faced. Ms. Amos was a divorced mother at the time, who did not learn of her infection with HIV until her pregnancy during her second marriage five years later. The infant died of pneumocystis pneumonia two months after birth. Suit was filed for numerous causes of action, including negligence, medical malpractice, wrongful birth, and separate counts of negligent infliction of emotional distress resulting from failure to notify Ms. Amos and her husband that she was HIV+. During this period, Ms. Amos died of AIDS. After a prior appeal in which it was ruled that expert testimony would not be needed on the issue of whether failure to notify transfusion recipients constituted negligence, the case went to trial. The trial court ruled that the claims for negligent infliction of emotional distress were "parasitic" to the negligence claim, so no expert testimony was required on the issue of negligent infliction of emotional distress.

The jury found Vanderbilt negligent, resulting in damages relating to the infant's medical expenses in the sum of $32,000, and awarded damages for the negligent infliction claims of

$2.7 million to the estate of Ms. Amos, and $1.6 million to Mr. Amos. Vanderbilt appealed.

The court of appeals reversed the judgment for negligent infliction of emotional distress in favor of Mr. Amos, because he was not an identifiable party when his wife received the transfusion, and to hold otherwise would, in effect, would impose a duty to warn on everyone that Ms. Amos ever met after the transfusion.

The court of appeals ruled that under the circumstances, expert testimony should have been required to prove negligent infliction which flowed from the negligence of Vanderbilt. No such showing was made, and because it was not Vanderbilt's negligence which resulted in Ms. Amos's infection with HIV (the transfusion occurred *before* the HIV tests were developed), no damages could be shown without such testimony. The damage award for negligent infliction of emotional distress in favor of Ms. Amos was stricken, and the case was remanded for further proceedings consistent with the court's opinion. It is unclear whether this decision would preclude the trial court from retrying the issue of negligent infliction of emotional distress, this time with expert testimony. (Then again, there isn't much which is clear in this opinion.) *Steven Kolodny*

Kentucky Appeals Court Finds HIV Contracted on the Job to Be Occupational Disease Rather Than Accidental Injury for Purposes of Proving Workers Compensation Claim

In *Hussey v. Barren River District Health Department*, 2000 WL 377497 (Ky. App., April 14), the court found that a registered nurse who died from AIDS had suffered an occupational disease and her estate was entitled to compensation accordingly, even though specific evidence was lacking of the incident in which she claimed to have suffered the HIV exposure that led to her infection.

Rebecca Hussey worked for the defendant as a registered nurse beginning in February 1990. Her duties included treatment of AIDS patients. Her prior employment as an Army Reserve nurse and a nurse in a Nursing Home had allegedly not brought her into contact with AIDS patients. While working for the defendant, she also held part-time employment with two other health care organizations, for neither of which she worked with AIDS patients. She developed pneumonia in December 1994 and was found to be HIV+ during her treatment for the pneumonia. She continued to work for the defendant until December 1995, when she became too ill to continue, and died from AIDS complications in February 1996. During her final illness, she reputedly made a statement that she had injected herself with HIV. Various witnesses from her family and co-workers testified about different incidents at earlier times when Rebecca had claimed to have sustained needle-stick injuries, but the documentary records were inconclusive and contradictory as to when such incidents might have occurred. The compensation claim was filed by her father as executor of her estate many months after her death, naming the company carrying the defendant's workers compensation coverage at that time as the responsible carrier, but this company had only begun to provide coverage in October 1994, and it seemed obvious that Rebecca's HIV-exposure must have occurred earlier than that, so the administrative judge for Kentucky workers compensation substituted the prior carrier on the claim.

The ALJ rejected the hospital's argument that this was a self-inflicted injury and thus not compensable, finding that Rebecca was in a highly emotional state and in the advanced stages of AIDS at the time, and had been receiving in-patient care at a mental hospital because of her delusionary state, so this statement would not be credited.

The main problem, as the court saw it, was whether the Compensation Board erred in awarding benefits for occupational disease, as the employer claimed, especially when it seemed that the evidence on actual exposure was contradictory enough to defeat a claim for accidental injury. The court found that this was a case of first impression for AIDS, and a conceptually difficult problem. It is clear that the concept of occupational disease refers to conditions that develop over time as a result of repeated exposure to workplace hazards, rather than medical consequences of specific accidents, and AIDS appears more like the latter than the former. On the other hand, the court pointed out that a health care professional such as Rebecca assigned to provide care to AIDS patients is repeatedly exposed to an environment with an elevated risk of exposure to HIV.

Under the Kentucky workers compensation statute, an disease "shall be deemed to arise out of the employment if… there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause… An occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from the source as a rational consequence."

Wrote Judge Emberton for the court, "We agree with the Board that this case is properly an occupational disease claim. Although there is no evidence that healthcare workers as a class are exposed to the disease as an incident of their employment, there is sufficient evidence that Rebecca was specifically affected in a manner causing her to contract the disease."

Finally, Emberton found that the evidence clearly indicated that whatever exposure led to Rebecca's infection with HIV, it occurred before October 1, 1994, the date when the defendant changed insurance carriers, thus the former carrier was the responsible carrier for this claim. A.S.L.

Wyoming Supreme Court Upholds Denial of Workers Comp Coverage for HIV Tests Taken by Cop Who Was Exposed to Arrestee's Blood

In a strange sort of pettifogging decision, the Wyoming Supreme Court unanimously affirmed a decision by a Workers Compensation hearing examiner to deny a police officer's claim for coverage of the costs of HIV and Hepatitis B testing after the officer was exposed to the blood of a person he was arresting. *Williams v. State of Wyoming*, 2000 WL 378259 (April 14).

Michael Williams, a Rawlins police officer, was called to assist with the arrest of a man who was battering some other people. In the course of the incident, Williams sustained some cuts on his hands and was exposed to the arrested man's blood. He was instructed by his supervisor to get tested for HIV and HBV. Williams went to the hospital and had the tests performed. He tested negative. He then sought reimbursement for the costs of the tests. In completing his claim form, he described his injury as follows: "came in contact with blood while arresting a subject whose hands were covered with blood." The Workers Comp division denied the claim, stating that "contact with blood" was not a compensable injury. Williams objected, and a hearing was held, at which the examiner ruled similarly and denied the request for payment. The matter was certified to the state supreme court.

The court, in an opinion by Justice Thomas, carefully parsed the language of the statute and found that, technically speaking, the Division and the hearing examiner were correct. Williams argued that he had suffered additional wounds and scrapes on his hands while apprehending the suspect, and that taking HIV and HBV tests were indicated as part of the medical follow-up for blood exposure to somebody who had open wounds on their hands. The court conceded that this probably was correct, but noted that in describing his injury in his claim form, Williams never mentioned the cuts and scrapes. (No, this opinion was not written by Franz Kafka or Charles Dickens!) *The claimant has the burden of following the procedures and rules contained within the Wyoming Worker's Compensation Act and the Department Rules and Regulations before he is entitled to worker's compensation benefits," Thomas wrote. "We hold the only injury claimed in Williams' report, the exposure to unidentified blood with some fu-*

ture potential for illness or disease, does not constitute an 'injury' under the Wyoming Worker's Compensation Act."

Justice Thomas was moved, however, to write a separate special concurrence, joined by two other members of the court, in which Thomas pointed out how silly this result was. Thomas pointed out that had Williams requested a bandage for his cut hands at the hospital, the expense would have been covered, and most likely the follow-up HIV and HBV tests as well. "As the hearing examiner found, Williams did sustain additional wounds and scrapes to his hands in the apprehensive of the suspect… The very narrow premise for distinction was the articulation by Williams of his claim to the Division. What would have been wrong with the Division contacting Williams and seeking clarification with respect to his claim? Perhaps it even would have been fair for the Division to point out that as it was stated, his claim for medical tests could not be paid. The obvious moral of our resolution of this case is that in every instance in which a police officer or perhaps a medical emergency person or perhaps a firefighter encounters blood in the course of aiding an injured person, that person either will forego appropriate assistance or indeed will ask for the Band-Aid in order to have the blood tests covered. Perhaps, the answer is for the legislature to specifically provide for the cost of such tests as a benefit under the statute." Thomas concluded by observing that the state undoubtedly spent far more in processing this case through the Supreme Court appeal than the cost of covering the tests. A.S.L.

Connecticut Supreme Court Finds Expert Testimony Necessary in HIV Transmission Claim Against Teaching Hospital by Infected Student

The Supreme Court of Connecticut remanded for retrial a claim by a medical student against Yale University for negligence resulting in her infection with HIV. *Doe v. Yale University*, 2000 WL 332092 (April 11).

Doe was a first year resident intern at Yale-New Haven Hospital and a graduate student at Yale University School of Medicine. While inserting a hollow needle into the artery of a patient with AIDS, without supervision, Doe punctured her thumb on the bloody needle and was infected. Doe prevailed on her negligence claim at a jury trial. Yale appealed on a number of issues. Judge Borden's opinion upholds the trial court ruling that Doe's claim is cognizable because it falls within the traditional duty not to cause physical harm by negligent conduct. Yale argued unsuccessfully that Doe's claim sounded in "educational malpractice," a theory previously rejected by Connecticut courts on public policy grounds.

The court rejected Yale's argument that "the existence of independent regulatory bodies that oversee medical residency programs obviates the need for the judicial establishment of standards of care" through negligence law, but agreed that expert testimony was required at trial to define the standard required when instructing students in techniques to avoid exposure to patients' blood. As the jury decided in favor of Doe without having heard such expert testimony, the court remanded the case for retrial. *Mark Major*

Federal Court Rejects Retaliation Claim from Discharged Registered Nurse

A registered nurse who claims he was discharged in violation of the Americans With Disabilities Act for complaining about discriminatory treatment accorded an HIV+ patient lost his case on summary judgment in *Hamner v. Community Hospitals of Indiana, Inc.*, 2000 WL 427066 (U.S.Dist.Ct., S.D.Indiana, March 31).

Gary Hamner was working as an RN in the Acute Adult Psych Department at Community North Hospital on January 18, 1997. Another nurse called him for assistance in dealing with a patient, D.J., who had been found lying non-responsive on the floor. D.J. was HIV+. Hamner and other patients attempted to resuscitate him, without success. Hamner's supervisor requested a follow-up report. Hamner submitted a written report that was extremely critical of the hospital staff, both regarding availability of necessary equipment and the responses of staff members to the emergency situation. Hamner's report did not mention that the patient was HIV+, or make any charge that the patient's HIV-status had anything to do with the quality of his treatment. However, after Hamner submitted the report, he was discharged. The story that went around was that Hamner was discharged for measuring a psychiatric patient's penis!

Hamner sued under the ADA, and also made a state tort law defamation claim with regard to the penis-measuring story. (The patient in question later executed an affidavit stating that Hamner had not measured his penis.) Hamner's ADA theory was that he was discharged in retaliation for his protest about discriminatory treatment of D.J. The problem, however, was that his report never mentioned D.J.'s HIV+ status, and, as District Judge Tinder pointed out, it is difficult based on Hamner's various factual allegations and deposition statements to put together a plausible retaliation case. There was no evidence, for example, that the lack of appropriate equipment for the resuscitation had anything to do with D.J.'s HIV-status, or that the failed efforts of staff were motivated by that either.

As to the defamation claim, the court found that qualified privilege protected the hospital regarding internal communications, and even the statements made to two health care professionals who were not employed by the hospital (but who had some authority with respect to the issue of Hamner's continued employment) were protected under a state law regarding responses to inquiries about employees. Although it turned out that the penis-measuring story was false, Hamner could not plausibly allege that the hospital staff members made those statements with knowledge or reckless disregard of its falsity. Indeed, the patient's psychiatrist had warned the staff against asking the patient about the incident, for reasons of the patient's mental health, so it was impossible for the hospital to have checked out the story. A.S.L.

Court Strikes Down N.Y. City Hall Demonstration Restrictions in Suit by AIDS Service Group

Rules limiting the size of gatherings on the steps and plaza of NYC City Hall were struck down by Federal District Judge Harold Baer, Jr., as he granted a permanent injunction sought by Housing Works. *Housing Works, Inc. v. Safir*, 2000 WL 358373 (S.D.N.Y., April 6).. Housing Works had sought to hold a World AIDS Day commemoration and was denied a permit even though much larger events had been held at the same location. In his ruling, Judge Baer cited a recent 2nd Circuit decision, *Tunick v. Safir*, which took note of "a relentless onslaught of First Amendment litigation" under NYC Mayor Rudolph Giuliani's administration.

Housing Works is a not-for-profit organization that provides services for people with AIDS and HIV. They have and continue to vigorously protest Giuliani's policies as they relate to people with AIDS and HIV. On July 14, 1998, Housing Works sought a preliminary injunction when the City had limited press conferences on the steps of City Hall to 25 people. A preliminary injunction allowing Housing Works to hold a press conference of 50 people was granted. On September 23, 1998, the police department issued rules which said that "no events of any type, without exception, could take place on the steps of City Hall." The following month, Mayor Giuliani hosted 5,000 invited people to celebrate a Yankees World Series victory in front of City Hall, using the steps.

Two weeks later, Housing Works was denied a permit for a World AIDS Day commemoration in front of City Hall. The City issued a new policy on November 10, 1998, providing that public gatherings "will not be permitted within certain protective zones." This new policy, allegedly for security reasons, authorized ceremonial occasions which were "of extraordinary public interest," "unique to city hall," "unique, non-annual events of civic and city-wide import (e.g. inaugurations, visits by world leaders, sports achievements, etc.)," *and* "require a ticket for entry."

Within a week, the City had a ceremony for astronaut Senator John Glenn with 3,000 attendees who were issued tickets. Housing

Works held their World AIDS Days commemoration near City Hall after getting a court order. The City blocked off the event with metal barriers, separating the speakers, participants and press into three pens. A 24 hour vigil held at the far end of City Hall park was not restricted.

Starting on December 7, 1998, City Council members held press conferences without seeking permission, to protest the rules. Those rules were again amended on February 23, 1999, allowing for the use of metal detectors and other searches on people entering a "Municipal Security Section" where groups of 50 people could hold events if a City Council member invited them and was present. Those who did not have a connection to a City Council member could hold rallies at the farthest point of City Hall park. These restrictions did not apply to "public ceremonies and commemorations, inaugurations, award ceremonies, celebrations, festivals and similar events" that are "traditionally" sponsored by the City.

On April 6, 1999, following a Court conference, the City suspended for 90 days the requirements of having a City Council member present at events and added restrictions providing for advance notice of an event and time restrictions. On June 16, 1999, the rules were once again revised, but still excluded from restrictions were all events "traditionally" sponsored by the City. Judge Baer noted that among those "traditional" events held were a Young Republicans rally and a Daily News stickball tournament.

Baer found that criteria for using the City Hall steps "set forth no clear principles" to guide officials who decided whether an event could be considered one "traditionally" sponsored by the City. Allowed events included "press conferences and expressive activities, including demonstrations and vigils, and are subject to limitations on the number of speakers." Housing Works contended that the rules allowed the City to prohibit or limit activities which they did not like while placing no limitation on City-sponsored programs. The City, denying discrimination based on content, sent a letter to the Court on February 16, 2000 "in effect stipulating that no longer would the City sponsor a host of cultural events" near City Hall which they "traditionally" had in the past, presumably to avoid any further constitutional challenge. But Judge Baer wrote that "the Final Rules permit the City to exclude [from the restrictions] virtually any activity which the City chooses to sponsor. It is hard for this Court to imagine that a celebration of the Yankee's victory is inherently a governmental activity and worthy of City Hall sponsorship while the commemoration of World AIDS Day is relegated to an event with no more than fifty or one hundred and fifty participants." Baer issued an order permanently enjoining operation of the current rules.

The *New York Daily News* reported that on April 19 Mayor Giuliani announced that there was an "immediate threat" to City Hall and protests would be limited to 300 people for up to three hours in a location chosen by the police. The police would have 10 days to decide whether or not to grant a permit. The article indicated that there were exceptions, among them ticker tape parades. The article did not elaborate further on the exceptions. An attorney for the City was quoted as saying, "This new rule, in our view, addresses the concerns raised by the Court." A police brutality march that terminated in City Hall Plaza on April 20 came off without incident. *Daniel Schaffer*

Federal Court Rejects HIV Harassment Claim

In an April 29, 1999, opinion only recently made available on Westlaw, *Maples v. General Motors Corp.*, 1999 WL 1068588, 15 NDLR P 176 (U.S.Dist.Ct., E.D.Mich.), District Judge Roberts granted summary judgment to the employer on a claim by Theodore Maples that he was unlawfully subjected to harassment because, as an openly-gay man, his co-workers believed that he was an "AIDS case." Roberts rejected Maples' argument that General Motors could be found liable for disability discrimination based on the attitudes of his co-workers, finding that the "regarded as having a disability" provisions of federal and state law referred to the employer's attitude toward the employee, not the attitudes of co-workers. Maples had not made any allegations that G.M. management considered him to be HIV+ or to have AIDS. Further, Roberts found that the harassment alleged by Maples was due to his sexual orientation, not to perceived HIV status, and that sexual-orientation-based harassment is not actionable under federal or state law. Finally, Roberts found that General Motors had responded in some way to every complaint made by Maples, and thus had not manifested the indifference necessary to subject it to liability. A.S.L.

AIDS Criminal Law Notes

An HIV+ woman was sentenced to 4 to 10 years in prison on April 4 after she allegedly bit, scratched and bled on a deputy sheriff and guards as they were attempting to escort her to a county prison after she was arrested on a disorderly conduct charge. Dorelle Davis pleaded guilty to four counts of aggravated harassment by a prisoner, resisting arrest and attempted escape for her role in the incident, and it was reported that she knew she was HIV+ when she engaged in this conduct. The presiding judge at sentencing was Pennsylvania District Judge Gay Elwell of Easton. *Allentown Morning Call*, April 5.

A native of Belize who is under indictment for illegal entry into the U.S. is not entitled to have the indictment quashed on the ground that he is HIV+ and there is "no effective treatment" for HIV available in Belize, according to U.S. District Judge Schwartz, S.D.N.Y., ruling in *United States v. Crown*, 2000 WL 364890 (April 10). The facts and procedural history of this case are too lengthy to summarize here; but it suffices to say that Errol Crown raised the issue of his HIV status for the first time relatively late in the proceedings, which began years ago when he was caught helping to smuggle cocaine in at the Mexican border. The issue was never raised at his first deportation hearing, leading Crown now to contend that he had ineffective assistance of counsel, but there was no indication in his allegations that he told his counsel he was HIV+, and even if he had, Judge Schwartz found that his counsel might have felt as a strategic move it would be better not to raise HIV status at that phase of the proceedings, so the decision whether to raise the issue was the kind of strategic call that could not provide the basis for an ineffective assistance finding. A.S.L.

AIDS Litigation Notes

Granting certiorari in a case from the 11th Circuit, the Supreme Court is again trying to confront the question whether Congress has effectively abrogated state immunity from suit under the employment provisions of the Americans With Disabilities Act. *University of Alabama v. Garrett*, No. 99–1240, cert. granted, 4/17/00, decision below, 193 F.3d 1214 (1999). In recent decisions, the Court has found states invulnerable to a direct suit by their employees to enforce rights under the Fair Labor Standards Act and the Age Discrimination in Employment Act. Of course, if the Court finds no private cause of action against a state employer under the Americans With Disabilities Act, people with HIV/AIDS encountering discrimination will, as a practical matter, be left to pursue state law remedies against their public employers, since it is unlikely that the EEOC will be able to pursue more than a negligible number of state employment suits on their behalf.

A federal district court jury in Los Angeles unanimously ruled on April 21 in favor of the estate of Robert Jahn, a Walt Disney Company executive who died from AIDS in 1996, finding that Disney had coerced Jahn into signing away millions of dollars in benefits in order to avoid being discharged (and thus losing his insurance coverage) over a charge that he had taken kickbacks from vendors to Disney. Lawyers for Jahn's estate contend that the kickback charges were untrue, but that Jahn was on his deathbed when the charges arose and did not have the strength to mount a defense. The estate sued Disney for $2.2 million, but U.S. District Judge Dean Pregerson (C.D. Cal.) has yet to decide

how much of that claim will be awarded in damages as a result of the jury verdict. *Associated Press*, April 22.

In a brief memorandum, the N.Y. Appellate Division, 2nd Dept., affirmed a ruling by Westchester County Supreme Court Justice DiBlasi in *Dunlap v. Levine*, 2000 WL 371186, affirming dismissal of an AIDS phobia complaint. Said the court, "Although the appellant established that he was exposed to the HIV virus [sic] and that his fear of contracting the disease was reasonable, he failed to raise an issue of fact as to the respondents' negligence. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment properly made by the moving parties." The plaintiff is a funeral home employee who sustained an injury from a sharp item present with a corpse presented for funeral preparation; the defendants include St. Luke's-Roosevelt Hospital Center, Health Nutritional Services a/k/a Healthdyne, Med-Tec, Inc, and U.S. Home Care Corp. of Manhattan. For more detailed discussion of the factual allegations in the complaint, see the trial court's opinion, published in the *New York Law Journal* on Feb. 8, 1999, and reported in the March 1999 edition of *Lesbian/Gay Law Notes*.

The Court of Appeals of Wisconsin ruled April 18 that a man who was afraid of contracting HIV from having a blood sample drawn did not have a reasonable basis for objecting to having his blood drawn after being arrested for driving while intoxicated. *State of Wisconsin v. Mahler*, 2000 WL 387531. Mahler was stopped at 2 a.m. on May 28, 1998, by Eau Claire police officer James Southworth, and arrested for operating a motor vehicle while intoxicated. He was brought to a nearby hospital to have his blood drawn for a test of his blood alcohol level. He refused to consent, but the test sample was drawn over his protest. Then he moved to have the test result suppressed, arguing that in light of his objection the police should have used a breath test instead. The trial court found that a breath test was an available alternative, and concluded that drawing Mahler's blood under protest was unreasonable. Reversing, Judge Peterson wrote that the issue was whether Mahler had a reasonable objection, and fear of contracting HIV from having his blood drawn under sterile conditions in a hospital was not reasonable.

Yet another circuit heard from on the question whether the ADA is violated when an employee benefit plan provides a different level of coverage for different disabling conditions. In *Equal Employment Opportunity Commission v. Aramark Corp., Inc.*, 2000 WL 336916 (D.C.Cr., April 14), the court held that a benefit plan adopted prior to the ADA's enactment that provided lesser benefits for psychiatric disabilities than for physical disabilities could not be considered a "subterfuge" for purposes of evading the Act, and thus was protected by the "safe harbor" provision for bona fide employee benefit plans. A.S.L.

AIDS Legislative Notes

On April 25, the Hawaii state legislature completed final work on a bill that will allow people with specific illnesses, including HIV-infection, to use marijuana as a medical treatment, and Governor Ben Cayetano, a supporter of access to marijuana for medical use, indicated he would sign the legislation without delay. The final vote in the state senate was 15–10. Whether federal law enforcement officials will attempt to interfere with implementation of this law is not yet known. *New York Times*, April 26.

Virginia Governor James Gilmore has signed into law a bill that makes it a felony to intentionally infect someone with HIV, Hepatitis B or syphilis through sexual intercourse. *Virginian-Pilot & Ledger-Star*, Norfolk, Virginia, April 11.

The Rhode Island state senate has approved a bill that would repeal the law that makes it a crime to possess a hypodermic needle without a prescription. According to the *Providence Journal*, April 27, the measure was specifically intended to prevent the spread of AIDS by "ensuring a plentiful supply of new, sterile needles," which could be bought without restrictions in pharmacies. The measure passed 28–17, and now goes to the state House. Gov. Almond has not stated a position on the issue. According to the news report, Rhode Island is now one of just seven states that have a criminal ban on needle possession, and the Senate debate focused on neighboring Connecticut's experience. Connecticut repealed its needle law in 1992 and has documented a decrease in needle transmissions of AIDS and hepatitis in subsequent years. A.S.L.

AIDS Law & Society Notes

Surprise, surprise! No sooner did the Supreme Court refuse to review the 7th Circuit's decision in *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), holding that the ADA does not prohibit AIDS-caps on insurance policies, that Mutual sent letters to its policyholders announcing that it was terminating the practice of capping AIDS-related claims at a lower ceiling than other claims. A company spokesman said the caps come off existing policies on May 1, because Mutual has learned more about the costs of covering AIDS-related illnesses and has apparently concluded that under current treatment regimes the disease should not be singled out for differential treatment. It was the plaintiff's position in *Doe*, of course, that "there is no legitimate, financial reason to treat" people with HIV differently from everybody else, said Heather Sawyer, a Lambda Legal Defense Fund staff attorney who represented the plaintiffs. *Wall Street Journal*, April 14. A.S.L.

AIDS International Notes

The South Africa *Business Daily* reported April 17 that the government is facing mounting pressure from employers to amend the Employment Equity Act to allow for voluntary HIV testing of workers. Employers are reported to say that they need to do voluntary testing to determine the prevalence of HIV in their workforces. Legal commentators are divided over whether the current law actually would be construed to prohibit such voluntary testing, but employers are reluctant to take the issue to the Labour Court, preferring a clarifying amendment. On the other hand, the government is hesitant to open a legislative debate on the topic. ••• Meanwhile, the South African government announced on April 18 that the number of South Africans infected with HIV was estimated at 4.2 million, or nearly 10 percent of the population. The figure was extrapolated from a national survey of women attending public prenatal clinics, which showed that 22 percent of tested pregnant women were HIV+. This gives South Africa one of the highest rates of HIV infection in the world. *Orlando Sentinel*, April 19.

A New Zealand court has sentenced Jeremy Douglas Walker, 22, to five years in prison for forcing women to have intercourse with him without using a condom. This was reported to be the first such conviction in New Zealand by *New Truth & TV Extra*, April 7.

In Ontario, Canada, Francisco Guevara, 37, was sentenced to 2 years, 4 months in prison for spitting in the face of a county jail staff member, under a 1999 law making "propulsion of a dangerous substance at a corrections officer" a felony. In addition to imprisonment, Guevara must pay $2546 (Canadian) in court fees and restitution, and submit to HIV testing. *Portland Oregonian*, April 19. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Clark, Randall Baldwin, *Platonic Love in a Colorado Courtroom: Martha Nussbaum, John Finnis, and Plato's* Laws *in* Evans v. Romer, 12 Yale. J. L. & the Humanities 1 (Winter 2000).

DelPo, Marianne C., *The Thin Line Between Love and Hate: Same Sex Hostile Environment Sexual Harassment*, 51 Lab. L. J. 15 (Spring 2000).

Ertman, Martha M., *Oscar Wilde: Paradoxical Poster Child for Both Identity and Post-Identity*, 25 L. & Soc. Inq. 153 (Winter 2000).

Gary, Susan N., *Adapting Intestacy Laws to Changing Families*, 18 L. & Inequality 1 (Winter 2000).

Gerber, Paula, *Case Comment: South Africa: Constitutional Protection for Homosexuals A Brave Initiative, But Is It Working?*, 9 Australasian G.L.L.J. 37 (Feb. 2000).

Heyman, Steven J., *State-Supported Speech*, 1999 Wis. L. Rev. 1119 (includes discussion of NEA funding controversy and homoerotic art).

Marr, David, *How Can We Square Freedom with Anti-Vilification Laws?*, 9 Australasian G. L. L. J. 9 (Feb. 2000).

Millbank, Jenni, *The Property (Relationships) Legislation Amendment Act 1999 (NSW) versus the De Facto Relationships Amendment Bill 1998 (NSW)*, 9 Australasian G. L. L. J. 1 (Feb. 2000).

Puplick, Chris, *Achieving an Equilibrium: A Reply to David Marr*, 9 Australasian G.L.L.J. 22 (Feb. 2000) (see Marr, David, above).

Shackel, Rita, *The Commercial Sexual Exploitation of Children: A Review of International Legal Responses*, 1999 Australian Int'l L. J. 91.

Sharpe, Alexander, *Imagining the Sexual: Transgendered Desire and Law's Limit*, 3 Flinders J. L. Reform (Australia) 273 (Dec. 1999).

Spitko, E. Gary, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 Wash. U. L. Q. 1065 (1999).

Strasser, Mark, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 Tenn. L. Rev. 1019 (Summer 1999).

Stuhmke, Anita, *Book Reviews: Sexuality, Morals & Justice: A Theory of Lesbian & Gay Rights*, 9 Australasian G.L.L.J. 74 (Feb. 2000).

Thomas, Ann F., *Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard*, 16 N.Y.L.S. J. Hum. Rts. 1 (1999).

Walker, Kristen L., *Capitalism, Gay Identity and International Human Rights Law*, 9 Australasian G.L.L.J. 58 (Feb. 2000).

Student Notes & Comments:

Hofland, Constance, *Constitutional Law First Amendment Freedom of Speech: The National Endowment for the Arts Can Require Consideration of "Decency and Respect" in Funding Decisions Without Abridging Freedom of Speech*: National Endowment for the Arts v. Finley, *118 S.Ct. 2168 (1998)*, 75 N.D. L. Rev. 893 (1999).

Recent Cases, *Family Law Massachusetts Supreme Judicial Court Upholds Probate Court's Exercise of Equity Power in Granting Visitation Between a Child and a Lesbian De Facto Parent* E.N.O. v. L.L.M., *711 N.E.2d 886*, cert. denied, *120 S.Ct. 500 (1999)*, 113 Harv. L. Rev. 1551 (April 2000).

Recent Cases, *International Law Human Rights European Court of Human Rights Rules That British Military's Discharge of Homosexuals Is Illegal* Lustig-Prean and Beckett v. United Kingdom, *App. Nos. 31417/96 and 32377/96 (Eur. Ct. H.R. Sept. 27, 1999)*, and Smith and Grady v. United Kingdom, *App. Nos. 33985/96 and 33986/96 (Eur. Ct. H.R. Sept. 27, 1999)*., *113 Harv. L. Rev. 1563 (April 2000)*.

Seminal Article on Gay Law Reprinted

The fiftieth anniversary commemorative issue of the *Hastings Law Journal* contains reprints of the most frequently cited articles published in that journal during the past fifty years. Number five on the list is by Rhonda R. Rivera, an emeritus professor from Ohio State University who now teaches part time at the University of Arizona Law School, titled "Our Straight-Laced Judges: the Legal Position of Homosexual Persons in the United States," originally published at 30 Hastings L.J. 799 (1979), and long since out of print. The republication in the April 1999 issue of the journal assures accessibility of this ground-breaking article, which broadly surveyed all the reported (and many unreported) court decisions concerning homosexuality as of its publication. Prof. Rivera has written a Forward for the article, titled "Our Straight-Laced Judges: Twenty Years Later," 50 Hastings L.J. 1179, describing how the article came to be written and offering wise reflections on legal developments affecting lesbians and gay men over the past twenty years. A must read!!

Specially Noted:

The 9th volume of the Australasian Gay and Lesbian Law Journal (Feb. 2000) has been published, with articles as noted above. ••• The March 29 issue of *The Daily Journal* in San Francisco, a legal newspaper, included a feature article commemorating the 20th anniversary of Bay Area Lawyers for Individual Freedom, under the title "Out at the Bar." *The Recorder*, another San Francisco publication, issued a special section to commemorate BALIF's anniversary, featuring a roundtable discussion by openly lesbian and gay judges and lawyers. ••• In the *National Law Journal*'s April 24 issue, the "Associates" column by Michael D. Goldhaber is about the all-gay law firms of Johnson, Gulling Heltzer & Burg, in Minneapolis, and Crockett & Chasen, in Miami Beach.

AIDS & RELATED LEGAL ISSUES:

Eichhorn, Lisa, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 Arizona St. L. J. 1071 (Winter 1999).

Palmer, Larry I., *Patient Safety, Risk Reduction, and the Law*, 36 Houston L. Rev. 1609 (1999).

Parmet, Wendy E., *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 Houston L. Rev. 1663 (1999).

Student Notes & Comments:

Acosta, Efren A., *The Texas Communicable Disease Prevention and Control Act: Are We Offering Enough Protection to Those Who Need It Most?*, 36 Houston L. Rev. 1819 (1999).

Girot, Ann Marie, *"Disability Status" for Asymptomatic HIV? Pondering the Implications, Unanswered Questions, and Early Application of* Bragdon v. Abbott, 1999 Utah L. Rev. 755.

Kromm, David, *HIV-Specific Knowing Transmission Statutes: A Proposal to Help Fight an Epidemic*, 14 St. John's J. Legal Comment. 253 (Fall 1999).

Manning, Jeffrey S., *Are Insurance Companies Liable Under the Americans With Disabilities Act?*, 88 Cal. L. Rev. 607 (March 2000).

McGuire, Amy L., *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 Houston L. Rev. 1787 (1999).

Short, Andrea K., *Eradicating Discrimination* Among *Individuals With Disabilities: Parity in Employer-Provided, Long-Term Disability Benefit Plans*, 56 Wash. & Lee L. Rev. 1341 (Fall 1999).

Smith-Duer, Barbara M., *Too Disabled or Not Disabled Enough: Between a Rock and a Hard Place After* Murphy v. United Parcel Service, Inc., 39 Washburn L. J. 255 (Winter 2000).

Specially Noted:

22 Univ. of Arkansas at Little Rock L. Rev. No. 2 (Winter 2000) is devoted to an essay and two articles about disability discrimination law, critical of the ways in which judicial interpretation and legislative timidity have narrowed the protection for people with disabilities. Laura F. Rothstein, *Reflections on Disability Discrimination Policy 25 Years*, 22 U. Ark. L. Rev. 147; Luther Sutter, *The Americans With Disabilities Act of 1990: A Road Now Too Narrow*, 22 U. Ark. L. Rev. 161; Stephen W. Jones, *The Supreme Court Reins in the Americans With Disabilities Act*, 22 U. Ark. L. Rev. 183.

EDITOR'S NOTE:

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