KANSAS APPEALS COURT REVIVES TRANSSEXUAL MARRIAGE CASE

In an extraordinary unanimous opinion, a three-judge panel of the Kansas Court of Appeals has ruled that questions of sex and gender may not be resolved solely by reference to genes and chromosomes, but must take into account the latest scientific information about gender identity. In so ruling, the court reversed a grant of summary judgment in an intestate succession dispute between J'Noel Gardiner, a male-to-female transsexual who is the widow of Marshall G. Gardiner, and Marshall's son from a prior marriage, Joseph M. Gardiner, III, who claimed that J'Noel's marriage to Marshall was void, depriving her of any right to inheritance. *Matter of the Estate of Marshall G. Gardiner*, 2001 WL 497777 (May 11, 2001).

J'Noel, a native of Wisconsin, was determined to be male at birth and was named Jay N. Ball. J'Noel grew up as a man but from early childhood felt uncomfortable with that sexual identity, a discomfort that persisted through two heterosexual marriages. In 1991, J'Noel began electrolysis and thermolysis to begin removing body hair, and gradually went through other procedures while receiving therapy and counseling. This process culminated in 1994 with sex reassignment surgery, including genital surgery to produce a functioning vagina in place of her penis. She obtained from a Wisconsin court an order entitling her to a changed birth certificate indicating female sex and her new name of J'Noel Ball. Ball, a highly educated individual, was teaching at Park College in May 1998 when she met Marshall Gardiner, an elderly widower whose son, Joseph, was estranged from him. Marshall fell in love with J'Noel and proposed marriage to her, a proposal she accepted after some consideration. In July 1998, J'Noel told Marshall about her past sexual identity, but this did not change his attitude towards her and they were married in Kansas on September 25, 1998.

Marshall died intestate on August 12, 1999, when he and J'Noel had been living together as spouses for more than ten months. His son Joe filed letters of administration, naming himself and J'Noel as Marshall's legal heirs, but alleging that J'Noel had waived any rights of inheritance and that Joe was legally entitled to the entire estate. J'Noel filed an objection, also applying for letters of administration as the surviving spouse. Joe then petitioned to amend his pleadings, claiming that he was Marshall's sole heir because the marriage was void. Joe argued that Kansas law prohibits same-sex marriages and that J'Noel, in the eyes of Kansas law, was a male who could not lawfully marry Marshall. He also advanced fraud arguments, contending that Marshall married J'Noel not knowing about J'Noel's past, and that J'Noel had defrauded Marshall on the issue of waiving inheritance rights. Joe moved for summary judgment, and J'Noel countermoved for partial summary judgment, asserting that under the Full Faith and Credit Clause of the U.S. Constitution, her Wisconsin birth certificate should be treated by the Kansas court as preclusive on the issue of her gender at the time of marriage.

In the Leavenworth, Kansas, District Court, Judge Gunnar A. Sundby ruled that as a matter of Kansas law, anybody born a man remained a man and could not be changed to a woman. Sundby relied upon and heavily quoted the Texas Court of Appeals decision in *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), rev. denied, March 2, 2000 (Tex. Sup. Ct.), cert. denied, 121 S. Ct. 174 (Oct. 2, 2000), in which the Texas courts held void a marriage between a man and a male-to-female post-operative transsexual, on the grounds argued by Joe Gardiner in this case. Consequently, Sundby found the marriage void and held that J'Noel had no right to any part of Marshall's estate. J'Noel appealed, represented by Sanford P. Krigel and Karen S. Rosenberg of Kansas City, with amicus support from the ACLU of Kansas and Western Missouri, Lambda Legal Defense & Education Fund, the ACLU of Illinois and the Gender Public Advocacy Coalition. The Thomas More Center for Law & Justice, a conservative Catholic litigation organization, weighed in on behalf of Joe Gardiner.

Writing for the court, Judge Gernon found that the district court was free to attach whatever weight it thought appropriate to the Wisconsin birth certificate, applying the Full Faith and Credit Clause. Gernon ruled that it is clear that a birth certificate is the kind of "public record" that is subject to full faith and credit, however, full faith and credit consists of giving a public record from a particular state the same weight that the courts of that state would give it. Wisconsin statutes provide that a birth certificate is normally conclusive evidence of the facts recorded on it, but authorizes Wisconsin courts to exercise their discretion with respect to birth certificates that are amended more than a year after the birth. So, although Wisconsin (unlike Kansas) has specifically authorized a change of sex on a birth certificate in response to a sex reassignment procedure, a Wisconsin court is not required to give the amended certificate preclusive effect on the issue of the individual's sex for legal purposes. Therefore, found Gernon, the Full Faith and Credit Clause does not require a Kansas court to give the certificate preclusive effect, either. Gernon also rejected J'Noel's attempt to mount an equal protection challenge on the appeal, finding that no such argument had been raised before the trial court.

However, Gernon found that Judge Sundby erred by granting summary judgment in favor of Joe Gardiner on the question of J'Noel's sex. Gernon produced an opinion that relies extensively on a recent law review article by Professor Julie Greenberg of Thomas Jefferson Law School, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology," 41 Ariz. L. Rev. 265 (1999). Gernon quotes several pages of material from the article, which sets out a detailed review of scientific information about the biology of sex and gender. Although Greenberg's immediate concern was to explore these issues in the context of intersexuality (and her article is the first extended law review treatment of this subject), Gernon took the material as illustrative of the broader proposition that the traditional dimorphic view of human sexuality is obsolete.

In the course of her scientific review, Greenberg made salient observations about transsexuality, and referred to recent research suggesting evidence from brain studies that a male-to-female transsexual's feeling of discomfort with their socially-assigned male gender has a biological basis, and is not based solely on psychology. Gernon cites the study (which had not yet been published at the time of Greenberg's article), Kruijver, Zhou, Pool, Hofman, Gooren and Swaab, "Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus", 85 J. of Clinical Endocrinology & Metabolism 2034 (2000), and characterizes it as follows: "A recent study that autopsied the brains of transsexuals and others supports a conclusion that there is a scientific basis for J'Noel's assertion that she was born with a condition — specifically that she had a penis and testicles, which was evidence that she was male, but in most other sense of the word, she was female. The same science which allows us to map the genome and explore our DNA requires us to recognize these discoveries in all aspects of our lives, including the legal ramifications. We can no longer be permitted to conclude who is male or

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who is female by the amount of facial hair one has or the size of one's feet."

In her article, Prof. Greenberg listed eight different factors to be taken into account in determining an individual's sex: genetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (whether the fetus at three months has begun generating male or female internal reproductive organs), external morphologic sex (whether the person after birth exhibits male or female genitalia), hormonal sex (the mix of hormones generated by the body), phenotypic sex (secondary sexual characteristics such as facial or chest hair, breasts, voice), assigned sex and gender of rearing, and self-perceived sexual identity. The court specifically identified this list of the factors to be followed by the court in making a determination of sex for legal purposes, stating, "we adopt the criteria set forth by Professor Greenberg… The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances." The court also stated that "chromosome makeup" could be considered as a factor in the determination, "but not the exclusive factor."

However, the court seemed determined not to leave to change the ultimate outcome on this issue. Gernon stated, "This court rejects the reasoning of the majority in the *Littleton* case as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion." Gernon instructed the trial court on remand to consider whether J'Noel was male or female at the time the married license was issued, not simply what her chromosomes were at birth. The court noted that prior case law on transsexuality (which the opinion extensively surveys and summarizes) has been superseded by the new scientific studies, and also distinguished many of those cases as not involving the kind of relationship that existed between J'Noel and Marshall, which Gernon characterized as appearing from the record to have been "stable and compatible." Most significantly, in terms of the existing case law, Gernon stated: "This court looks with favor on the reasoning and language of *M.T. v. J.T.*, 140 N.J. Super. 77, 335 A.2d 204, *cert. denied*, 71 N.J. 345 (1976)," a case in which the New Jersey courts upheld as valid a marriage between a man and a male-to-female transsexual in the context of a divorce and support proceeding. So, there seems little chance that Judge Sundby if it is indeed Sundby who gets the case on remand — could rule that J'Noel was a man at the time of her marriage without being reversed on appeal.

However, the court held that Joe's fraud allegations also could not be disposed of by summary judgment, since the court would have to make a factual inquiry into the events leading to the marriage to determine whether Marshall proceeded cognizant of J'Noel's history, as she claims, and also whether the marriage was contracted with any understanding about J'Noel's inheritance rights. "If fraud can be shown, a marriage can always be annulled, under any circumstances," wrote Gernon. But, apparently signaling the trial court to tread carefully here as well, Gernon continues: "Here, the evidence in the appellate record to date points to a conclusion that Marshall knew of the transsexual nature of J'Noel, approved, married, and enjoyed a consummated marriage relationship with her."

To put a firm note of closure on the opinion, Gernon quoted from an article by Dr. William Reiner of Johns Hopkins, "To Be Male or Female — That is the Question<@148 151 Arch. Pediatr. Adolesc. Med. 225 (1997), in which Reiner asserts that individuals must determine their own sexual identity, and the quotation concludes: "In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain."

The *Kansas City Star* reported on May 24 that Joe Gardiner has filed a motion for reconsideration with the court, a procedural requirement before he can petition the Kansas Supreme Court to review the case. A.S.L.

Minnesota Trial Courts Enjoins Enforcement of Consensual Sodomy Law

In a peculiarly-worded opinion dated May 15 but released to the public on May 21, Hennepin County, Minnesota, District Judge Delila F. Pierce granted a summary judgment motion for a declaratory judgement that the Minnesota statute criminalizing "consensual sodomy," Minn. Stat. Sec. 609.293, violates the state constitution's right of privacy. Timothy E. Branson, from the Minneapolis law firm of Dorsey and Whitney, appeared before Judge Pierce in a hearing on April 19, to argue the motion in *Doe v. Ventura*, 2001 WL 543734, in this test case that was put together by Leslie Cooper of the national ACLU Lesbian and Gay Rights Project in coordination with the Minnesota Lavender Bar Association and Minnesota ACLU attorney Teresa Nelson. The named plaintiffs are a diverse group of Minnesota citizens, some using pseudonyms.

Judge Pierce's opinion is "peculiarly-worded" in that it consists of an extended summary of the plaintiff's arguments as to standing, jurisdiction and the merits, followed by a one-sentence conclusion: "The court finds Plaintiffs' reasoning persuasive and, accordingly, declares Minn. Stat. Sec. 609.293 to be unconstitutional, as applied to private, consensual, non-commercial acts of sodomy by consenting adults, because it violates the right of privacy guaranteed by the Minnesota Constitution." Judge Pierce provided no explanation about why she found the plaintiffs' arguments persuasive, and made no mention of any arguments by the state, other than to mention that the state conceded that there are no contested issues of material fact, thus providing the basis for the court to rule on the summary judgment motion without holding a trial.

In order to show that there was a genuine controversy sufficient to merit adjudication under Minnesota's provisions for declaratory judgments, the plaintiffs alleged that various attempts to repeal the statute had been resisted by the legislature, the Minneapolis police chief had stated his expectation that the police force would enforce the statute, and several of the plaintiffs held or were applying for professional licenses that required them to swear that they were not violating any state laws, which as practicing sodomites they were not in a position to swear!

As to the merits of the state constitutional privacy claim, the plaintiffs argued that beginning with its decision in *State v. Gray*, 413 N.W.2d 107 (Minn. 1987), the Minnesota Supreme Court had acknowledged a state constitutional right of privacy, and that subsequent decisions showed that the Minnesota courts considered that right to be broader than the privacy right recognized by the U.S. Supreme Court under the 14th Amendment. The *Gray* case, which involved a male judge who had been charged with soliciting a teenage boy to engage in prostitution with him, led the court to hold that there was a right of privacy in the state constitution, but it did not extend to commercial sexual activity.

The plaintiffs emphasized the growing list of state appellate courts that have declared sodomy laws unconstitutional based on state constitutional privacy arguments, and especially noted that the Georgia sodomy statute, upheld 5–4 by the U.S. Supreme Court, had subsequently been declared unconstitutional by the Georgia Supreme Court on state constitutional grounds. The plaintiffs took pains to distinguish and refute the effect of last year's decision by the Louisiana Supreme Court in *State v. Smith*, 766 So.2d 501 (La. 2000), which rejected a state constitutional challenge to that state's sodomy law based on an "original intent" construction of the state constitution. Plaintiffs argued that the *Smith* court's approach was inconsistent with the approach that Minnesota courts have taken in privacy cases, in which strict scrutiny has been applied to circumstances that would not be subject to strict scrutiny under U.S. Supreme Court 14th and 4th Amendment privacy precedents.

According to a press release from the ACLU announcing the decision, Minnesota's sodomy law has been on the books since the 19th century and prohibits all consensual anal or oral sex between adults, regardless of sex, authorizing penalties of up to one year in jail and up to $3,000 in fines. While this declaratory judgment should be interpreted to prevent enforcement of the law any-

where in Minnesota if not appealed by the state, the ACLU is taking no chances, and expects to seek a "class action certification" from the court to ensure that the decision will have statewide effect.

Governor Jesse Ventura, the leading named defendant in the case, announced to the press that he agreed with the court's ruling, so an appeal by the state seems unlikely. The governor's office released a statement to the Associated Press, in which a spokesman said, "It's consistent with the Governor's philosophy that there are some things the government has no business making laws about. He sees this as a welcome decision." *St. Paul Pioneer Press*, May 21. A.S.L.

LESBIAN/GAY LEGAL NEWS

Arizona Repeals Law Against Consensual Sodomy

On May 8, Arizona Governor Jane Hull signed H.B. 2016, a measure drafted by openly-gay Arizona Representative Steve May, a Republican, which effectively ends Arizona's ban on consensual sodomy. May's strategy for repeal was to bundle the sodomy law issue with several other issues, and to promote the bill as a privacy measure intended to require the state to respect the wide range of diverse families.

In addition to repealing the sodomy law (which applied to anal sex), the new law also repeals the ban on lewd and lascivious acts (which applied to oral sex) and the ban on open and notorious cohabitation (unmarried adults of the opposite sex living together). It also defines "dependents" under state tax law to include cohabitants, and modifies the definition of dependent in the state tax code to remove an exclusion that a dependent cannot be claimed if the relationship is in violation of local laws.

May introduced the measure on January 8. It passed the House after much committee activity on March 20. It actually died in the Senate when it came up for a final reading on April 26, but supporters were able to win a motion for reconsideration, and the measure was passed, just barely, on April 30. Opponents of the bill deluged Gov. Hull with 6,000 communications demanding a veto. The governor could have allowed the measure to become law without her signature, but she surprised many by signing the bill on May 8. A front-page story in the *Arizona Republic* on May 8 reported the following comment by Gov. Hull: "At the end of the day, I returned to one of my most basic beliefs about government: It does not belong in our private lives."

The Arizona repeal reduces the number of state sodomy laws arguably in force to just 17: Alabama, Florida, Idaho, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, South Carolina, Utah and Virginia continue to ban all sodomy, while Arkansas, Kansas, Missouri, Oklahoma and Texas ban only same-sex sodomy. The Arkansas sodomy law was recently declared unconstitutional by a trial judge, whose decision the state will appeal. Shortly after the Arizona repeal was signed, a trial judge in Minnesota declared that state's sodomy law unconstitutional (see story above), leaving uncertainty about the continued enforceability of that law. The Texas sodomy law was declared unconstitutional by a 3–judge intermediate appellate panel, but that decision was replaced by a recent en banc upholding of the law, which is on appeal to the Texas Court of Criminal Appeals. The Massachusetts sodomy law has long been considered a dead letter due to some expansive privacy decisions by the state courts dating back to the 1970s. As recently as 1961, every state had a law against consensual sodomy. The first to repeal was Illinois when it adopted the Model Penal Code that year. A.S.L.

Supreme Court of Canada Upholds Religious Freedom Claim by Anti-Gay Christian University

On May 17, in *Trinity Western University v. British Columbia College of Teachers*, http://www.lexum.umontreal.ca/csc-scc/en/rec/html/trinity.en.html, the Supreme Court of Canada held (by 8 votes to 1) that a public teacher certification agency could not refuse to certify, as qualified to teach in public schools, graduates of a private, religious university that required faculty, staff and students to sign a "Community Standards" document prohibiting "homosexual behaviour" on or off campus.

Trinity Western University (TWU) had applied to the British Columbia College of Teachers (BCCT) for certification of its four-year teacher-training program, so as to remove the need for its students to complete a fifth year at a public university. The BCCT refused because "the proposed program follows discriminatory practices which are contrary to the public interest and public policy," subsequently citing express and implied prohibitions of sexual orientation discrimination in the Canadian Charter of Rights and Freedoms (part of the federal Constitution) and in federal and British Columbia human rights (anti-discrimination) legislation.

In its newsletter, the BCCT later said: "Labelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour. Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law.… A teacher's ability to support all children regardless of race, colour, religion or sexual orientation within a respectful and nonjudgmental relationship is considered by the [BCCT] to be essential to the practice of the profession." Before the Supreme Court, the BCCT argued that it had been authorized to require applicants to demonstrate "that they will provide an institutional setting that appropriately prepares future teachers for … the diversity of public school students."

Writing for the majority, Justices Iacobucci and Bastarache began by dismissing TWU's argument that BCCT had no jurisdiction to consider discriminatory practices in dealing with the TWU application: "Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance." Then, applying a "correctness" rather than "patent unreasonableness" standard to review the justifiability of BCCT's administrative decision, they asked: "Are the internal documents of TWU illustrative of discriminatory practices? If so, are these discriminatory practices sufficient to establish a risk of discrimination sufficient to justify that graduates of TWU should not be admitted to teach in the public schools [without one extra year of study]?" After considering the "Community Standards" and arguments as to whether there is a difference between "homosexual persons" and "homosexual behaviour," they concluded that "a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our sec. 15 [equality] jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation [discrimination in admissions on the basis of religion is permitted] and to which the Charter does not apply."

Justices Iacobucci and Bastarache then turned to "[t]he issue at the heart of this appeal … how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally." They observed that "[n]either freedom of religion [Section 2(a) of the Charter] nor the guarantee against discrimination based on sexual orientation [Section 15(1) of the Charter] is absolute," but that, properly delineated, there was no conflict between these rights in this case. The BCCT's decision "place[d] a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice." Was this burden justified? "TWU's Community Standards, which are limited to prescribing conduct of members while at

TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church."

"While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU [Simon Fraser University] teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate [or that the fifth year had corrected any student's attitudes]. ... Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. ... Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system."

"Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct.... Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs.... Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct [on duty], that teacher can be subject to disciplinary proceedings before the BCCT.... [D]isciplinary measures can still be taken when discriminatory off-duty conduct poisons the school environment. ... In this way, the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled."

In dissent, Justice L'Heureux-Dub,, applying a "patent unreasonableness" standard, would have dismissed TWU's application for judicial review of the BCCT's decision. At the outset, she soundly rejected "[t]he status/conduct or identity/practice distinction for homosexuals and bisexuals ... [so as] to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood." She then compared TWU's "Community Standards" to the ban on interracial dating and marriage in *Bob Jones University v. United States*, 461 U.S. 574 (1983), which justified the denial of a tax-exemption to a private, religious university. "[W]hile the religious exemption from human rights legislation allows for religious teacher training institutions in British Columbia to self-regulate without state interference, once graduates ask to be accredited for public school teaching, the public interest comes to the fore and reasonable secular requirements can be imposed without infringing the freedom of religion." Stressing the "pressing need for teachers in public schools to be sensitive to the concerns of homosexual and bisexual students," in view of the frequent absence of family support and their higher suicide rate, she found that it was not patently unreasonable for the BCCT: (i) "to treat [the] public expressions of discrimination [by TWU students signing the Community Standards document] as potentially affecting the public school communities in which TWU graduates wish to teach"; and (ii) "to believe that a component of the noble effort to eradicate public school homophobia, whether perceived or actual, is to require TWU students to take a fifth year of training outside the supervision of that institution." In her view, any interference with the freedoms of expression or religion of TWU or its students was justifiable under Section 1 of the Charter.

Cases like *Trinity Western*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), show that legal protection against sexual orientation discrimination must sometimes be curtailed in order to respect the freedom of religion, expression or association of the discriminator. However, the question always arises: would discrimination based on race or sex be treated in the same way? The *Trinity Western* majority declined to attempt to distinguish the U.S. Supreme Court's reasoning in *Bob Jones*: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.... [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education ... [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." Would the conclusion of the *Trinity Western* majority have been the same if TWU's "Community Standards" had included a ban on interracial dating or marriage, or a statement that "white persons are superior to non-white persons and men are superior to women"? These cases suggest that, even when sexual orientation discrimination is taken seriously (as it is by the Supreme Court of Canada), sexual orientation and religion are seen as morally relevant "choice" grounds of discrimination, in relation to which dissenting views must be given greater respect, whereas as race and sex are morally neutral "non-choice" grounds, in relation to which dissenting views are less likely to be tolerated. *Robert Wintemute*

Mississippi Supreme Court Awards Child Custody to Mother Who Was Alleged to be a Lesbian

In a 6–3 decision, the Mississippi Supreme Court has granted a biological mother sole custody of her son, ruling that the chancellor erred when he gave undue consideration to the mother's alleged affair with another woman as evidence of her "moral unfitness." *Hollon v. Hollon*, 2001 WL 463339 (May 3).

Tim and Beth Hollon were married in April 1994 in Jackson County, Mississippi. The couple had a son, Zachary Thomas, on July 16, 1996. Beth's child from a prior marriage, Tyler, also lived with the couple. Soon after Zachary's birth, the couple's marriage began to deteriorate. After one temporary separation, Tim moved out of the couple's apartment permanently and moved in with his parents, leaving Zachary and Tyler in Beth's care. In order to help pay the bills, Beth took in a roommate, Beth Dukes and her two children. Beth and Dukes shared expenses, household chores, babysitting responsibilities, and a bed. Beth denied any sexual relationship between her and Dukes, but a family friend testified that Beth confided having sex with Dukes. When Tim heard rumors about Beth and Dukes' relationship, he snuck into their apartment and took pictures of things he felt were "inappropriate," including Duke's clothing in the bedroom she shared with Beth, beer bottles in the refrigerator and trash, and "one red light bulb in ceiling fixture."

During the trial, Beth left Dukes and moved into her parents' house with her two children. According to the Supreme Court, this decision appears to have been motivated by a "veiled threat" by the chancellor — that he would draw negative inferences of adultery from Beth and Dukes continuing to live together.

Tim and Beth each testified that the other was a good parent and had Zachary's best interests at heart. Tim admitted that the only problem he had with Beth having permanent custody of Zachary was his belief that she had engaged in "homosexual activity." On December 20, 1999, the chancellor entered a final judgment granting Tim and Beth a divorce on the grounds of irreconcilable differences, granting Tim custody of Zachary, ordering Beth to pay approximately $200 a month in child support to Tim, and allowing Tim to claim Zachary as a dependent on his federal and state income taxes.

According to the opinion for the court by Justice Diaz, the chancellor focused "the lion's share" of his opinion on the "moral fitness" of the parents. For example, the chancellor stated that Beth's having a red light bulb in a fixture was "somewhat unusual, but not determinative of the issues herein." Justice Diaz commented: "It is impossible to understand why the color of a light bulb is mentioned under this heading [of moral fitness.]" The chancellor went on to discuss at length the alleged affair between Beth and Dukes. In particular, the chancellor found Beth's testi-

mony to be untrustworthy, and even asked the District Attorney's office to consider conducting an investigation as to whether Beth had committed perjury when she denied having a sexual relationship with Dukes. The chancellor stated that he lacked confidence that Beth was a truthful, forthright person, an assessment which weighed heavily against awarding her custody of Zachary.

Justice Diaz explained that although a deferential "abuse of discretion" standard of review applied to the chancellor's determination, the evidence demonstrated that the majority of the factors relevant to custody determinations weighed in favor of Beth retaining custody of Zachary. The court also noted that the chancellor failed to mention certain factors that weighed against awarding custody to Tim, including Tim's admission that he drank a couple of beers every other day, and gambled every other week (Tim testified that he had not gambled recently, but only because he didn't have money to do so.)

Diaz noted, "It is clear from the record that the chancellor's defining consideration in determining custody of Zachary centered on the allegations of Beth's homosexual affair. In doing so, the chancellor committed reversible error. The chancellor abused his discretion by placing too much weight upon the 'moral fitness' factor and ignoring the voluminous evidence presented under the remaining factors supporting Beth as the preferred custodial parent."

A separate concurring opinion, written by Justice Waller and joined by three other justices, found that the living arrangement between Beth and Dukes "was inappropriate and questionable at best," but that Beth made "a positive change in her physical living arrangement" by leaving Dukes. That fact, coupled with the other factors that already weighed in Beth's favor, warranted granting Beth custody of Zachary, according to Justice Waller.

In a dissenting opinion joined by two other justices, Presiding Justice McRae explained that "the key factors in this matter are the trustworthiness and honesty of Beth, and whether the facts that point to her dishonest behavior, such as encouraging her friend to perjure herself, coupled with Beth's adulterous affair by living and sleeping with her paramour for a period of time with her children in the household, played a significant factor in the Chancellor's decision." Based on the deference ordinarily given to chancellors in the custody determinations, and the dissent's belief that "The behavior of Beth provided a glaring mark upon her credibility, truthfulness and morality," the dissent concluded that the chancellor had given appropriate weight to the facts in reaching his conclusion.

Only last month, in an unrelated case, the Mississippi Supreme Court denied custody and unsupervised visitation to a biological mother based, at least in part, on her sexual orientation and cohabitation with another woman (See *Morris v. Morris*, reported in the May 2001 Lesbian/Gay Law Notes at p. 77). The month before, the Court of Appeals of Mississippi refused to overturn the chancery court's determination that the biological mother was not entitled to custody of her daughter, in part because she is a lesbian. (See *S.B. v. L.W.*, reported in the April 2001 Lesbian/Gay Law Notes at 55). In light of these past decisions, it is somewhat difficult to find fault with the Supreme Court's decision here. Nonetheless, based on the rationale of the concurring opinion, and the number of votes supporting it, Beth may very well have lost her custody appeal had she not changed her living arrangements and separated from Dukes. Counsel in Mississippi would be wise to warn clients not to share close quarters with members of the same sex (or to use red light bulbs in household fixtures) until after a custody determination is made.

Beth Hollon was represented by Thomas L. Musselman. *Ian Chesir-Teran*

Tennessee Supreme Court Upholds Visitation Rights for Lesbian Mother

The Tennessee Supreme Court unanimously affirmed a trial court decision granting a lesbian mother unrestricted visitation with her children over the protests of the children's heterosexual father and his new wife. *Eldridge v. Eldridge*, 2001 WL 455876 (May 2). In an opinion by Justice Janice M. Holder, the court reversed the decision of the intermediate appellate court, which had found that the trial judge abused his discretion when he permitted the mother's partner to be in the home while the children were visiting overnight.

Anthony and Julia Eldridge were divorced in 1992, and agreed to joint custody of their two minor daughters, Andrea and Taylor, who were eight and nine respectively at the time. Two years later, a dispute arose regarding Julia's visitation rights when she moved in with her new lover, Lisa Franklin. Anthony petitioned for sole custody of the children, and Julia simultaneously requested that the court establish a formal visitation schedule to protect her ability to visit with her daughters.

In July 1995, the Chancery Court awarded sole custody of the children to Anthony. After the couple was unable to agree upon a mutual acceptable visitation scheduled, even after counseling with a psychiatrist appointed by the court to serve as a special master, Chancellor Ladd appointed, at Anthony's request, a guardian ad litem, to assist him in determining visitation. The guardian recommended regular visitation, with the initial visits to last from Saturday morning through Sunday evening, and eventually to be extended to Friday through Sunday.

In September,1996, Chancellor Ladd ordered overnight visitation with Taylor every other Saturday night through Sunday. Eight months later, Julia requested that the court extend Taylor's overnight visits to include Friday nights, holidays and summer vacation, but Anthony opposed the request. The Chancery Court appointed Dr. Judy Millington, a counselor from the Church Circle Counseling Center, as a Special Master, and ordered that Dr. Millington's written recommendations were to take effect immediately without further order of the court. Although Dr. Millington recommended to the court that Julia's overnight visitation be expanded, various disputes regarding visitation continued. Finally, after conducting a hearing in October 1998 to resolve the visitation issue, the court entered an order in November 1998 adopting Dr. Millington's recommendations and permitting Julia unrestricted visitation with her daughter Taylor. On appeal, the Court of Appeals found that the trial court had abused its discretion, and modified the order to prohibit Lisa Franklin's presence in the home during overnight visits by Taylor.

Justice Holder began her opinion by noting that decisions regarding custody and visitations are "peculiarly within the broad discretion of the trial judge," which means that the trial judge's decision must be upheld "so long as reasonable minds can disagree as to the propriety of the decision made." Only when a trial court applies an incorrect legal standard "or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining" will reversal be appropriate. Holder noted that the appellate court's opinion had explicitly stated that it did "not rely on the fact that Ms. Eldridge is a lesbian" in reaching its decision that the trial court had abused its discretion. Yet, after reviewing the order, Holder could not find a statement of any other reasons upon which the court had, in fact, relied. The appellate court's observations that courts frequently place reasonable restrictions on the visitation rights of parents was irrelevant to the issue of whether the trial court acted within its discretion in determining that restrictions were not necessary in this case.

The Supreme Court distinguished these proceedings from *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1982), cited by the court of appeals, in which the appellate court *sua sponte* added restrictions to the trial court's visitation order. In *Dailey*, the non-custodial lesbian parent had apparently "engaged in overt, lascivious, sexual conduct in the presence of her five-year-old mentally and physically handicapped child." Specifically, there was proof that the lesbian couple would cuddle naked in bed with the child and engage in visible and audible expressions of sexual intimacy while the child was in the home. Unlike in *Dailey*, where the court had before it "definite evidence" that unrestricted visitation "would jeopardize the child in either a physical or moral sense," Justice Holder observed that there was no proof in this case that the child's well-being was in danger. In fact, the court of appeals had found that "the facts of this case do not rise to the level of the harmful behavior displayed by the mother in *Dailey*." The only similarity between this case and *Dailey* was the fact that both mothers were

lesbians. Since the appellate court had insisted that Julia's lesbianism had not played a role in its decision, Justice Holder inferred that the court of appeals had found Dailey to be "completely irrelevant" to this case.

The Supreme Court explained that the failure of the Court of Appeals to provide a basis for its opinion offered "little insight as to what facts in the record show the trial court abused its discretion." Justice Holder noted that Franklin provided all of the financial support for their household, that the women have a monogamous relationship but have not been sexually intimate in over a year and that they "make no expression of physical emotion or physical contact" when Taylor is in the home. Dr. Millington noted that there was no risk that either couple — Julia Eldridge and Lisa Franklin or Anthony Eldridge and his new wife Chantal Eldridge would engage in sexual conduct in the child's presence. Justice Holder also pointed out that the trial court had ordered that Julia and Lisa not share a bedroom during Taylor's overnight visitation, and there was no evidence that they had not complied with that order. As a general matter, the Supreme Court affirmed the proposition that the trial court may impose restrictions on a child's overnight visitation in the presence of a non-spouse. However, in this case, in which the trial court had found no restrictions to be necessary, Holder remarked that nothing in the record justified disturbing Chancellor Ladd's decision.

The Court emphasized that while Dr. Millington had suggested that visitation without Franklin present would be the ideal, Millington found that the most significant source of anxiety for Taylor stemmed from her desire to please both of her parents. Specifically, Taylor felt that she needed to lie to her father about the fact that she had enjoyed her visits with her mother. Although there was clearly a "moral dilemma between the parents," the Supreme Court found that Taylor's moral well-being would not be placed in jeopardy were the trial court's order be allowed to stand. Even though Anthony's religious beliefs dictated against cohabitation by unmarried couples (although he admitted that he and his new wife had lived together prior to their wedding) and against homosexuality, Justice Holder insisted that "[a] finding of harm to Taylor's sense of morality, however, does not necessarily follow from her parents' moral dilemma." While preserving the ability of trial courts to place restrictions in future cases if necessary, the Supreme Court concluded that there was no abuse of discretion by the trial court, and that the appellate court had overstepped its bounds by modifying the order on appeal. Holder commented that appellate courts are not authorized to "tweak" trial court visitation decisions in order to make them "better."

Michael May from Kingsport, Tennessee, represented Julia Eldridge. Shannon Minter, from the National Center for Lesbian Rights, filed an amicus brief that was co-authored by Lambda Legal Defense and Education Fund and was joined by the Tennessee National Organization of Women and the Memphis National Organization of Women. Abby Rubenfeld also filed a friend-of-the-court brief on behalf of the Tennessee ACLU. *Sharon McGowan*

7th Circuit Upholds Same-Sex Partner Benefits Plan

The U.S. Court of Appeals for the 7th Circuit has affirmed the right of the Chicago Board of Education to provide health care benefits to its employees' same-sex domestic partners, to the exclusion of its employees' opposite-sex domestic partners. *Irizarry v. Bd. Of Educ. Of City of Chicago*, 2001 WL 506985 (May 15). The suit was brought by Milagros Irizarry, a female employee of the Chicago school system who has lived in a committed relationship with the same man for more than twenty years. Irizarry claimed that the school district unlawfully discriminated against her and her male domestic partner when it denied him health care benefits. The district court dismissed her suit for failure to state a claim. The unanimous three judge panel affirmed, concluding that the school board's policy survived "rational basis review" and therefore did not violate the Equal Protection Clause of the United States Constitution.

The Chicago Board of Education provides health care benefits to its employees and their lawful spouses. In July of 1999, the Board of Education began extending benefits to the same-sex domestic partners of employees. Applicants for domestic partner status must be unmarried, unrelated, at least 18 years old, and "each other's sole domestic partner, responsible for each other's common welfare." Additionally, applicants must satisfy two of four conditions: that they have been living together for a year; that they jointly own their home; that they jointly own other property of specified kinds; that the domestic partner is the primary beneficiary named in the employee's will. Irizarry and her domestic partner satisfied the school board's requirements, but for the fact that they are not of the same gender.

The school district articulated in its court papers two reasons for distinguishing between same-sex and opposite-sex domestic partners. First, the school district explained that it wants to attract lesbian and gay teachers in order to provide support for lesbian and gay students, and believes that providing benefits to same-sex domestic partners facilitates that goal. In language worthy of a Lambda amicus brief (but see below), the school district noted that "lesbian and gay male school personnel who have a healthy acceptance of their own sexuality can act as role models and provide emotional support for lesbian and gay students … They can support students who are questioning their sexual identities and who are feeling alienated due to their minority sexual orientation. They can also encourage all students to be tolerant and accepting of lesbians and gay males, and discourage violence directed at these groups."

Writing for the panel, Circuit Judge Posner challenged these words outright, all the while holding fast to the idea of judicial restraint: "It is not for a federal court to decide whether a local governmental agency's policy of tolerating or even endorsing homosexuality is sound. Even if the judges consider such a policy morally repugnant — even dangerous — they may not interfere with it unless convinced that it lacks even minimum rationality, which is a permissive standard." The court also questioned the nexus between the school board's goal and the classification used to achieve it, since only nine employees out of 45,000 had signed up for benefits since the program was implemented. Even so, Judge Posner acknowledged bitingly that "limited efficacy does not make the policy irrational — not even if we think limited efficacy evidence that the policy is more in the nature of a political gesture than a serious effort to improve the lot of homosexual students."

The school district's second motivation for distinguishing between same-sex and opposite-sex domestic partners centered around the accessibility of marriage. The school district explained that since same-sex couples cannot marry under the law of any state while opposite-sex couples can, the benefit is more important for same-sex domestic partners. Ultimately, the Seventh Circuit bypassed this articulated classification, and instead focused on whether it was a legitimate exercise of governmental power for the school district to offer benefits to married couples, but not to opposite-sex domestic partners. Posner, citing to a smattering of secondary sources, explained with anarchistic eloquence that such a classification was indeed permissible:

"So far as heterosexuals are concerned, the evidence that on average married couples live longer, are healthier, earn more, have lower rates of substance abuse and mental illness, are less likely to commit suicide, and report higher levels of happiness — that marriage civilizes young males, confers economies of scale and of joint consumption, minimizes sexually transmitted diseases, and provides a stable and nourishing framework for child rearing — refutes any claim that policies designed to promote marriage are irrational … [N]o court has gone so far as to deem marriage a suspect classification because government provides benefits to married persons that it withholds from cohabiting couples. That would be a bizarre extension of case law already criticized as having carried the courts well beyond the point at which the Constitution might be thought to provide guidance to social policy."

Lambda Legal Defense and Education Fund filed an amicus curiae brief urging the Seventh Circuit to reverse the district court's ruling dismissing the plaintiff's complaint. Lambda's position is likely more political than practical, since it is unlikely that the organization frowns on the

school district's desire to provide health care benefits to same-sex partners of public employees, or to attract lesbian and gay employees through a generous benefits package. Rather, as Judge Posner noted in his decision, "Lambda is concerned with the fact that state and national policy encourages (heterosexual) marriage in all sorts of ways that domestic-partner heath benefits cannot begin to equalize."

The fact that a conservative jurist such as Posner would pen a decision upholding the rights of local governments to provide benefits to same-sex domestic partners (albeit to the exclusion of opposite-sex domestic partners) on grounds of separation of powers and judicial restraint makes one wonder whether the court's holding is actually a wolf in sheep's clothing. On the one hand, it allows needed benefits to be extended to lesbian and gay couples, who cannot avail themselves of the rights of married couples. On the other hand, and from a broader perspective, the benefits come only one at a time, and at the discretion of the more politicized legislature and local governmental bodies. Perhaps, then, the 7th Circuit has done nothing more than to further insulate Equal Protection jurisprudence from assessing classifications based on sexual orientation with the "bite" required of post-*Cleburne* rational basis review. In the end, the exclusive credit for providing same-sex couples with health care benefits rightly goes to the Chicago Board of Education. *Ian Chesir-Teran*

[*Editor's Note:* Lambda Legal Defense Fund has committed itself to advocating for inclusive domestic partnership plans that do not discriminate on the basis of sex or sexual orientation, which was the basis for its amicus brief in this case. In the opinion, Judge Posner expresses surprise at Lambda's position, and attributes it to a desire by Lambda to diminish the traditional preferred social status of opposite-sex legal marriage. Lambda expresses no such desire in its amicus brief. A.S.L.]

8th Circuit Protects Bible-Reading Anti-Gay Protesters

A panel of the U.S. Court of Appeals for the 8th Circuit ruled May 29 in *Altman v. Minnesota Dept. of Corrections*, 2001 WL 569102, that a group of Corrections Department employees who were disciplined for engaging in Bible-reading as a protest during a mandatory training program titled "Gays and Lesbians in the Workplace" had stated valid speech and equal protection constitutional claims in challenging their discipline. However, the ruling on their appeal was mixed, as the court found that claims of religious discrimination were not raised by the incident.

In mid–1997, the training director at the state prison in Shakopee persuaded the warden, Connie Roehrich, to include in the next one-day training session for employees a program dealing with gays and lesbians in the workplace. When the agenda was published, Thomas Altman sent the warden an email protesting this program, asserting that it would "raise deviant sexual behavior for staff to a level of acceptance and respectability." The warden issued a memorandum to staff, explaining that the program was part of the institution's commitment "to create a work environment where people are treated respectfully, regardless of their individual differences," and that it was not "designed to tell you what your personal attitudes or beliefs should be." The memo reiterated that participation was mandatory for all employees. This did not satisfy Altman and a few other employees, who believed the program was designed to "sanction, condone, promote, and otherwise approve behavior and a style of life [they] believe to be immoral, sinful, perverse, and contrary to the teachings of the Bible."

Altman and the other protesting employees met prior to the session and agreed to read their Bibles during the program as a silent protest, which they did. They did not disrupt the trainers' presentation, and nobody else present complained about their actions. However, two of the trainers reported their activity, and the department's affirmative action officer filed a complaint against them. Written reprimands were issued, making the protesters ineligible for any promotions for two years. They filed suit in federal court, backed up by depositions from numerous witnesses stating that prison officials had never before disciplined employees for being inattentive during training sessions by sleeping or engaging in unrelated activity such as reading magazines.

Before the federal district court, the state moved to judgment on the pleadings, arguing that discipline was imposed solely for insubordination. The plaintiffs argued that they had been singled out because of the content of their protest, and that the imposition of discipline violated their rights of free speech and equal protection under the Constitution, and of religion under Title VII. The trial judge granted the state's motion on the constitutional claims, finding that the protest was aimed at internal prison policies and was thus not on a matter of public interest; in light of existing precedents on the constitutional rights of public employees, such purely internal protest receives no constitutional protection. However, the trial judge found that the plaintiffs stated a valid religious discrimination claim, although it held that the officials who imposed the discipline had qualified immunity, thus limiting the remedy to a withdrawal of the reprimands.

Both sides appealed. Writing for the circuit panel, Judge Loken found that the district court erred in all of its rulings! Contrary to the district court, the court of appeals found that the plaintiffs did not state a valid religious discrimination claim, but that they had stated valid claims of free speech and equal protection.

While the trial judge found that the protest concerned only internal prison policy issues, the court of appeals asserted that "the way in which the Department and [the prison] deal with issues of gays and lesbians in the workplace affects the performance of their public duties and is a matter of political and social concern to the general public. By making attendance at the training session mandatory, [the prison] created a context in which employees speaking out in opposition to their public employer's handling of this social issue should be considered speech on a matter of public interest and concern." The court acknowledged the right of a public employer to establish training programs and require attendance, commenting that an "employee who refuses to be trained has, from the employer's reasonable perspective, impeded his or her ability to do the job." However, the court found it hard to believe that these employees were disciplined for insubordination when the record at this point reflects that other employees who deliberately engaged in non-responsive activity during training sessions had never been disciplined. Finding that "defendants' motive for reprimanding Appellants is a disputed issue of fact," the court held that summary judgment had been improper on this claim.

As to the religious discrimination claim, however, the court was unpersuaded that the actions of the prison officials imposed a "significant burden" on the Appellants' free exercise of religion. "Appellants do not suggest that their religion requires them to read the Bible while working," wrote Judge Loken, noting that the record showed that one of the Appellants has brought her Bible to work and read during break and meal times without incurring any discipline from prison management. Also, taking at her word the warden's statement that the program was not intended to tell any employee what to believe, the court concluded that "the only burden placed on Appellants was a requirement they attend a seventy-five minute training program at which they were exposed to widely-accepted views that they oppose on faith-based principles. This is not, in our view, a substantial burden on their free exercise of religion."

The court engaged in similar analysis of the Appellants' supplementary state constitutional law claims.

Judge Lay offered a separate opinion concurring in part and dissenting in part, arguing that there was no need to hold a trial on the free speech claim because, in his view, it was clear that the Appellants were disciplined because of the content of their expression, so there was no need for further fact-finding on the prison officials' motivation for disciplining them. A.S.L.

Defunding of Arts Organization That Sponsored Gay Film Festival Held Unconstitutional

A U.S. District Court in Texas held that when the San Antonio City Council eliminated funding for Esperanza Peace and Justice Center, it had engaged in "viewpoint discrimination in violation of the First Amendment," as well as violating equal protection rights under the 14th Amendment and the Texas Open Meetings Law. Therefore, the City owes damages to Esperanza, a non-profit corpora-

tion, and two unincorporated associations that it sponsors, one of which is the San Antonio Lesbian & Gay Media Project. *Esperanza Peace & Justice Center v. City of San Antonio*, No. SA–98–Ca–0690–OG (W.D. Tex. [San Antonio Div.] May 15, 2001).

City funding of the Media Project's "Out at the Movies" and other programs became a hot issue in San Antonio in 1997. Esperanza had received funding every year starting in 1990, and had begun sponsoring the Media Project in 1994. Funding was awarded based on criteria set by the City's Cultural Advisory Board (CAB), a committee of the City's Department of Arts and Cultural Affairs (DACA). Criteria for the grants include artistic excellence, audience development, and administrative capacity. The DACA strategic plan emphasized that CAB should seek "diverse programming," programming aimed at "traditionally underserved groups," and "programs that address social issues." Based on peer review, CAB and then DACA approved projects and presented the recommendations to the City Manager as part of the DACA budget.

In 1997, a conservative majority was elected to fill seven of the 10 seats on the City Council. Their mandate from the voters was to pass a "back to basics" budget. Arts in general were not a priority for these council members, and Christian fundamentalists created a great deal of pressure to completely eliminate funding for groups that advocate the "gay and lesbian lifestyle." On September 10, 1997, the mayor called impromptu meetings with members of the Council (but never as many as six members at one time, which would constitute a quorum). The meetings resulted in a decision to approve across-the-board cuts in expenditures for all arts programs, except that Esperanza's funding was totally eliminated. On September 11, the Council met publicly and, with little or no discussion, passed the budget.

In 1998, Esperanza again applied for funding, but by that time, it had sued the City. Immediately after Esperanza filed suit, the City Attorney announced on television that no group litigating against the City could be funded. The City Attorney later reversed that position at the City Council meeting of September 17, 1998, at which the Council, for the second year in a row, denied funding for Esperanza.

In his 85–page opinion, Judge Orlando Garcia cites dozens of luminaries associated with freedom of expression, from Holmes to Brandeis to Cardozo to John Stuart Mill, and recites a litany of case holdings furthering free speech doctrines.

Addressing the First Amendment argument, the court held that, if the City Council engaged in viewpoint discrimination as is alleged, it violated the First Amendment. "Of course, the government is not required to fund arts programs. But if it chooses to do so, it must award the grants in a scrupulously viewpoint-neutral manner," wrote Garcia. "[T]he government may establish criteria of artistic merit to allocate funding," but not viewpoint criteria.

The court then set out to measure whether the City unconstitutionally denied funding to Esperanza based on its point of view. Judge Garcia adopted the standard enunciated in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), which presents a three-part burden-shifting analysis. 1. Esperanza must first prove by a preponderance of the evidence that its constitutionally protected conduct was "a substantial or motivating factor" in the City's decision. 2. Esperanza must then show that the City's decision was "motivated in part by a constitutionally impermissible motive." This shifts the burden to the City. 3. The City must prove by a preponderance of the evidence "that it would have made the same decision in the absence of the protected conduct." The City must show "that its legitimate reason, standing alone, would have induced it to make the same decision," quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

The court then set out to discover whether the Council's decision was based on unconstitutional motives. Judge Garcia found that liability exists "only if one peers behind the textual facade and concludes the legislative body acted out of a constitutionally impermissible motive." But, "in a sufficiently compelling case the requirement that the plaintiff prove bad motive … might be relaxed and a proxy accepted instead. Nevertheless, any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting probable complicity of others." The court looked at the statements made by council members, at the effect of the back to basics campaign, at constituents' anti-gay attitudes, and at some council members' statements that the reason for holding back Esperanza's funding was that the group was "too political" or "too aggressive." These views, if they were the reasons for withholding funding, were not permissible.

If the City "wanted to fund, say, performing arts at the expense of visual arts, no constitutional prohibition would forbid the Council from [doing so]. Likewise, if [the City] preferred to fund arts projects that would attract tourist dollars instead of projects geared only to local participation, that too is acceptable. But the voters cannot require the Council to deny funding to an arts group merely because that group promotes a social or political viewpoint those voters find objectionable."

"[L]abeling expression as 'too political' (or 'too controversial' or 'too offensive') cannot be used to justify — or disguise — viewpoint suppression. Rather, discriminating against someone on the basis that they are 'too political' is discrimination precisely because that person has chosen to express a political viewpoint."

The court found that "a clear majority of the Council was motivated, at least in part, by plaintiff's views on gay and lesbian, political, and social issues, by their constituents' objection to funding 'Out at the Movies,' and by their dissatisfaction with Esperanza's supporters' 'aggressive' advocacy style." Therefore, the burden fell on the City "to show that it would have made the same decision absent plaintiffs' viewpoints." Since all other arts groups were funded (though at a lesser level), the court determined that the Council's action was based on unconstitutional viewpoint discrimination. In addition, there was no compelling governmental interest to justify such discrimination. Therefore, the court held that the City "had violated the First Amendment by defunding plaintiffs based on their viewpoint."

Turning to equal protection, Garcia found that Esperanza must prove "(1) that the City created two or more classifications of similarly-situated groups that were treated differently, and (2) that the classification had no rational relation to any legitimate governmental objective." Clearly, the plaintiffs were singled out. As rational bases for this special treatment, the City raised the points that (1) such treatment indicates that the City strongly opposes the homosexuality, which it considers immoral; (2) funding of Esperanza will start the City "down the slippery slope that leads to City-funded display in public forums of art 'glorif[ying] Hitler, … advocating that the Holocaust was fictitious, and [showing] Holocaust victims befouled with swastikas,'"; (3) Esperanza was a political group, not primarily an arts group; and (4) that the City was attempting to effectuate its back-to-basics priorities, thereby adhering to the will of the electorate.

The court found none of the above to be rationally related to any legitimate governmental objective, even under the strict standard of FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993), which stated that classifications made by legislators "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." The court held that "none of the City's justifications provide a rational basis for the City's defunding of the plaintiffs. The City violated plaintiffs' equal protection rights when it denied their funding."

However, the court did not find that refusing to fund Esperanza after it filed a lawsuit against the City was retaliatory, and therefore an unconstitutional infringement of freedom of speech. The City Attorney read a statement at the September 16, 1998, meeting informing the Council that retaliation for the lawsuit was an impermissible basis for denying funding. A majority of council members testified that the lawsuit did not affect their decision. Therefore, it could not be shown that retaliation was a factor in the decision. Actually, found Garcia, the members' minds were made up before Esperanza filed its lawsuit.

The court did find that the Council had violated the Texas Open Meetings Law by deciding on the budget through a series of informal meetings and

phone calls on September 10, 1997. The formal vote at an open meeting on September 11 became a mere formality. The Texas law requires that the "executive and legislative decisions of our governmental officials as well as the underlying reasoning must be discussed openly before the public rather than secretly behind closed doors." Acker v. Texas Water Comm'n, 790 S.W.2d 299, 300 (Tex. 1990). A "meeting" is "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action." TEX. GOV'T CODE ANN. Sec. 5551.00(4). The court ruled that "the deliberation by which the agreement is reached is subject to the Act's requirements, and those requirements are not necessarily avoided by the fact that a quorum was not physically present in one place at one time." Judge Garcia found in this case that there was a clear "manifestation of an intent to reach a decision in private while avoiding the technical requirements of the Act…." The court found the informal meetings held on September 10 were illegal; therefore, the attempted ratification on September 11 of the results of those meetings "was ineffective, and the Council's defunding of plaintiffs is void."

The court found that damages are appropriate, but the opposing sides have very different views on the proper amount. The court therefore requested supplemental briefs from both sides addressing the amount of damages that should be awarded. *Alan J. Jacobs*

Texas Appeals Court Rejects Tort Claims Against Gay Dad, But Cuts Down Visitation Rights

The Texas Court of Appeals in Dallas affirmed the trial court's decision to throw out claims of intentional infliction of emotional distress, breach of fiduciary duty and fraud brought by an estranged wife during divorce proceedings against her gay husband. *Jenkins v. Jenkins*, 2001 WL 507221 (May 15, 2001). However, the court reversed the trial court's decision to restrict the children's domicile and to expand the husband's visitation rights, and reversed and remanded the case to the trial court for reconsideration of the division of the marital property and monthly child support payments.

At the time of their divorce, Lisa Marie Jenkins and David Allen Jenkins had been married for sixteen years and had five-year old triplet daughters. Prior to filing for divorce, David moved out of the house and announced to Lisa that he was gay. Lisa counter-petitioned for divorce, and included in her petition claims for intentional infliction of emotional distress, breach of fiduciary duty and fraud. The trial court dismissed Lisa's tort claims, and sent the remainder of the case to the jury. The jury named Lisa the "sole managing conservator" of the children, pursuant to Texas Family Code 105.002(c)(1), with unrestricted rights regarding the children's residency. The jury also made specific findings regarding the parties' property and Lisa's allegations that David was at fault because of his cruel treatment and adultery. Despite the jury verdict in Lisa's favor, the trial judge restricted the children's domicile to Dallas and the contiguous counties, and expanded David's rights to visit with his children.

The Court of Appeals first reviewed the trial judge's decision to grant summary judgment on the tort claims. Justice Poff, writing for the court, found that the emotional distress suffered by Lisa as a result of David's coming out and abandonment was not severe enough as to justify holding David liable, and that Lisa had not produced sufficient evidence to support her claim. On the breach of fiduciary duty question, the court noted that not all relationships involving a high level of trust and confidence create a fiduciary duty. In particular, no such duty exists between parties prior to a marriage such as would have required David to reveal to Lisa any internal conflict he was feeling regarding his sexual orientation. Furthermore, no fiduciary duty exists between spouses to remain married. Therefore because no duty existed, the trial court properly threw out this claim. Finally, the court found that even though David had confided in several church members that he had struggled with feelings of homosexuality since adolescence, David had not knowingly made false representations to his wife about his sexuality. Therefore, any claim for actual or constructive fraud was properly dismissed by the trial court.

The Court of Appeals criticized the trial court for imposing domicile restrictions on the custodial parent, Lisa, even though the jury had granted her unrestricted rights. The local rule in six of the seven family law courts in Dallas County establishes a presumption in favor of restricted domicile, but the trial court may not overrule a jury verdict with regard to determination of the primary residence of the children because unlike other portions of the verdict, which are merely advisory, determinations by the jury regarding domicile are binding on the court. The appellate court sternly rejected the notion that a local rule could institute a presumption in favor of restricted domicile because each case needed to be decided based on its own facts. Furthermore, the court noted the hardship that restrictions on children's domicile may cause to the custodial parent. In particular, in this case, Lisa wanted to leave Texas, and move to Mississippi, where her family ties and employment prospects were much stronger. Therefore, Justice Poff determined that the trial court abused its discretion in placing additional restrictions on Lisa, in contravention of the jury verdict.

The court also overruled the trial court's decision to grant David visitation rights greater than those awarded by the jury. The court determined that there was no evidence in the record to justify increasing his visitation schedule to include the first, third and fifth weekend of every month, starting Thursday evening through Monday morning, the right to take the children to school in the morning at least twice each week, and up to fifty-six days vacation. Justice Poff noted that the children were particularly young, and expressed concern that David had introduced his children to his new "paramour" almost immediately after the parties had separated. The court also emphasized that David did not act responsibly with the children, and cited an incident where one of the girls suffered a broken arm while under his care, and he sent her back to her mother without obtaining medical attention for her. The court-appointed psychologist noted that, despite her recommendation that David not entertain overnight guest while the children were staying with him, David's new partner had moved in to the apartment. The psychologist further testified that "since the parties' separation, [David] had not been protective of the children and had evidenced an inability to place the children's needs and well-being above his own." In light of these findings, the appellate court found that the trial judge abused his discretion when he expanded David's visitation rights beyond what had been ordered by the jury.

Considering Lisa's other grounds for appeal, the court accepted her argument that the child support award had been improperly calculated because David's 1997 income tax return had not properly reflected his actual income. The court also found the division of marital property to be inequitable because David had liquidated many of the assets of the couple, including purchasing gifts and trips for his new lover, so even though the division of assets may have appeared to be equitable on its face, the split was in fact disproportionate in favor of David. While noting that a 50–50 split was not required, Justice Poff ruled that the record clearly did not support an unequal distribution of assets in favor of David. The court also vacated the trial court's order that Lisa pay off the credit card bills, finding that David had been the one to unilaterally run up the charges. The court remanded the case to the trial judge with instructions to recalculate the child support and to "enter a just and right division of the marital property."

Finally, the court rejected any claim by Lisa that she was prejudiced by erroneous evidentiary rulings made by the trial judge during the proceedings. The court determined that any error that may have occurred during the trial was harmless. *Sharon McGowan*

Illinois Appeals Court Renders Mixed Verdict on Scouts Employment Policies

The Boy Scouts of America (BSA) had won another battle concerning its discriminatory hiring practice with respect to homosexuals. On May 1, the Appellate Court of Illinois, First District vacated an injunction issued by the Chicago Com-

mission on Human Rights (CHR) enjoining the Chicago Area Council of the Boy Scouts of America (BSA) from considering the sexual orientation of applicants for jobs. *Chicago Area Counsel of Boy Scouts of America v. City of Chicago Commission on Human Rights*, 2001 WL 474049. However, the court left the door open for a finding that the BSA could not discriminate against an openly homosexual applicant applying for a non-expressive position in the organization.

In 1992, Keith Richardson filed a complaint with the CHR alleging that the BSA discriminated against job applicants based upon sexual orientation. After a full hearing, the CHR issued an injunction against the BSA, enjoining the organization from considering sexual orientation during hiring, and fined it $100. In addition, Richardson was awarded damages of $500 plus his attorney fees, which came to a substantial sum. On a writ of certiorari to the circuit court in Cook County, that court found that Richardson lacked standing to bring a complaint against the BSA. Essentially, the Court found that Richardson was a vocal advocate from a group of former Boy Scouts who are gay, and brought his complaint as a "tester" rather than a serious job applicant. Under the circumstances, the circuit court found that Richardson lacked standing and it vacated the damages and attorney fees award. However, the court found that the CHR, independent of Richardson, had prevailed in the proceeding and, as a result, the court had the authority to enjoin the BSA's discriminatory conduct. Both sides appealed.

In the interim, the U.S. Supreme Court decided *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In Dale, an openly gay assistant Boy Scout leader was terminated. Dale filed a complaint under New Jersey's human rights law, which prohibits discrimination based upon sexual orientation. The BSA ultimately prevailed in the U.S. Supreme Court (after losing in the New Jersey Supreme Court) arguing that the New Jersey human rights law violated the BSA's first amendment rights by limiting the moral message of the Scouts. In *Dale*, the Supreme Court found that the BSA is an expressive organization and accepted the its assertion that it did not want to promote homosexuality. The Court further found that Dale's position as an assistant scout master imposed a significant burden on the organization's ability not to promote homosexuality.

Applying this test, the Appellate Court of Illinois found that the BSA is an expressive organization that does not promote homosexuality. However, the court found the record was insufficient on whether the position Richardson was applying for was such that it would impair this organizational message, since the vague statements in the record could include applications for non-expressive (i.e., internal and clerical) positions. The court held that further findings of fact were necessary to determine whether Richardson could function in a non-public administrative position in the BSA without impairing the expressive rights. Accordingly, the case was remanded for a determination on whether Richardson was seeking an expressive or non-expressive position within the Boy Scouts.

On the standing issue, the court noted that "testers" have previously been held to have standing to bring similar complaints. However, the court reversed the circuit court finding that the CHR had standing to enjoin the BSA's employment policies, even in the absence of Richardson having standing. The court found that under the human rights law, the CHR did not have standing to independently bring an action against the BSA in the absence of a properly-made complaint by an alleged discriminatee. As a result, the court vacated the CHR's injunction, reversed the circuit court in its entirety, and remanded the matter to the CHR for further findings of fact. *Todd V. Lamb*

California Appeals Court Finds Same-Sex Harassment Claim Actionable

A panel of the California Court of Appeal, 2nd District, ruled in *Valdez v. Clayton Industries, Inc.*, 2001 WL 481947, 2001 Daily Journal D.A.R. 4489 (May 8), that California law goes further than federal law under Title VII in protecting employees from hostile environment harassment in the workplace, reversing a decision by Los Angeles County Superior Court Judge Victoria Chaney to grant summary judgment against Alex Valdez on his harassment and retaliation claims.

Valdez was employed as a mechanic assembler in 1996. He alleges that from December 1996 until he was discharged on March 4, 1998, he was subjected to sexual harassment by Larry Metzler, his supervisor. Valdez alleged that Metzler repeatedly and frequently solicited Valdez to perform oral sex on Metzler, and referred to Valdez as a "whore" and a "prostitute," that Valdez complained to management to no avail, and that when he took his complaints to a higher level in the company, he was terminated in retaliation. The company argued that most of Valdez's allegations were time-barred, that the conduct complained of was not sufficiently severe to constitute a hostile environment and was, in any event, not actionable because Valdez had not alleged facts sufficient to support a conclusion that he was singled out because he is male, and that no facts were alleged tending to link the discharge to his complaints.

Writing for the court, Judge Curry found that summary judgment was improper because Valdez's allegations were sufficient to support actionable claims requiring resolution at trial. To the company's argument that Valdez's claims would not support a sexual harassment cause of action under Title VII, Curry replied: "In some respects, the FEHA [California Fair Employment and Housing Act] may go farther than title VII in offering protection against sexual harassment." Curry also dismissed the argument that Metzler's conduct was merely typical in a workplace full of sexual jokes and remarks, in which even Valdez is alleged to have engaged. "Here, Valdez's evidence indicates that, unlike the sexual jokes and remarks that respondents cite, Metzler's conduct targeted Valdez, and Valdez repeatedly complained about it to Gonzalez and Metzler. Furthermore, Valdez's evidence implies that Valdez gave Metzler the items in question [sexually oriented holiday gifts] only after Metzler began his conduct and Valdez made his unsuccessful complaints. Finally, Valdez testified that he gave Metzler the items solely to halt Metzler's conduct. On this evidence, a reasonable jury could conclude that Metzler's conduct was unwelcome."

Curry also found that it was not necessary for Valdez to have alleged specific facts showing that the discharge was retaliatory. It was enough to make out a prima facie case, for purposes of surviving the summary judgment motion, for Valdez to allege that he had carried his complaint to a higher level manager who promised to get back to him, but never did so, and that his discharge followed soon thereafter. Although the company showed that three other men were discharged at the same time as Valdez, that was not dispositive on the issue of motivation for his discharge. The court also rejected the time-bar argument by finding that Valdez's allegations would support a claim of a continuing violation, thus allowing him to present evidence of all the similar harassment dating back to December 1996. A.S.L.

Federal Court Upholds Right of High-Schooler to Wear "Straight Pride" T-Shirt

In *Chambers v. Babbitt*, 2001 WL 530550 (U.S.Dist.Ct., D. Minn., May 17), U.S. District Judge Donovan Frank ruled that Woodbury High School's principal, Dana Babbitt, violated the First Amendment rights of Elliott Chambers, a student who wore a "Straight Pride" t-shirt to school, by banning the t-shirt. Frank issued a preliminary injunction against the school. However, Frank went out of his way to commend the school for attempting to prevent homophobia and violence on campus, and also expressed unhappiness that the Chambers family resorted to the courts.

According to a news report in the *Washington Times* on May 19, Chambers claims to have discovered the "Straight Pride" t-shirt when he observed somebody else wearing one while attending a rally in support of George W. Bush in December. The t-shirt proclaims "Straight Pride" on the front, and on the back shows stick figures of a man and woman holding hands, together with the website address of the seller. Chambers went to www.straightpride.com and purchased his own t-shirt. According to the *Times*, Chambers thought the t-shirt "was cool" and said that his motto is: "Why be politically correct when you can be right?"

After obtaining the t-shirt, Chambers wore it to school the day after he had gotten into a heated ar-

gument with some gay students during a student organization meeting. A gay student contacted the assistant principal, complaining that Chambers was wearing an offensive shirt. The school had suffered some prior incidents, including a physical altercation the previous semester when a white student wore a bandana with a Confederate battle flag design and vandalism of a student's car the prior spring, which had been attributed to the student being perceived as gay. The principal, Mr. Babbitt, summoned Chambers to his office, and forbade him from wearing the shirt to school again, seeking to avoid any further incidents.

Chambers' parents then came to see Principal Babbitt to protest, also expressing unhappiness that the school was "promoting homosexuality" by designating certain teachers' and administrators' rooms as "safe spaces" where lesbian/gay/bisexual/transgendered students could find a sympathetic listener and by putting pink triangles on diversity posters around the school. When the principal refused to back down, the Chambers family contacted a right-wing litigation group, the American Family Association's Center for Law and Policy, which filed a federal lawsuit on their behalf, and immediately sought an injunction in support of Chambers' right to wear his t-shirt to school.

In a carefully reasoned opinion, Frank found that the Supreme Court has supported the right of high school students to engage in expressive activity at school, provided their activities do not disrupt the educational process. In this case, Frank found that the school's history of past incidents were not sufficient to support a ban on Chambers' t-shirt, without any evidence that the shirt had produced a disruption or was likely to do so. (Frank speculated that Chambers might even decide not to wear the t-shirt in the future in order to avoid problems.)

However, in a lengthy concluding section of his opinion, Frank used very sensitive language in describing the problems faced by sexual minority youth. "The teenage years are a time of discovery as all of our youth assert their individuality and sexuality. Those students who identify themselves as gay, lesbian, bisexual, or transgender ('GLBT'), however, struggle with the added pressures of potential alienation from friends, family, and community, and the potential for ridicule or even violence. Indeed, studies show that more than ninety percent of high school students hear negative comments regarding homosexuality during the school day. It is no wonder that there are significantly higher reports of depression and suicide amongst our GLBT youth, a problem that cannot be ignored." Judge Frank went on to reject the Chambers' arguments "that the school is in any way promoting homosexuality." (After Chambers' parents confronted the principal, the safe space program was expanded to cover other issues besides sexuality.) "By displaying posters and lists of staff members who are willing to talk about issues of sexuality and now race, disability, gender, and religion, the school has made a conscious and commendable effort at creating an environment of tolerance and respect for diversity," wrote Frank.

"Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by 'Straight Pride.' While the sentiment behind the 'Straight Pride' message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own. The Court does not disregard the laudable intention of Principal Babbitt to create a positive social and learning environment by his decision, however, the constitutional implications and the difficult but rewarding educational opportunity created by such diversity of viewpoint are equally as important and must prevail under the circumstances."

Frank ended his decision by calling on all the parties to try to work out their differences directly rather than resorting to the court, asserting that it is their responsibility to do so "if the best interests of all students and children in Woodbury are to be served." A.S.L.

Federal Court Finds Military Doc "Came Out" To Avoid Service Obligation

In a hotly contested challenge to the Defense Department's policy of demanding repayment of education expenses from military personnel who are discharged for being gay, U.S. District Judge William Alsup (N.D.Cal.) ruled May 29 that Dr. John Hensala "came out" shortly before he was scheduled to begin active duty in order to evade service, and thus was obligated to repay the government for his medical training. The court's opinion was not available as we went to press, so this report is based on a newspaper account published May 30 in the *San Francisco Chronicle*.

Hensala enlisted in the Air Force in 1986 (at about age 21) and attended Northwestern University Medical School for four years on a government scholarship that required four years of active military service after graduation. He spent 20 weeks on active duty while at school, but deferred service while completing a residency in his specialty and a fellowship at UC San Francisco. Hensala "came out" to a few friends in 1988 but made no disclosure concerning his sexual orientation to military officials at that time. As his fellowship was ending and he received notification to begin his active duty obligation in November 1994, Hensala wrote to his commanding officer, stating that he is gay but that he did not believe that this would affect his ability to serve. He was processed for discharge under the then-new "don't ask, don't tell" policy (an action that Hensala did not appeal or challenge), and then the Air Force initiated proceedings to recoup the enormous expense of Hensala's extensive medical training.

Hensala countered by filing this lawsuit, arguing that he wanted to service and was being involuntarily excluded, thus should not have to repay the government for his scholarship assistance during medical school. He also contended that he genuinely believed at the time that he would be able to serve under the "don't ask, don't tell" policy so long as he made no public statements about his sexuality. He contended that Air Force officials initially treated him as if he could serve, and that a supervising officer even told him that he could bring his boyfriend on the military base if they conducted themselves with discretion.

Judge Alsup was not buying these argument, however. Noting that Hensala had obtained legal advice before writing his commander, had submitted a list of organizations that could confirm his sexual orientation, and had asked an Air Force officer about bringing his boyfriend on base, Alsup concluded that the Air Force was correct in contending that once he had finished his medical education, he intended to use the "don't ask, don't tell" policy to evade his service requirement by writing to his commander about his sexuality. Consequently, Hensala must pay the Air Force $70,000 for the financial assistance he received.

Hensala's attorney, Clyde Wadsworth, said he would appeal this ruling to the 9th Circuit. A.S.L.

Nassau County, N.Y., Trial Court Rules Against Domestic Partner Housing Right

Nassau County, N.Y., District Judge Fairgrieve ruled in *Blake v. Stradford*, NYLJ, 5/2/2001, p.25, col. 2, that a man was entitled to an order to evict his former domestic partner, a woman, from the house he owned, as she was merely a "licensee" even though they had children together who were living in the house with her. However, the court refused to evict the children, finding that they are not licensees.

Easton Blake and Kim Stradford had one child before Stradford moved in to Blake's house in West Hempstead, and then they had a second child. The relationship fell apart and Blake moved out, subject to an order to pay child support. Stradford obtained an order of protection against Blake, under which he could not come into the house when he came around to see the children, but had to pick them up at the curb. Blake responded by filing the action in District Court to evict his former partner and children from the house and reclaim possession for himself.

Stradford maintained that as a former domestic partner and mother of Blake's children, she was not a mere licensee whose right to remain could be unilaterally revoked by Blake. Judge Fairgrieve rejected this argument, and stated specific disagreement with the decision in *Minors v. Tyler*, 521 N.Y.S.2d 380 (N.Y.C. Civ. Ct., Bronx Co. 1987), which had ruled that a domestic partner who had resided in an apartment with the lessee was not a mere licensee. Fairgrieve opined that

this was inconsistent with the Court of Appeals' decision in *Morone v. Morone*, 50 N.Y.2d 481 (1980), a failed palimony suit, and with the state law ending recognition of common law marriage, enacted in 1933. A marital partner has rights to occupancy of a home owned by a spouse, derived from the legal obligations of support, but a domestic partner has no such right, according to this court. However, the natural children of Blake have a legal right of support, and so cannot be considered licensees.

The court also rejected Stradford's argument that the case should be handled in the family court, where the best interest of the children could weigh in the determination, finding that family court would not have jurisdiction over the eviction action, just as the district court does not have jurisdiction over a child custody action. A.S.L.

Same-Sex Harassment Cases Becoming Routine, According to 7th Circuit Panel

On May 14, the U.S. Court of Appeals for the 7th Circuit affirmed the award of $7,500 in back pay and lost benefits to same-sex harassment plaintiff Kenneth Cooke in *Cooke v. Stefani Management Services, Inc.*, 2001 WL 503600. As Cooke, a heterosexual, alleged harassment by openly-gay manager Fred Lagon, the parsing of the meaning of "because of sex" common to post-*Oncale* Title VII decisions is not present here. (Compare e.g. *Hamner v. St. Vincent's Hospital*, 2000 WL 1202287 [7th Circuit rejects gay plaintiff's Title VII harassment claim as not based on discrimination "because of sex."]).

Cooke alleged that during his employment at a restaurant from February to June 1998, Lagon subjected him to a litany of sexual propositions, inappropriate touching, and nonverbal gestures of a sexual nature. Lagon fired Cooke, purportedly for "inappropriate interactions with coworkers, superiors, and a neighborhood restauranteur." Cooke alleges he was fired in retaliation for refusing Lagon's sexual propositions, and sought nearly $300,000. The jury rejected his plea for emotional distress damages, but awarded him $10,000 punitive damages and nearly $50,000 in lawyers fees on top of the $7,500 compensatory damages. Stefani Management Services, Cooke and Lagon's employer, appealed the court's denial of its motion for summary judgement on liability and punitive damages. Cooke cross-appealed, seeking a doubling of the lawyers fee award.

Cooke was the only substantive witness for his side of the case. Stefani called a number of Cooke's coworkers, who testified to witnessing no harassment, and Cooke's then-girlfriend, who testified that Cooke never mentioned any inappropriate conduct by Lagon. Stefani challenged Cooke's assertion of discomfort by demonstrating that he came to the restaurant to socialize on days off, and at least once went out socially with a group including Lagon. Stefani introduced a note to Lagon from Cooke which read: "Fred Just a note to say 'thanxs' [sic] for all you have done. Here's looking at many more fun days to come. Thanks again for the vino! K."

Noting the strength of Stefani's case and allowing that either the jury or the appellate court itself could have found for either party, the court held that it was not unreasonable for the jury to accept Cooke's allegations and that Stefani's appeal could not overcome the jury's liability verdict. The court struck the punitive damages award, however, as Stefani showed good faith efforts to comply with Title VII of the Civil Rights Act, including its formal policy prohibiting sexual harassment, its provision of a management seminar on sexual harassment which Lagon had attended, and an anti-harassment poster at the restaurant.

Cooke's lawyers sought more than $115,000 in fees. The court affirmed both a $16,000 reduction for duplicative fees and a 50 percent limited-success reduction. The opinion, written by Judge Evans, explains: "Contrary to Cooke … this was not a groundbreaking, first-time-ever-in-this-district, same-sex sexual harassment case … but rather a run-of-the-mill employment case in which Cooke himself was the only substantive witness for his side … In a simple case with no broad social impact, Cooke's attorneys should be happy to receive fees of nearly seven times the amount of their client's recovery." *Mark Major*

Court Rejects Sexual Harassment Claim by Gay Employee Against Gay Supervisor

A U.S. District Judge granted summary judgement for the defendant hotel on Ered Wu's claim that he experienced sexual harassment and retaliation by his male supervisor. *Wu v. Pacifica Hotel Co.*, 2001 WL 492475 (N.D.Cal., April 25, 2001).

Wu was a front desk clerk at the Best Western Lighthouse Hotel (Pacifica) from October 1999 until March 29, 2000, when he resigned, filing a Title VII claim on June 8, 2000. Wu alleged that his supervisor, David Turner, coerced him into a sexual relationship in exchange for employment benefits and a promise of promotion. After Wu terminated the relationship in March, 2000, Turner allegedly continued to make sexual advances and retaliated by "drastically reducing" Wu's work hours and issuing a notice of discipline for switching work-shifts with another employee without management approval. Wu did not deny switching shifts. Turner appeared to be a "very compassionate, kind, caring person, and also … a very eloquent speaker" when he was first involved with him, Wu testified, but his sexual advances "continued after he tried to discontinue the relationship."

Wu alleged sexual harassment and retaliation in violation of Title VII and the California Fair Employment and Housing Act (FEHA) and alleged constructive discharge in violation of public policy. The court granted summary judgement in all but the FEHA sexual harassment claim, which was dismissed without prejudice. Pacifica had an internal complaint procedure, which Wu did not utilize before resigning. Wu filed a complaint two weeks after resigning. Based on records submitted to the court, Wu faced no reduction in hours, but a change of shifts. Judge Illston found that Wu could not "demonstrate that he suffered any adverse employment action" as a result of the notice of discipline. The shift changes by themselves, Judge Illston found, do not "constitute adverse employment action." *Daniel R Schaffer*

N.Y. Appellate Division Embraces Narrow Interpretation of Off-Duty Conduct Law

According to the N.Y. Appellate Division, 1st Department, a male employee who was allegedly terminated from his job for having a romantic relationship with a female co-worker does not state a cause of action for discrimination based upon sex, marital status, or sexual orientation. *Hudson v. Goldman Sachs & Co., Inc.*, 2001 WL 522146 (May 15, 2001). Romantic relationships are not protected recreational activities within the meaning of New York Labor Law §§ 201–d(2)(c), which forbids discrimination on the basis of lawful off-duty conduct of various types, including recreational activities.

As plaintiff was married and his paramour was single, and both were terminated due to the relationship, there was no evidence of discrimination based upon gender or marital status, according to the court. The plaintiff's claim that had the relationship been homosexual rather than heterosexual he would not have been terminated, was based upon utter speculation and undermined by his allegation that the religiously intolerant supervisor responsible for his termination had an animus against homosexuals. Accordingly, the court affirmed dismissal of the plaintiff's discrimination complaint, but it reinstated his claim for defamation based on certain statements made by an employee of the defendant, that appeared in a newspaper article. *Todd V. Lamb*

Civil Litigation Notes

The Supreme Court has agreed to review a case that may lead to the first substantial change in U.S. obscenity law in a quarter century. In *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000), the court of appeals held unconstitutional the Child Online Protection Act, 47 U.S.C.A. sec. 231, which was an attempt by Congress to protect minors from being exposed to "harmful material" on the World Wide Web, by banning knowing posting such material for commercial purposes. The statute, seeking to repair constitutional flaws in prior similar enactments, sought to track the Supreme Court's formula for determining whether written or graphic material lacks First Amendment protection, by invoking the concept of "contemporary community standards." The court of appeals found this unworkable, since materials posted on

the World Wide Web are accessible from anywhere in the world, and so the statute would impose an impermissible burden on constitutionally protected First Amendment speech if it led to restrictions against posting materials that are considered harmful in some places and not others. The same "community standards" test is used in American obscenity law for determining whether material is sufficiently "offensive" in its explicit sexual depictions to be deemed obscene and thus unprotected by the constitution. The Supreme Court's May 21 grant of certiorari may result in a high stakes ruling focused on whether the "community standards" approach must be abandoned in the age of the internet.

The General Counsel's Office of the U.S. Army has informed Patricia Kutteles that it is rejecting her claim for damages from the military in the death of her son, Pfc. Barry Winchell, who was beaten to death in his sleep by anti-gay soldiers at Fort Campbell. Although the Army concedes that Winchell's death was bias-motivated, and has prosecuted the soldiers involved, it claims that Kutteles claim is invalid under the Military Claims Act because an Army investigation concluded that the commander of the base did not violate any military policies. Kutteles cannot sue the Army in federal court because of Supreme Court precedents shielding the armed forces from tort liability for the death of active-duty service members. *The Tennesean*, May 22.

The international news media made a big deal early in May over filing in Los Angeles Superior Court of a $100 million defamation suit on May 2 by actor Tom Cruise against Chad Slater, a gay porn star who performs under the name Kyle Bradford. Cruise alleged that Slater had falsely told a magazine called *Actustar* that Slater had an affair with Cruise which led to the breakup of Cruise's marriage with actress Nicole Kidman. *Los Angeles Times*, May 4. After the news reports appeared, Slater published a denial that he had given the interview that was attributed to him in the magazine, and the story quickly lost currency.

In *Hoffman v. Lincoln Life and Annuity Distributors, Inc.*, 2001 WL 467550 (U.S.Dist.Ct., D. Md., April 30), the court granted summary judgment to the defendant employer on hostile environment sexual harassment and retaliation claims in which a woman secretarial employee alleged that she was fired in retaliation for refusing to mail pornographic material for a gay supervisor. It turns out that her gay supervisor was a member of a professional association of gay people from whom the employer had derived a considerable amount of business, and that what he had asked her to mail were non-sexual invitations to a dinner meeting of the association. She state religious objections to homosexuality, and he reassigned the project to another secretary. She also claimed about being required to open pornographic mail addressed to her prior supervisor and to open pornographic emails. The court found these claims similarly overblown and undocumented.

A pending suit by employees of the University of Pittsburgh seeking domestic partnership benefits has been put on hold as a result of the University's announcement that it had appointed a campus committee to study the possibility of extending the benefits voluntarily. After the committee makes its recommendation to Chancellor Mark Nordenberg, the plaintiffs' attorneys from the ACLU will reassess whether to push the litigation further. *Pittsburgh Post-Gazette*, May 9.

The *Washington Blade* reported May 18 that a circuit court jury in Miami-Dade County awarded $570,702 in damages to openly-gay American Airlines flight attendant Mark London in his suit against Stephen Day, an airline passenger who shoved him and called him "queer" and "fag" during a 1997 flight between Cancun and Miami. London told the *Blade* that the large award resulted from "the aggravation of a pre-existing condition" as a result of Day's actions. London also filed criminal charges against Day, which resulted in an assault conviction in 1999.

The *Boston Herald* reported May 29 that Sergeant Joanne Caron of the Essex County, Massachusetts, sheriff's department has settled her sexual harassment suit pending in Middlesex County Superior Court. Caron, a lesbian, alleged that she was subjected to harassment and discriminatory treatment by Essex County Jail Deputy Superintendent Richard A. Mendes, solely because of her sexual orientation. Under the terms of the settlement, Caron will receive damages of $250,000 and Essex County guarantees that Mendes will no longer be in a position of any supervisory authority over her. As a practical matter, it appears that Mendes, who recently suffered a heart attack, is being replaced.

The *Washington Post* reported May 26 that Montgomery County (Md) Circuit Judge DeLawrence Beard had approved a petition by a gay man to adopt his same-sex partner of 32 years in order to establish a legal family relationship, mainly for purposes of inheritance and being able to make legally enforceable decisions about each other's medical care. The attorney for the two men, who wished to remain anonymous, stated that they were a middle-aged couple, and that the younger man had adopted the older one, whose parents are deceased and thus could not object. The order approving the adoption requires that a new birth certificate be issued to the older man, listing the younger man as his parent! A.S.L.

Criminal Litigation Notes

The Missouri Supreme Court, sitting en banc, rejected a constitutional vagueness challenge to the state's hate crimes law in *State of Missouri v. Callen*, 2001 WL 569101 (May 29). The law, which provides for a penalty enhancement, authorizes the state to charge a higher level of crime in crimes "which the state believes to be knowingly motivated because of race, color, religion, national origin, sex, sexual orientation or disability of the victim or victims." Joseph Callen argued that the phrase "the state believes" introduces a fatal ambiguity, in that nobody can know what the "state believes" about their motivations. The court dismissed the argument, commenting that Callen had mistakenly assumed that the "state believes" provision is "an element of the crime." In the view of the court, it is "simply a procedural prerequisite to the filing of the charge in the first place, a mechanism designed to ensure the prosecutor's 'good faith' in bringing the charge." The opinion does not specify the kind of bias for which Callen's felony trespass charge was enhanced.

Ronald Edward Gay, age 55, pled guilty to first-degree murder and malicious wounding charges stemming from his shootings at a gay club, the Backstreet Caf,, in Roanoke, Virginia, last September 22. The May 10 plea sets him up to be sentenced to a maximum of four life terms plus 60 years; under Virginia law, he could be eligible for geriatric parole in ten years, but only if parole officials find him to be in very poor physical shape, essentially unable to harm anybody. In a rather incoherent statement to the court, Gay attributed his activities to the action of Lucifer. *Roanoke Times & World News*, May 11. A.S.L.

Legislative Notes

A Correction: Last month, we reported that the new Maryland law forbidding sexual orientation discrimination had been signed by Governor Parris Glendening on April 20. This was based on advanced news reports that proved to be in error. The governor's signing ceremony was held on May 15, 2001, at which time he signed approximately 200 bills that had been passed during the recent legislative term. A quiet protest against the sexual orientation discrimination bill was staged by a group calling itself Take Back Maryland.org, which is collecting signatures for a statewide repeal referendum. 40,000 valid signatures will be required. MIBaltimore Sun, May 16.

After a protracted campaign stretching over several legislatures, Texas activists finally secured enactment of a hate crimes penalty enhancement law that specifically includes "sexual preference." The measure was signed by Governor Rick Perry, a Republican, on May 11, and takes effect on September 1. As originally drafted, the bill used the term "sexual orientation," but this was changed at the instance of Republicans in the state House, who apparently disagree with the contention of gay political leaders that sexuality is not strictly a matter of choice. Texas already has a hate crimes law, but its authorization for penalty enhancement is based on a judicial finding that the crime was motivated by prejudice against a "group," without defining that term. Former Governor George W. Bush was opposed to changing the law to list specific characteristics, but his successor did not take a public position (although there were allegations that he was working behind the scenes to prevent passage). At the

signing ceremony, Perry stated: "In the end, we are all Texans, and we must be united as we walk together into the future. I have expressed reservations about passing a hate-crimes law which delineates particular groups of Texans… But I also believe that as the governor and as a Texan, I have an obligation to see issues from another person's perspective." Perry also stated his hope that the law would have sufficient deterrent effect that the number of hate crimes prosecutions in the state would not increase when the law takes effect. *Austin American Statesman*, May 12. It was also reported that an attempt to pass a specific legislative ban on recognition of same-sex marriages was stalled in a legislative committee, after passing one house of the Texas legislature. Opponents argued that the measure was unnecessary in light of existing Texas law. *Fort Worth Star-Telegram*, May 22.

The San Francisco Board of Supervisors voted 9–2 on April 30 to approve an amendment to the city's health benefits plan to cover up to $50,000 of the costs of city employees undergoing sex-reassignment procedures, including necessary surgery toward that end. *San Francisco Chronicle*, May 1.

A bill banning sexual orientation discrimination passed the Illinois House by a vote of 60–55, but failed in the Senate, where the bill's sponsor withdrew it from consideration after it was referred to a hostile committee. "I think we have the votes on the Senate floor," said Senator John Cullerton (D-Chicago), "but it's hard to get it out of that particular committee." When the committee announced that the bill had been withdrawn, some gay rights advocates who had come to the scheduled hearing on the bill staged a disruptive protest and were arrested. *St. Louis Post-Dispatch*, May 10.

The Rhode Island House of Representatives voted 46–41 on April 28 in favor of an amendment to the state's law against discrimination that would add "gender identity or expression" to the existing categories covered by the law, to make clear that discrimination against transgendered persons is unlawful. The measure was expected to encounter significant opposition in the state Senate, however. It had actually been part of the original gay rights bill year ago, but was dropped at that time to ensure passage of the ban on sexual orientation discrimination in 1995. *Providence Journal*, April 29.

In Washington State, a legislative proposal aimed at curtailing bullying and harassment in schools was blocked in the House Education Committee by Christian conservatives who claimed it was really a gay rights measure. The bill would have required school districts to adopt policies against harassment and intimidation, and would have required the state to develop a model policy for use by local districts as a guide. Christian conservatives claimed that the bill would unfairly censor anti-gay statements by students and public school staff in violation of the First Amendment. The measure, which had passed the state Senate with bipartisan support, had been endorsed by the state Parent-Teacher Association, police groups, and the largest teachers union in the state. *Seattle Post-Intelligencer*, May 1.

Maine Governor Angus King was expected to sign a bill approved by the state legislature that requires health insurers licensed to do business in Maine to include domestic partnership coverage as an available option for group insurance plans that cover spouses of plan members. The Christian Civic League of Maine has announced it will attempt to win repeal of the bill by the voters in a referendum. The League was previously successful in winning repeal of a state gay rights law. *Portland Press Herald*, May 24.

The city council of Portland, Maine, voted 8–0 on May 21 to approve an ordinance that recognizes gay and unmarried heterosexual couples as families, and requires agencies that get city funding to recognize such families as well. The ordinance designates all couples who register with the city as families, and requires agencies that receive city money to provide health insurance to domestic partners of employees. The measure will depend for its efficacy on the state bill, mentioned above, that would require insurers doing business in Maine to offer domestic partnership coverage in their group health policies. The measure will also affect the city school system, which will have to recognize same-sex partners as parents of the children they are raising. *Portland Press Herald*, May 22.

Montgomery County, Maryland, has enacted a revised human rights law that will take effect during the summer. The law forbids sexual orientation discrimination along with the other categories usually found in such laws. It greatly expands jurisdiction by comparison to its predecessor law, and provides new enhanced penalties and enforcement mechanisms. BNA Daily Labor Report No. 97, 5/18/01, p. A–12.

Minnesota Governor Jesse Ventura proposed to allow unions representing state employees to negotiate a domestic partner benefits plan, but on April 30 the state Senate voted 37–29 to add an amendment limiting state employee benefits to employees, spouses and dependent children or grandchildren, thereby probably scotching the plan. *Star-Tribune*, May 1.

In Glendale, California, the City Council voted May 15 that local nonprofit agencies seeking community development block grants must expand their anti-discrimination policies to cover citizenship, gender, domestic-partner status and AIDS/HIV status. This year, $4.4 million in federal grants were distributed by the Council to a variety of programs. It is expected that this requirement may affect grants to the local council of the Boy Scouts of America. *Los Angeles Daily News*, May 18.

On May 8 the Madison, Wisconsin, City Council voted 11–6 against ratification of a contract with municipal unions that would have extended domestic partner benefits eligibility for city employees, but this was a preliminary vote and a final vote was to be taken at the end of May. Opponents said that they could not justify asking taxpayers to shoulder both a wage increase and the estimated $60,000 a year cost to extend benefits to same-sex partners of city employees. This was the first time in at least 40 years that the Council had rejected an agreement reached by city and union negotiators, according to the *Capital Times* of May 9.

The U.S. House of Representatives approved an amendment to the pending education bill on May 22 that will require public schools that receive federal funds to allow military recruiters to have access to their campuses to speak with students. *New Orleans Times-Picayune*, May 23. The measure was passed in specific reaction to a vote by the Portland, Oregon, school board on May 21 to continue a ban of on-campus recruitment by the military at Portland high schools.

The Nebraska Board of Realtors and the Nebraska Real Estate Commission have been working for several years to produce a revised statute regulating real estate transactions, which had been introduced in the state legislature by Senator Adrian Smith. But Smith decided to pull the bill from consideration after Sen. Ernie Chambers succeeded in adding an amendment forbidding discrimination on the basis of sexual orientation, even the Real Estate Commission voted unanimously to support the amended bill. Smith said, "My desire is that it not pass with that amendment." Smith said he did not support anti-gay discrimination, but felt that the amendment had lacked any public comment and would be difficult to enforce, according to a May 24 report in the *Omaha World-Herald*.

Having lost a string of rulings in the New York City trial courts attempting to shut down adult-oriented businesses, the New York City Planning Commission is proposing yet another revision to regulations under the City's Zoning Ordinance. When the ordinance was first passed, the regulations stated that any business that reduced its "adult uses" to below 40% of its floor space would not be considered an adult establishment. Operators of adult businesses eager to keep operating at their existing locations redesigned the businesses to reduce the proportion of floor space, adding non-adult books, videos and other material to their stock. City inspectors attempted to shut them down anyway, claiming that the changes were mainly for show and that the businesses continued to derive almost all their income from sales of sexually-oriented materials. The courts refused to go along, requiring the city to comply with its own regulation. Now the Commission proposes to change the regulation to make it easier to shut down such establishments, but gay organization leaders testifying at a Commission hearing on the proposed changes argued that the proposal was vague and subject to discriminatory application. *Newsday*, May 24.

All four of the leading Democratic candidates for mayor of New York City in this fall's election have announced their support, at least "in concept," for a legislative proposal that would require prospective city contractors to have domestic partner benefits plans for their employees. City Comptroller Alan Hevesi, Public Advocate Mark Green, and Bronx Borough President Fernando Ferrer all endorsed a bill that has been pending in the city council for several years. Council Speaker Peter Vallone announced that he was for the idea in concept but wanted to review potential financial impact before committing to the bill, which now has 16 co-sponsors. The administration of incumbent Mayor Rudolph Giuliani has not taken a position on the issue. *New York Post*, May 16.

The Vermont Civil Union law was the subject of furious debate during last fall's general election in that state, and the state House of Representatives changed over to Republican control largely due to the defeat of incumbents who had voted for the bill. Now the House has narrowly approved a bill that would replace the Civil Unions law with a new statute that would offer the benefits of marriage to any couple who live together but cannot legally marry, including parents and children. The measure is seen as having no chance of passage in the Democratic-controlled Senate, and Governor Howard Dean has stated that he would veto the measure, so the vote was largely symbolic. *Washington Post*, May 24. However, in the simplistic manner of the press in the U.S., quite a few newspapers reported on this development as a "setback" for civil unions.

Various news media reported during May that the Republican leadership of the New York State Senate was signaling its willingness to consider taking up the Sexual Orientation Non-Discrimination Act for consideration during this session. The bill has been pending in some form or another for about thirty years in the New York legislature, and has passed the Assembly every year for the past nine years, most recently by a very decisive bi-partisan vote. Supporters have long contended that they could pass it on the Senate floor, if the Republican majority leaders did not persist in keeping it bottled up in committee. But there were hopeful signs that the leadership, prodded by Gov. George Pataki, who wants to get more gay votes when he runs for re-election next year, may be willing to let the matter come to a vote this year. *Newsday*, May 20. A.S.L.

Boy Scouts Updates

Actions by several large public school districts around the country to sever ties with the Boy Scouts of America has inspired some of the usual anti-gay suspects in Congress to propose federal action. On May 23, the House of Representatives approved an amendment to the pending education bill that would require school districts to allow BSA units to continue using school facilities on the same basis as other groups as a condition of receiving federal education funds. A similar amendment has been proposed by Senator Jesse Helms (R-N.C.) for the Senate version of the education bill. When he introduced his amendment on May 14, Sen. Helms specifically cited the Broward County School Board's actions, which have since been rejected by a U.S. District Court. *South Florida Sun-Sentinel*, May 24. The national press has largely failed to report this development, which has so far been discussed in local newspapers reporting on co-sponsorship of the amendment by various House members. Gay commentators pointed out that the amendment would do no more than codify the recent Broward County court decision, which is undoubtedly correct as a matter of First Amendment law, although it must be at least somewhat embarrassing to the Scouts to note that the main precedent relied upon by the court was an old decision holding that the Ku Klux Klan must be accorded the same rights as any other organization to make use of a public school auditorium that was routinely made available for meetings by private groups. See *Boy Scouts of America v. Till*, 136 F.Supp.2d 1295 (S.D.Fla., March 21, 2001).

The Louisiana Senate voted 14–21 against amending the state's civil rights law to forbid employment discrimination on the basis of sexual orientation. *Baton Rouge Advocate*, May 24. The vote came shortly after the Louisiana House fell six votes short of passing a bill to decriminalize consensual adult sex. Although 47 members voted for decriminalization and 45 voted against, enough members were not voting to deprive the measure of the absolute majority of the House necessary for passage. The bill's chief sponsor stated he would try to get another vote when more members of the House are present. (The Louisiana sodomy law has been under continual litigation attack since the 1980s, but has been upheld by the state's supreme court several times. More suits are pending.). *Baton Rouge Advocate*, May 18.

The Civil Rights Commission in suburban Montclair, New Jersey, passed a resolution May 3 condemning the discriminatory policies of the Boy Scouts of America, applauding the efforts of local Boy Scouts organizations to distance themselves from such policies, and called on public agencies to withhold "any special support for the Boy Scouts, and urges all private organizations to reconsider any financial and other support for the Boy Scouts."

The Wake County, North Carolina, Board of Triangle United Way voted May 17 to allow the Boy Scouts and other recipient agencies to exclude gay people as employees and volunteers and continue receiving United Way funds. The expressed reason for the action was fear that major donors would withdraw their support of United Way if it cut off the Scouts. *Raleigh News & Observer*, May 18.

The United Way of the Lehigh Valley in Pennsylvania sent an inquiry to the Minsi Trails Council of the Boy Scouts of America concerning its policy on openly-gay members, preliminary to deciding what to do about continued funding. The response was that the council will exclude a scoutmaster or member who sexuality or behavior "becomes publicly inappropriate," but would not try to determine the sexual orientation of members. This variant of "don't ask, don't tell" was enough to satisfy the United Way board, which voted unanimously to keep funding the local Council. *Allentown Morning Call*, April 27.

The United Way of Milwaukee, Wisconsin, added "sexual orientation" to its non-discrimination policy, but will continuing funding local Scouts units while the local Scouts council lobbies the national BSA to lift its ban on gay members, reported the *Milwaukee Journal-Sentinel* on May 11. The Milwaukee County Council reportedly sent a letter to national headquarters urging national leaders to consider the "strain" that their policy is putting on local Scouts organizations. The United Way indicated that ultimately all grant recipients will have to comply with the new non-discrimination policy, but has not set a time limit for compliance.

Last month we reported that the Jamestown (ANY) Community College campus at Olean had barred the Scouts from holding a meeting for adult leaders on campus. As follow-up to that incident, the *Olean Times Herald* reported May 9 that college representatives and scout representatives met and came to an understanding that the College will not endorse or sponsor Scout activities, but that the organization will have the right to rent space for activities at the College on the same basis as other organizations, consistent with the 1st Amendment.

After gay activists protested that an advertisement running in East Bay newspapers billing a Scouts event as "a great way to make sure no child misses the opportunities, motivation and fun that scouting offers" was misleading due to the Scouts' anti-gay membership policies, Bay Area Scout officials pulled the advertisement for revisions. *San Francisco Chronicle*, May 25.

The *Palm Beach Post* reported May 18 that it was unlikely that the United Way of Palm Beach County and the Boy Scouts would reach an agreement that would result in continuation of funding after June 2002. The United Way's board set June 30 as the deadline for its 59 recipient agencies to sign a non-discrimination agreement that includes sexual orientation, which the BSA at this point will not sign. However, during the last year of funding, beginning July 1, the BSA is likely to get much more money than in the past, because many new donors have given earmarked donations to United Way intended for the Scouts.

Syracuse University Chancellor Kenneth A. Shaw stirred up a hornet's nest of local controversy by ruling that a major annual fund-raising event for the Boy Scouts could no longer be held at the Carrier Dome, the University's large domed football stadium, due to the organization's dis-

criminatory membership policies. The *Herald American* reported April 29 that the annual Boypower Dinner, which had been held in the Carrier Dome for 17 of the last 18 years, was the largest single BSA fundraising event in the nation, earning $400,000 to $500,000 each year for BSA programs. Shaw sent a letter to Scout officials early in April stating that they may not use the Dome beginning in 2002 "because Boy Scout policy with respect to homosexual leaders conflicts with the university's policy of acceptance of homosexuality," according to the newspaper report. On a historical note, it is worth mentioning that Syracuse University's law school was the first in the United States to have an openly-gay dean of the faculty, was back in the 1980s, and that the city of Syracuse has had an ordinance banning sexual orientation discrimination since 1990.

The Rhode Island Medical Society has decided to oppose the Boy Scouts' antigay policy on grounds of health. According to an item published in the *Providence Journal-Bulletin* on May 11, the Society "says homosexual youths are already more likely to slump into depression or to kill themselves than their heterosexual peers. The doctors have adopted a resolution saying the scouts' ban on gays greatly increases the risk of both… The policy-making board voted unanimously on the resolution in April but only after reviewing studies, including one by a Brown University psychiatry professor."

The Iowa City school board approved a policy that prohibits groups that do not follow the district's "equity statement" (which forbids sexual orientation discrimination) from engaging in promotional activities in the schools, and also approved a building use policy that will require Scout troops to pay a fee to use school buildings on the same basis as other groups, according to a report in the *Washington Blade* on May 18. A.S.L.

Law & Society Notes

Beginning May 9, the national press was flooded with stories stemming from a panel presentation being held that day at the annual meeting of the American Psychiatric Association in New Orleans, at which Dr. Robert Spitzer, a psychiatrist on the faculty of Columbia University, reported on his study finding that some "highly motivated" gay people could "become heterosexual" through psychotherapy. What made the story more newsworthy than the usual crackpot accounts of conversion therapy by dissident psychiatrists was that Spitzer had been among those psychiatrists who worked in the 1970s to get homosexuality removed from the psychiatric profession's published list of mental disorders. However, in the ensuing controversy it became clear that many in the press, led by a peculiarly incomplete and slanted article by Erica Goode published that day in the *New York Times*, had oversimplified and distorted Spitzer's research, and had downplayed (and in some cases completely overlooked) other research findings presented by panel participants rejecting Spitzer's conclusions. (The *Washington Post* version of the story published the next day emphasized the clash of study results, rather than focusing mainly on Spitzer's study.) On May 23, the *Wall Street Journal* published an op-ed article by Spitzer attempting to clarify his findings. Spitzer stated: "What I found was that, in the unique sample I studied, many made substantial changes in sexual arousal and fantasy — and not merely behavior. Even subjects who made a less substantial change believed it to be extremely beneficial. Complete change was uncommon. My study concluded with an important caveat: that it should not be used to justify a denial of civil rights to homosexuals, or as support for coercive treatment. I did not conclude that all gays should try to change, or even that they would be better off if they did. However, to my horror, some of the media reported the study as an attempt to show that homosexuality is a choice, and that substantial change is possible for any homosexual who decides to make the effort. In reality, change should be seen as complex and on a continuum. Some homosexuals appear able to change self-identity and behavior, but not arousal and fantasies; others can change only self-identity; and only a very few, I suspect, can substantially change all four. Change in all four is probably less frequent than claimed by therapists who do this kind of work; in fact, I suspect the vast majority of gay people would be unable to alter by much a firmly established homosexual orientation." But, of course, the follow-up and clarification received almost no attention compared to the original story, which had generated headlines around the country along the lines of "Study Says Gays Can Change."

The number of unmarried adult partners living together in the U.S. increased by 72 percent from the 1990 census to the 2000 census, according to data released by the U.S. Census Bureau in May. Because the Bureau had not yet broken down the data by gender, it was not known what proportion of such couples were same-sex couples, but that information is expected to be released in a few months. The Bureau had previously reported that 145,130 same-sex couples self-identified on the 1990 census, 4.6 percent of all self-identified unmarried adult cohabiting couples counted that year. At the time, gay commentators contended that there was significant under reporting of same-sex couples in 1990, at least partly due to insufficient explanation by the Census Bureau of the category "unmarried partner" on census forms. Gay activists hoped that efforts by gay organizations to encourage same-sex partners to check that box on their 2000 census forms would reduce the undercounting phenomenon. *Washington Blade*, May 18.

Home Depot, Inc., a major U.S. retailer, announced May 14 that it would add "sexual orientation" to its written non-discrimination policy. The company's action came as a shareholder proposal was pending on this topic for the company's annual meeting on May 30. The company had been urging shareholders to reject the proposal on the ground that the company does not discriminate on this basis and there was no need to add it to the formal policy. Now there is no need for the vote (unless, of course, a devious management strategy leads the company to rescind the policy after the company meeting has taken place). However, anti-gay forces have also been adopting the shareholder proposal tactic: AT&T shareholders were faced with a proposal to delete "sexual orientation" from the company's non-discrimination policy, on the ground that the policy promotes unlawful activity in those states that still outlaw consensual sodomy. Last year, shareholders of Computer Associates International, Inc., rejected a shareholder proposal to repeal the company's domestic partnership benefits policy. *Wall Street Journal*, May 15. • • • The *Washington Blade* reported on May 25 that AT&T shareholders voted down the proposal to delete "sexual orientation" from the company's policy statement, as fewer than 7% of the shares were voted in favor of the proposal.

The National Institute of Military Justice appointed a special commission chaired by a former top military appeals judge, Walter T. Cox III, to prepare a report on the 50th anniversary of the Uniform Code of Military Justice. The Cox Commission Report, issued in May, calls for the repeal and replacement of the rape and sodomy provisions of the Code, and urges adoption of something more akin to the Model Penal Code (which does not prohibit consensual sexual activity between adults in private). The Report opines that inappropriate sexual activity in a military context can be addressed through other provisions of the Code, and there is no need for a military sodomy law. Copies of the report can be obtained from the website of the Servicemembers Legal Defense Network, www.sldn.org.

Reverend John Schlegel, the president of Creighton University, a Jesuit Catholic school, announced official recognition of a Gay Straight Alliance at the school, stating that the school must stand against "discrimination and prejudice." According to an article published May 25 in the *Omaha World-Herald*, Rev. Schlegel said that the university had consulted with Omaha Archbishop Elden Curtiss prior to making this decision. Schlegel stated that the group "will not be engaged in political advocacy for a gay life style or do anything that even appears to be contrary to Catholic teaching. This is not their intention and it will not be allowed." According to Creighton's news release, the university is one of 12 Jesuit campuses that formally recognize gay and lesbian student groups.

Human Rights Watch, an international organization that monitors human rights issues internationally, has issued a report faulting public schools in the United States for failing to protect lesbian, gay, bisexual and transgendered students from harassment. Titled *Hatred in the Hallways:*

Discrimination and Violence Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Public Schools, the report can be found at the organization's website: www.hrw.org/reports/2001/uslgbt/.

There was a brief flurry of comment in the national press after students at Ferndale High School, in Whatcom County, Washington, voted to make Krystal Bennett, a lesbian, their "prom king." Bennett is reportedly the only openly-gay student at Ferndale High, and the mischievous action of the students in electing her their "king" has inspired school officials to do what they never anticipated they might have to do: adopt formal rules requiring that the king be male in future! The students appear to be somewhat ahead of their teachers in rejecting gender stereotypes... *Seattle Times*, May 20.

Bishop Paul W. Egertson, the Lutheran Bishop of Southern California, announced on May 22 that he has been asked to resign by national denominational leaders because he joined in the ordination of a lesbian as a Lutheran minister in defiance of central church policy. Egertson was the first active bishop in the church to participate in such a ceremony. Egertson is the father of a gay son, and strongly pro-gay in his public pronouncements; his son is a seminary graduate who wants to be ordained and follow the same profession as his father, but is prevented from doing so by the policy. Egertson, who is 65, would be required to step down under church policy as of Aug. 31, but he announced that he would accelerate his retirement by one month, characterizing himself as a "conscientious objector" to the church's refusal to allow ordination of gay people. *Los Angeles Times*, May 23 & 31.

Prior to its acquisition by Exxon, Mobil Corp. had adopted one of the most strongly pro-gay employment policies of any major energy company, including a ban on sexual orientation discrimination and the extension of benefits to same-sex partners of employees. Exxon terminated those policies, and faced a shareholder proposal at its annual meeting seeking to reinstate them. The proposal was co-sponsored by several pro-gay institutional investors, including the New York City Pension Funds, the California Public Employee Retirement System, and the City of Atlanta. Exxon takes the position that domestic partnership benefits policies are unworkable in any jurisdiction that does not legally recognize same-sex partners. At this point, it states that it would extend benefits to same-sex partners who were lawfully married in the Netherlands, or who were recognized as spouses under Canadian federal legislation. The news reports we saw did not mention whether Exxon will recognize Vermont civil unions or Hawaii reciprocal beneficiaries, or California domestic partners, all of whom have statuses recognized by virtue of state statutes. *Washington Post*, May 24. The *Los Angeles Times* reported on May 31 that Exxon Mobil Corp. shareholders had defeated all of the "activist" proposals brought forward at the annual meeting; the proposal receiving the greatest number of votes was that to adopt a non-discrimination policy on the basis of sexual orientation, which received more than 10% of the votes, an unusually high number for a shareholder proposal. Because the proposal received more than 6% of the votes, it may be presented again next year.

At Kirkwood High School in St. Louis, the district superintendent came to the defense of a recently formed Gay-Straight Alliance by stating that the district has a legal obligation to accept such a club when its formation is initiated by students who had found a willing faculty advisor and had agreed to abide by the school's guidelines on student clubs. Said Superintendent David Amerall to the *St. Louis Post-Dispatch* (May 13), "We have an obligation to make sure every student who comes to school is going to be respected as a learner and as a person. As public schools, we understand we are going to serve a diversity of students." The matter became a public issue when the publisher of a local "Christian" newspaper called for the discharge of the high school principal for allowing the club to be formed.

Lest we become complaisant… The *Dayton Daily News* reported May 11 that plain-clothes police officers had staked out Caesar Creek State Park and arrested thirteen men for "soliciting" and "engaging in sex" at the park. Authorities said the action was undertaken in response to complaints from visitors to the park. The news report noted that areas where the arrests took place were listed among Ohio "cruise spots" on the "Gay Universe" website.

After Major League Baseball pitcher Julian Tavarez of the Chicago Cubs made homophobic remarks about San Francisco baseball fans on April 28, the Cubs pressured him to issue a public apology on April 29 and imposed a substantial fine, hopeful that Major League Baseball officials would not impose more significant sanctions. *Chicago Daily Herald*, May 1. But this wasn't the biggest "gay" story in pro baseball: In the May issue of *Out*, the nation's largest circulation gay-oriented magazine, editor Brendan Lemon wrote that he had been having an affair with a major league baseball player for the past year and a half, and had been urging his lover to "come out" publicly. This sparked intense speculation on the internet about the identity of Lemon's sweetheart, and a rash of editorial commentary by newspaper sports reporters, almost all charging Lemon with having an unrealistic view of how an openly-gay player would be treated by other players and fans of the sport. A.S.L.

Developments in Canadian, European and Caribbean Law

Marriage: Constitutional challenges, under the equality provision of the Canadian Charter of Rights and Freedoms, to the exclusion of same-sex couples from civil marriage are pending in courts in Vancouver, Toronto and Montr,al. In the Vancouver set of cases, the Attorney-General of British Columbia is challenging the exclusion, seen as the result of a common-law rule (restated in a 2000 federal statute) which only the federal government has the constitutional power to amend. The standing of the Attorney-General to do so was upheld by Chief Justice Brenner of the Supreme Court of British Columbia (a trial court) on Jan. 8 in *In the Matter of Applications for Licences by Persons of the Same Sex Who Intend to Marry*, No. L001944, http://www.courts.gov.bc.ca/jdb-txt/SC/01/00/2001BCSC0053.htm. The other Vancouver cases, in the same court, are *Egale Canada Inc., et al. v. Attorney General of Canada, et al.*, No. L002698, and *Dawn Barbeau & Elizabeth Barbeau, et al. v. Attorney General of B.C., et al.*, No. L003197. The Toronto cases, in the Ontario Superior Court of Justice (Divisional Court), are *Hedy Halpern & Coleen Rogers, et al. v. Attorney General of Canada, et al.*, No. 684/00, and *Metropolitan Community Church of Toronto v. Attorney General of Canada, et al.*, No. 39/2001. The Montr,al case, in the Qu,bec Superior Court, is *Michael Hendricks & Ren, Leboeuf v. Linda Goupil (Minister of Justice of Qu,bec), et al.*, No. 500–05–059656–007.

Intestate Succession: On April 2, in *In Re Sand (Estate)*, http://www.albertacourts.ab.ca/webpage/jdb/current_judgments-qb.htm, Perras J. of the Alberta Court of Queen's Bench held that the denial of a spouse's share of an estate, upon intestacy, to a surviving same-sex partner violated the equality provision of the Canadian Charter. The Government of Alberta, considered Canada's most politically conservative province, announced that it would not appeal, and that it would conduct a review of all legislation on spousal rights. *Edmonton Journal*, April 4.

Partnership Laws: Laws on registered partnership or cohabitation, applying only to same-sex couples or to both same-sex couples and unmarried different-sex couples, and offering varying packages of rights and obligations, continue to proliferate in Europe. Recent laws include: Canton of Geneva, Switzerland, Law on Partnership (*Loi sur le partenariat*), Feb. 15, 2001 (7611), http://www.geneve.ch/legislation/welcome.html (*Modifications r,centes*); Germany, Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 Bundesgesetzblatt 266, http://www.bundesanzeiger.de/bgbl1f/b1findex.htm; Autonomous Community of Valencia, Spain, Law on Regulating De Facto Unions (*Ley por la que se regulan las uniones de hecho*), (9 April 2001) 93 *Boletin Oficial de las Cortes Valencianas* 12404, http://www.corts.gva.es/esp; and Portugal, Law No. 7/2001 of 11 May, Adopting measures of protection for de facto unions (*Lei No. 7/2001 de 11 de Maio, Adopta medidas de protec‡ o das uni es de facto*), [2001] 109 (I-A) *Di rio da*

Rep£blica 2797, http://www.portugalgay.pt (*Espa‡o Aberto, Politica e Direitos*). *Criminal Injuries Compensation:* On April 1, a new Criminal Injuries Compensation Scheme 2001, http://www.cica.gov.uk, came into force for England, Wales and Scotland. The Scheme is an executive act, which is authorised by an Act of Parliament and a draft of which Parliament was given a chance to veto, but which is not itself an Act of Parliament. Where an individual dies as a result of personal injuries directly attributable to a crime of violence, paragraph 38 of the Scheme provides that compensation may be payable by the Criminal Injuries Compensation Authority to the "partner of the deceased," defined as "a person who was living together with the deceased as husband and wife [judicially interpreted as meaning only an unmarried different-sex partner] or as a same sex partner." Under the old Scheme, only unmarried different-sex partners could be compensated. This meant that the male partner of a man killed in the April 30, 1999, bombing of a gay pub in London was not eligible, unlike the male partner of a woman killed in the blast. For England and Wales, this is the second significant recognition of same-sex partnerships by executive regulations, after the changes to the Immigration Rules. Neither reform is likely to have been adopted had an amendment to an Act of Parliament been required. For this reason, surviving same-sex partners will still be unable to claim compensation, under the Fatal Accidents Act 1976, from a third party whose negligence caused the death of their partner, unlike surviving unmarried different-sex partners.

Caribbean Criminalization: Article 56 of the European Convention on Human Rights permits member states of the Council of Europe to extend the Convention to any territory for whose international relations they are responsible. The United Kingdom has done so both with regard to European territories (Gibraltar, Guernsey, Jersey, Isle of Man), and with regard to non-European territories, including some in the North Atlantic or Caribbean (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos). The European territories and Bermuda voluntarily passed legislation to comply with the 1981 judgment of the European Court of Human Rights in *Dudgeon v. U.K.*, which held that criminalization of private, consensual, adult same-sex sexual activity violates Article 8 of the Convention (right to respect for private life). Because the five remaining Caribbean territories refused to do so, on Dec. 13, 2000, at Buckingham Palace, the Queen's Most Excellent Majesty in Council approved the Caribbean Territories (Criminal Law) Order 2000 (in force Jan. 1, 2001). The Order decriminalizes sexual activity between men in these five territories, but retains two rules which are or might be discriminatory. First, the age of consent is eighteen. If the age of consent to male-female and female-female sexual activity in any of these territories is sixteen, as in England and Wales, then this rule violates Articles 8 and 14 (discrimination) of the Convention, according to the July 1, 1997 report of the European Commission of Human Rights in *Sutherland v. U.K.* Second, sexual activity is not "in private," and therefore illegal, if "more than two persons take part or are present." The European Court of Human Rights held on July 31, 2000 in *A.D.T. v. U.K.*, [Sept. 2000] L.G.L.N., that this rule violates Article 8. Gay and bisexual men living or vacationing on these islands need no longer fear prosecution, and there is now no criminal law pretext for turning away gay cruise ships. *Robert Wintemute*

Additional International Notes

On May 13, a district court in Tel Aviv, Israel, denied a lesbian couple's petition to adopt each other's children, affirming a prior ruling in the case by the Tel Aviv Family Court. The vote was 2–1, the majority holding that the Adoption Law applies only to married couples and pointing to a dispute among academics about the impact of single-sex parental couples on child development. Dissenting Judge Savyona Roth-Levy argued that the law should be applied to same-sex couples. The petitioners contemplate an appeal. *Jerusalem Post*, May 14.

Archbishop Peter Carnley, the new head of the Anglican Church of Australia, released a statement that Christians should treat same-sex relationships as "committed friendships" and should be supported by the church, however he did not call for formal church recognition of same-sex marriages as such. *Associated Press*, May 26.

As of March 29, Section 28 of the Local Government Act is no longer in force in Scotland, so the ban on "promotion" of homosexuality by local government officials is abolished; however, Section 28 remains in force in England and Wales due to the capitulation of the Blair Government to reactionary forces in the Parliament. The legislative compromise by which Section 28 was repealed by the Scottish parliament resulted in the enactment of the following language as Section 35 of the Ethical Standards in Public Life Act 2000: "Councils' duties to children" provides in part "(1) It is the duty of a council, in the performance of those of its functions which relate principally to children, to have regard to - (a) the value of stable family life in a child's development; and (b) the need to ensure that the content of instruction provided in the performance of those functions is appropriate, having regard to each child's age, understanding and stage of development." *SCOLAG*, May 7.

The Japanese Society of Psychiatry and Neurology announced that it will urge the Justice Ministry and the Supreme Court to grant post-operative transsexuals the right to officially change their sex designation in formal registry documents. *Yomiuri Shimbun*, May 25. ••• According to a message posted to the international email list of the International Lesbian and Gay Association on May 28 by the Japan Association for the Lesbian and Gay Movement, the Japanese Justice Ministry's special council for founding a new national human rights commission has included lesbian/gay/bi/trans rights on its list of subject matter for the proposed commission to deal with. There is presently no law forbidding discrimination on the basis of sexual orientation in Japan.

The *Times of London* reported on April 30 that three members of the British Defence Forces have undergone sex change procedures and remained in the Forces after a period of cross-dressing to become accustomed to their new gender roles. The Ministry of Defence decided to allow service members to undergo such procedures after it became clear that under European law transsexuals are protected against discrimination in this regard.

On May 2, the *Express* reported that a gay British soldier who had gone absent without leave in an attempt to keep his sexuality secret had been so highly praised at his court martial by his commanding officers that the tribunal decided to reprimand and fine him but not to impose any other punishment, in hopes of retaining him in the service. Among other things, Sergeant Steven Peterson was praised by his commander for helping another young soldier struggling with his sexuality to "come out" and make a successful adjustment to being openly-gay in the service. After the hearing, Peterson said to the press, "I am glad it is all over and all I want to do is get back to my regiment."

The *National Post* reported on May 10 that a recent poll of Canadians by Environics Research Group found that a majority of Canadians (55%) now either strongly or somewhat support marriage rights for same-sex couples, while 41% either strongly or somewhat oppose such rights, the remainder expressing no opinion. The poll also found a substantial decline from prior polls in the percentage of Canadians who continue to express disapproval of homosexuality, 37%, an eleven point drop from the 48% disapproval rate obtained in the same poll in March 1996.

During Italian national elections in May, Titti de Simone, a young openly-lesbian member of a Marxist party became Italy's first openly-lesbian member of the national legislature. *New York Times News Service*, May 17.

Jowelle De Souza, a male-to-female transsexual, won a $5,000 damage award in a settlement approved by the High Court in Trinidad as compensation for a violation of her constitutional rights by local police. De Souza claimed that police officers wrongly arrested her and then mistreated her while she was held at the police station, after she pushed a photographer who was taking pictures of her without her permission. The case was reportedly the first in which a member of the much-harassed transsexual community in Trinidad & Tobago has actually sued the police for violation of rights. *South Florida Sun-Sentinel*, May 16.

In a lengthy feature article published May 1, the *London Independent* reported that so many gay men are in training to be Catholic priests in Britain that the rector of one Catholic seminary had expressed fears that the priesthood is rapidly becoming a gay profession in Britain. The article noted that a forthcoming television documentary, titled "Queer and Catholic," will report that although all priests take vows of celibacy, many of the gay priests have interpreted this as a ban solely on heterosexual intercourse and have continued to be sexually active in the priesthood. The article reported that a "gay subculture" had grown up at the British seminaries, "similar to that which has developed in the United States, where it has been suggested that as many as a quarter of American priests are gay."

The Polish parliament has voted to expand the investigative powers of the police to gather and maintain information about the ethnicity, political and philosophical stands, religion, sexual orientation, habits and addictions of members of the public. *Polish News Bulletin*, May 25. A.S.L.

Professional Notes

Anthony D. Romero, an openly gay lawyer who has been serving as a program director at the Ford Foundation, has been appointed to become the executive director of the American Civil Liberties Union beginning in September. Romero will be the first openly-gay executive director of the nation's largest and best-known civil liberties organization, as well as the first Latino to achieve such a position. He was honored for his services to the lesbian and gay community at the LeGaL Annual Dinner in March 2001. At that time, he was recognized for helping to lead a breakthrough in the foundation world in funding lesbian and gay rights work. He is a graduate of Princeton University and Stanford Law School. ••• The ACLU Lesbian and Gay Rights and AIDS Projects have announced the hiring of three new professional staff members: James Esseks, a long-time cooperating attorney for the Project while employed at Valdeck, Waldman in New York, will become Litigation Director. New staff attorneys are Ken Choe, previously Assistant Counsel to the U.S. Secretary of Health and Human Services, and Tamara Lange, formerly associated with Caldwell, Leslie, Newcombe and Pettit in Los Angeles.

Lorri Jean, a lesbian attorney who worked for many years as a management official in the Federal Emergency Management Administration (FEMA) and has a successful tenure as executive director of the Los Angeles Gay and Lesbian Center has been tapped to be the new executive director of the National Gay and Lesbian Task Force. In a first for the Task Force, she will direct the organization from her hometown of Los Angeles, where the Task Force will open its first west coast office. The main office staff will remain headquartered in Washington, D.C.

LeGaL President Bob Bacigalupi was honored with a public service award by the New York County Lawyers Association at a May 24 reception. Bacigalupi is the Public Benefits Coordinator at Legal Services of New York, and an alumnus of New York Law School.

Kevin McCarty is an openly-gay attorney who serves as deputy commissioner of the Florida Department of Insurance. He is also the plaintiff in a lawsuit against Bankers Insurance, a Florida insurance company that attempted to influence McCarty's regulatory actions by engaging a private investigator to look into McCarty's private life for material to use against him. One month before trial was to begin, the insurance company settled McCarty's legal claim against it for $2.55 million, but the company faces a continuing battle as the Insurance Commission is moving to suspend its license to do business in the state. *Sarasota Herald-Tribune*, May 20.

A group of attorneys in Pakistan has contacted the LeGaL Foundation to arrange for a group subscription to *Law Notes*. This is the first inquiry we have received for such an arrangement from Asia. Many lesbian/gay bar associations in the United States have arranged with us for rights to distribute Law Notes to their members. Those interested in pursuing such arrangements should contact the LeGaL Foundation Administrator, Daniel R Schaffer, at 212–353–9118, or, by email, at legal@interport.net. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Appeals Court Defers to Doctor on Referral of HIV+ Patient

The U.S. Court of Appeals for the 1st Circuit ruled May 22 that a Massachusetts obstetrician did not violate Section 504 of the Rehabilitation Act or the Massachusetts Law Against Discrimination when he referred a pregnant HIV+ patient to another hospital in 1995 based on his unfamiliarity with administration of AZT and the possibility that the local community hospital with which he was affiliated might not have an AZT protocol in place in time for the delivery of the patient's child. *Lesley v. Chie*, 2001 WL 530481.

Vickie Lesley had been a patient of Dr. Hee Man Chie since 1982, and became pregnant late in 1994. In December she began seeing Dr. Chie for prenatal care. He had admitting privileges at Leominster Hospital, the community hospital in Lesley's town. Lesley had a variety of preexisting conditions that might pose complications for the pregnancy, so Chie scheduled a fetal echocardiogram and recommended that she take an HIV test. Lesley tested positive for HIV. Just a month previously, the Massachusetts Dept. of Public Health had mailed to all obstetricians in the state an advisory embodying new U.S. Public Health Service guidelines for the use of AZT with pregnant women to prevent HIV transmission to their babies, which Dr. Chie had read. Leominster Hospital's pharmaceutical department had apparently not yet dealt with this issue and did not stock AZT. Dr. Chie did some research and phoning around, including speaking with Sheila Noone, the nurse-coordinator of the Women and Infants HIV Program at Worcester Memorial Hospital, about 45 minutes away. Worcester Memorial had participated in the clinical testing that led to the USPHS recommendations. Noone offered to consult with Dr. Chie during Lesley's pregnancy, or in the alternative to have Lesley enroll with the HIV Program at Worcester and deliver her child their.

Chie spoke with Lesley and her husband on March 20, 1995, telling them about the HIV Program at Worcester and giving them nurse Noone's telephone number. He also told Lesley he had no experience in administering AZT, but Lesley expressed confidence in him and scheduled a follow-up appointment for 10 days later. She also met with Nurse Noone and signed up for counseling and other services at the HIV Program, but planned to continue her prenatal care with Dr. Chie and deliver her baby at her community hospital in Leominster.

However, in the ten days between Lesley's appointments, Dr. Chie's research and conversations led him to conclude that it would be best for Lesley to deliver at Worcester Memorial, and he requested the approval of Lesley's primary care doctor at her HMO to make this referral. At the March 30 appointment, Dr. Chie told Lesley he had decided to transfer her case to the HIV Program. He told her that there was no AZT program at Leominster Hospital, and no other doctor at Leominster with relevant HIV experience, and that he (Dr. Chie) lacked confidence in monitoring AZT administration without any experience. Although Lesley repeated that she wanted to continue with him, he refused to continue treating her.

Lesley then enrolled at the HIV Program and delivered her baby there on July 10, five weeks premature. She received satisfactory care at Worcester Memorial and her baby tested negative for HIV at birth and in follow-up testing.

In 1997, Lesley filed suit against Dr. Chie in state court, claiming violations of Section 504, the ADA, and the Massachusetts law barring discrimination on the basis of disability in public accommodations. Dr. Chie removed the case to federal court, and the parties agreed to drop the ADA claim.

District Judge Gorton granted Dr. Chie's summary judgment motion. The expert testimony on

the trial record introduced by Lesley showed that public health officials at the time believed that any licensed obstetrician should be able to administer AZT during pregnancy without specialized training or knowledge. It also showed that Lesley was a high risk patient, due to preexisting conditions, and there was expert testimony introduced by Dr. Chie that as of the time his referral decision was made in March 1995, it was a reasonable decision. Dr. Bruce Cohen, a specialist in high-risk pregnancy, testified that denying a "high risk patient" such as Lesley the specialized care that was offered by the HIV Program would have been unethical, and Dr. Bonnie Herr, a community-based obstetrician, testified that at the time of the referral, obstetricians in the general medical community, outside of teaching hospitals such as Worcester Memorial, had limited knowledge and experience in managing HIV-positive pregnant patients. There was also testimony that it took several months after the November 1994 advisory was circulated for most hospitals and obstetricians to set up appropriate mechanisms for AZT treatment. Based on this record, Judge Gorton found that Dr. Chie's decision was based on his medical judgment and was not discriminatory.

The court of appeals agreed. Writing for two members of the panel, Circuit Judge Lynch found that it was necessary in cases involving allegations of denial of services by health care providers to balance deference to the professional judgments of doctors with the policy concerns of disability discrimination law. "On the one hand, courts cannot simply defer unquestioningly to a physician's subjective judgment as to whether his referral was proper. Physicians, or course, are just as capable as any other recipient of federal funds of discriminating against the disabled, and courts may not turn a blind eye to the possibility that a supposed exercise of medical judgment may mask discriminatory motives or stereotypes… On the other hand, courts should not probe so far into a doctor's referral decision as to inquire whether it was the correct or best decision under the circumstances, or even whether it met the standard of care for the profession. Lest questions of medical propriety be conflated with questions of disability discrimination, it must take more than a mere negligent referral to constitution a Rehabilitation Act violation." Lynch expressed concern that giving too much play to Section 504 could impose something like a catch–22 on doctors: to avoid a medical malpractice claim, doctors want to refer complicated cases to better qualified specialist or advanced facilities, but if a second-guessing court decided after the fact that the doctor was competent to handle the case, the doctor could be held liable for discrimination.

Adopting what the court described as "the middle ground," the majority determined to apply the following standard: "Under the Rehabilitation Act, a patient may challenge her doctor's decision to refer her elsewhere by showing the decision to be devoid of any reasonable medical support. This is not to say, however, that the Rehabilitation Act prohibits unreasonable medical decisions as such. Rather, the point of considering a medical decision's reasonableness in this context is to determine whether the decision was unreasonable *in a way that reveals it to be discriminatory*. In other words, a plaintiff's showing of medical unreasonableness must be framed within some larger theory of disability discrimination. For example, a plaintiff may argue that her physician's decision was so unreasonable — in the sense of being arbitrary and capricious — as to imply that iwas pretext for some discriminatory motive, such as animus, fear, or 'apathetic attitudes.'"

In this case, Judge Lynch found that the record would not support an argument that Dr. Chie's decision was discriminatory. The record showed that Dr. Chie was treating other HIV+ patients, and continued to treat Lesley after learning she was HIV+ until he had determined that Worcester Memorial would provide a better program for her care than Leominster Hospital was capable of doing at that time. The court found that Dr. Chie had not been acting on stereotypes, but rather had undertaken a "fact-specific and individualized" inquiry leading to his decision, and had sought confirmation of the decision from Lesley's primary care physicians.

The court rejected the idea that its decision must be controlled by the expert testimony that public health officials believed that specialized knowledge beyond that of the ordinary licensed obstetrician was unnecessary to provide acceptable care to an HIV+ pregnant woman, even though the Supreme Court's disability law jurisprudence stresses that the informed opinions of public health officials are the best source of expertise for the courts on medical issues. Judge Lynch contended that this is most directly relevant to situations where medical opinion is consulted on whether a particular disability presents a direct threat to the health and safety of others. On the question of risks to the plaintiff's own health, Lynch contended that the opinion of her own doctor should have greater weight, so long as there was a reasonable medical basis for it.

In conclusion, Judge Lynch wrote, "We recognize the scope of the HIV epidemic and the importance of ensuring equal access to health care for those infected with the virus. Thus, we reiterate that a doctor cannot escape potential liability under the Rehabilitation Act merely by casting his refusal to treat as an exercise of medical judgment: such judgment must be the reasoned result of an individualized inquiry. At the same time, however, the Rehabilitation Act cannot be pressed into service as a vehicle for disputes over the propriety of debatable treatment decisions. And the propriety of such a decision is all we find to be at issue in this case."

In a concurring opinion, Circuit Judge Lipez agreed with the outcome of the appeal, but argued that the court should not have adopted a broad, general rule for refusal to treat cases, because such was not necessary to dispose of this case. Lipez argued that because the record showed that there was reasonable medical support for Dr. Chie's decision to transfer Lesley to Worcester Memorial, Lesley could not possibly show that the decision was a pretext for discrimination and thus would lose the case. Lipez was wary of establishing a general rule that plaintiffs in treatment refusal cases under disability discrimination law had to show that the defendant's treatment decisions are unreasonable in a way that reveals it to be discriminatory.

This opinion, if followed in other circuits, would mark a significant narrowing of protection for people with HIV who believe that health care workers are improperly refusing to provide appropriate care. Although the court disclaims insulating health care professionals from the requirements of disability discrimination law, a standard that requires the plaintiff to show that there is no medical basis for the health care worker's decision presents an extraordinary barrier to relief, since the court's approach seems to be that if there is a "battle of the experts" the doctor wins, because any reputable expert testimony provides a "medical basis" for the doctor's decision.

Lesley is represented by Bennett H. Klein, the AIDS Project attorney at Gay and Lesbian Advocates and Defenders in Boston. A.S.L.

Federal Court Holds ADA Protects Ski-Patroller Whose Wife Has AIDS

In an important ruling under the Americans With Disabilities Act, U.S. District Judge Michael R. Hogan (D. Ore.) issued an injunction requiring an Oregon ski resort to offer reinstatement to a ski-patroller whose wife has AIDS. *Doe v. An Oregon Resort*, Civ. No. 98–6200–HO (May 10). The resort had refused to allow the patroller to continue working in that job unless he could present evidence that he was not HIV+. The names of the plaintiff and the identity of the ski resort are concealed in Judge Hogan's opinion.

John Doe was hired as a ski patroller by the defendant in 1996. His job involved performing rescue work when skiers were stranded or injured on the slopes. He was authorized to perform cardiopulmonary resuscitation and to stabilize wounds, but he was not trained or authorized to intubate, start intravenous lines or perform injections. In common with all other ski patrollers, he was instructed to use surgical gloves when dealing with bloody situations and to observe universal blood precautions when rendering assistance to skiers.

Doe's wife contracted HIV sexually from a ski instructor at a different resort in 1988 and subsequently developed AIDS. Doe and his wife observe safe sex precautions, and he has consistently tested negative in the past, most recently in 1997, after this controversy arose. When Doe was hired, he and his wife had health insurance through the Oregon Health Plan. Doe was con-

cerned about whether the insurance coverage offered by his employer would provide adequate coverage for his wife, and in mid-December, 1996, he approached his supervisor to discuss the problem. During this discussion, he disclosed that his wife had AIDS. When Doe determined that the coverage would probably not be adequate, he informed his boss that he would be looking for another job.

The parties disagreed about whether Doe had given notice to quit at that point, but the court decided that the subsequent events should not be treated as a quit and a re-application, but rather as incidents arising from continuing employment.

After consulting with its lawyer, the ski resort informed Doe that he would not be allowed to continue working as a ski patroller until he could provide a current HIV test result. Doe was reassigned to snow removal duty pending this. After thinking things over, Doe decided he would not submit a new HIV test, and the resort refused his request to be assigned back to ski patrol. Doe sued the resort under both the ADA and Oregon's civil rights law, which prohibits unjustified employment discrimination on the basis of disability. Doe argued that he was being discriminated against because of his association with his wife, that the demand for an HIV test was unlawful, and that he was, in effect, being treated as if he was himself disabled by HIV-infection.

Judge Hogan agreed with all of Doe's arguments. Most significantly, Hogan rejected the idea that being HIV+ is disqualifying for a ski patroller, finding that the evidence presented at the three-day trial held in February did not demonstrate that there was a significant risk to the health and safety of ski resort patrons if a ski patroller is HIV+. The testimony showed that it is possible that a ski patroller might find him or herself in a situation presenting a risk of body fluid exchange with a resort patron due to a bloody accident, but it was not enough to show that this was possible: the burden under the ADA and Oregon law is to show that there was a significant risk of such a situation occurring, and Hogan found that the case just had not been made by the ski resort.

The court heard two expert witnesses on HIV-transmission, both of whom opined that the chances of Doe being infected by his wife were slight, and the likelihood he would transmit HIV on the job to a resort patron as a result of his ski patrol duties were insignificant. In the past, any worker who could be characterized as a "health care worker" has had a very hard time persuading courts that being HIV+ did not present a significant risk to patients. But Judge Hogan did not follow the kind of "virtually zero risk" requirement that many of those prior courts seemed to embrace. Instead, he carefully analyzed the evidence on risk, noting with particularity the types of medical procedures that Oregon public health officials have listed as exposure prone, and noting that ski patrollers are not authorized to perform any of those procedures.

Judge Hogan concluded that since this was not a significant risk situation, the resort did not have the right to require Doe to submit an HIV test result, since such a requirement was not consistent with business necessity, which is the statutory test for evaluating medical requirements that employers seek to impose on continuing employees. (Had the court treated Doe as a job applicant, the question would be whether the test is uniformly required of all applicants, or whether Doe was being singled out for testing without justification. The resort would clearly have lost under such a test, since it did not require HIV testing of all ski patrol applicants.)

Doe was not seeking any damages in this case, just an order to the ski resort to offer him reinstatement as a ski patroller. Judge Hogan granted his wish, issuing such an order. A.S.L.

Georgia Collateral Estoppel Rule Precludes Relitigation of HIV+ Protected Status Determination

"A judicial decision based upon administrative hearings that determines the reasons for an employee's termination precludes re-litigation of the causality issue in subsequent proceedings," held the Georgia Supreme Court on April 30, answering a certified question from the U.S. Court of Appeals for the 11th Circuit. *Shields v. Bellsouth Advertising & Publishing Corp.*, 2001 WL 430872.

Plaintiff Shields claimed that the official reason for his dismissal — violating company policy by behaving badly toward a customer — was merely a pretext, and that Bellsouth actually dismissed him because of his HIV+ medical condition. Shields had been a sales representative of Bellsouth for thirteen years when he had a heated dispute with one of his customers, an advertiser in Bellsouth's Yellow Pages. The dispute, on January 17, 1995, was over whether the advertiser, Anh Puckett, was entitled, because of a mistake in a previous Yellow Pages edition, to receive a free advertisement in the next directory. In the course of the argument, Mr. Shields "threw rate sheets on the floor and exclaimed, 'I might as well throw this out the window.'70 Shields then walked out of Bellsouth's office, leaving his supervisor to apologize to Ms. Puckett. This episode, in addition to a similar episode in 1992, led to Mr. Shields' dismissal, according to Bellsouth. The dismissal occurred on Feb. 10, 1995. Shields filed a union grievance. An arbitrator ordered Shields' return to work with back pay and retroactive seniority. Shields returned to work in July 1996, but voluntarily resigned on August 15, 1996.

Meanwhile, Shields applied for unemployment benefits for the period between his termination and his return to work. A claims examiner allowed the benefits, but Bellsouth appealed. An administrative hearing officer upheld the grant of unemployment benefits, and "observed that Shields attributed his termination to the fact that he had contracted the AIDS virus and had been receiving medical treatment since the middle of 1994." On cross-examination, however, the supervisor who fired Shields denied any knowledge of Shields' medical condition, and the hearing officer's decision was not based on any finding that HIV status entered into the reason for the firing.

Bellsouth prevailed in its appeal to the Superior Court of DeKalb County, which reversed the grant of unemployment benefits, determining "that Shields' conduct demonstrated 'willful, intentional disrespect to [Ms. Puckett], in contravention of company rules.'" The court found "no evidence that [Shields' supervisor] knew that he was HIV positive or that this fact motivated the company's discharge." Shields sought a review of this decision, but it was denied.

In late 1997, Shields filed a federal lawsuit alleging that his termination was in violation of Title I of the Americans with Disabilities Act. The district court dismissed the suit upon Bellsouth's motion, based on Georgia's doctrine of collateral estoppel. Shields appealed, leading the 11th Circuit to certify a question to Georgia's Supreme Court to determine the issue under Georgia law.

Justice Thompson's opinion for the court stated that "the collateral estoppel doctrine precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies.…[S]o long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim." Thompson cited a lower court ruling that "collateral estoppel would bar re-litigation of the reasons behind an employee's dismissal." *Langdon v. Department of Corrections*, 469 S.E.2d 509 (Ga. App. 1996).

The Supreme Court found that "at each level of procedural review, including the administrative hearing, Shields presented the theory that his firing was related to his medical status. [Bellsouth] could not have met its burden in proving willful misconduct if a pretextual motive underlay Shields' dismissal.… Shields' contention … that he was fired without cause due to his HIV-positive status was considered and specifically rejected by the superior court." Therefore, held the unanimous court, "collateral estoppel bars revisiting the alleged reasons behind Shields' dismissal."

In a footnote, the court mentions that the Equal Employment Opportunity Commission felt it "more likely than not" that Shields was disciplined more severely than other employees who had committed similar breaches of company policy. The outcome of Shields' case before the EEOC is not revealed. *Alan J. Jacobs*

Alabama Supreme Court Rejects AIDS Phobia Claim by Surgical Nurse Exposed to Patient Blood

In an unpublished decision, the Supreme Court of Alabama partially upheld a summary judgement finding for Dr. Keith Vanderzyl, who allegedly spilled blood on Tammy Grantham's face during

an operation, on an emotional distress claim. *Grantham v. Vanderzyl*, 2001 WL 499361 (Ala.). May 11, 2001.

Grantham, a nurse, was assisting Vanderzyl on April 10, 1997, during an operation. When a foot pedal was not working properly, Grantham knelt down to fix it. Vanderzyl had remarked that Grantham was not properly trained. Grantham alleged that while she was at Vanderzyl's foot, he took a surgical drape containing the patient's blood and surgical refuse and "threw it at her." While Vanderzyl said it was an accident, he also allegedly said "I don't give a damn" when he saw that he had spilled the blood on her face. Grantham and the patient had testing for communicable diseases (including HIV) six times and always tested negative. Grantham was told by the infectious-disease supervisor "to consider herself HIV positive and to adapt her lifestyle accordingly." After one of the tests, the initial result was positive, but had to be redone and then came back negative.

Grantham sued Vanderzyl in July of 1997. alleging that he committed assault and battery on her and that his conduct was a tort-of-outrage. Grantham sought to recover damages based on injuries and loss of income.

The circuit judge granted summary judgement in Vanderzyl's favor on the tort-of-outrage claim and claims related to Grantham's alleged loss of income and fear of contracting a communicable disease. The circuit judge found that Alabama had no precedent "allowing a recovery of damages for fear of contracting a communicable disease."

Chief Justice Moore, speaking for a 6–3 majority, affirmed the summary judgment on Grantham's tort-of-outrage claim, but The court was unanimous in allowing Grantham to pursue monetary damages relating to loss of income. Moore wrote that while Grantham felt "a threat to her life," there had to be "some basis in fact for her fear of developing a disease from exposure to the patient's blood. The mere fear of contracting a disease, without actual exposure to it, cannot be sufficient to cause the level of emotional distress necessary for this cause of action." Grantham, the court found, "did not face a danger of contracting a communicable disease."

Justice Woodall, writing for the dissent on tort-of-outrage issue, believed that Grantham's emotional distress and "humiliation" was not given proper weight. Woodall also noted that Grantham "could reasonably be expected to suffer severe emotional distress" when she was told to assume that she was HIV+. *Daniel R Schaffer*

AIDS Law Litigation Notes

In a unanimous ruling issued May 14 in *U.S. v. Oakland Cannabis Buyers Cooperative*, 121 S. Ct. 1711, the U.S. Supreme Court found that the 9th Circuit erred in holding that there was a "medical necessity" exception to the Controlled Substances Act. In so ruling, the Court dealt a serious blow to the continued viability of marijuana buyers clubs for people who need the weed for medicinal purposes, among them people with HIV, some of whom have argued that marijuana is a necessary part of their treatment because it suppresses the nausea that accompanies some AIDS treatments and helps to maintain an appetite, which is necessary in the battle against the wasting syndrome associated with advanced cases of AIDS. In an opinion by Justice Clarence Thomas, the Court found that the prohibition of the Act was absolute, and that any exception would have to be made by Congress, not the courts.

The U.S. Court of Appeals for the 4th Circuit held in a short per curiam unpublished disposition that the decision to segregate HIV+ prisoners from other prisoners in the South Carolina prison system was the kind of policy judgment that falls "within the wide deference afforded prison administrators," and rejected the challenges filed by numerous prisoners and consolidated into a single proceeding. *Bowman v. Beasley*, 2001 WL 427932 (April 26, 2001).

In an unpublished opinion released on May 24, the Ohio 8th District Court of Appeals upheld Charles McPherson's conviction of soliciting prostitution while knowing he was HIV+, which earned him a three-year prison sentence. However, the court found that soliciting prostitution is not on the list of offenses for which one can be classified as a "sexually oriented offender" with the various consequences attached to such classification under Ohio law, and thus reversed the trial court's decision to so classify McPherson. *State of Ohio v. McPherson*, 2001 WL 563159. According to the court's summary of the trial record, a plain-clothes police officer who recognized McPherson as a known prostitute who had tested HIV+ in the past placed himself in position to be solicited by McPherson, and arrested himself after McPherson quoted a price for engaging in oral sex with the officer.

On May 25, the Massachusetts Supreme Judicial Court, ruling on a certified question from the U.S. District Court in Massachusetts, held that in construing the term "handicap" in the Massachusetts Law Against Discrimination, courts should not take account of whether an individual can benefit from mitigating or corrective devices in deciding whether they have an impairment that substantially limits one or more major life activities of the individual. *Dahill v. Police Department of Boston*, 2001 WL 562018. In so ruling by unanimous vote, the court refused to follow the lead of the U.S. Supreme Court, which adopted a contrary interpretation of the Americans With Disabilities Act in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Bennett Klein, staff attorney on AIDS issues at Gay & Lesbian Advocates & Defenders, had submitted an amicus brief to the court on behalf of GLAD and various other disability rights and AIDS organizations. The question is an important one for asymptomatic HIV+ individuals, especially gay men, who might be left out from coverage in some circumstances under the federal statute. The case involved a man who was born with a severe hearing impairment but who has benefits from the use of hearing aids, who was rejected for employment by the Boston Police Department on account of his hearing. The Department argued that he has no right of action because his corrected hearing qualifies him for a wide range of jobs; while this argument may be valid under the ADA because of *Sutton*, it is apparently not valid under the Massachusetts state law.

The Massachusetts Commission Against Discrimination found probable cause on a charge that A#1 Affordable Relocations System, a moving company, violated the state's public accommodations law by refusing to move the belongings of a woman and her son because the son has AIDS. The moving company, denying the allegations, claimed its movers refused to move the belongings because they were not properly packed. The woman testified that when the movers were told that her son had AIDS, they said they would not move his mattress because they didn't want to "catch anything." The parties are scheduled to meet to discuss settlement on July 9. Bennett Klein of Gay & Lesbian Advocates and Defenders represents the complainants. *Boston Herald*, May 22.

Perturbed that the City of New York is failing to comply with an order to provide medically-necessary housing for homeless persons with AIDS, N.Y. Supreme Court Justice Emily Jane Goodman has entered a contempt order against the City in five pending complaints, requiring the City to reimburse the complainants for their legal expenses and to pay them $250 for every night during which they had requested shelter and were denied by the City. The five were among 17 complaints filed by Housing Works on May 1. Justice Goodman reserved judgment on the 12 other complaints pending review. She wrote: "Lest there be any confusion, the city of New York and defendants, DASIS, are directed to provide and ensure medically suitable transitional housing with same day placement." The city announced it would appeal, claiming that the failure to providing suitable housing in these cases was due to human error rather than any deliberate policy, and thus the contempt findings are unwarranted. *City Limits*, May 21.

The *Arizona Republic* reported May 26 that the Arizona Dept. of Insurance has fined National Health Insurance Co. $21,000 after a routine audit found that the company had falsely advertised coverage of emergency room costs but actually did not pay emergency room physician fees, had conducted HIV tests without getting written consent from its enrollees, and did not correctly handle appeals of benefits coverage decisions. A.S.L.

AIDS Law Legislative Notes

Among items vetoed by Indiana Governor Frank O'Bannon on May 3 on grounds of expense was a bill that mandated HIV testing of all inmates committed to the custody of the state Department of Correction after June 30. *Chicago Tribune*, May 4. A.S.L.

AIDS U.S. Law & Society Notes

June marks the 20th anniversary of the first publication in official U.S. government publications concerning the emergence of AIDS. The phenomenon was not yet named at the time, but the *Morbidity and Mortality Weekly Report* published by the U.S. Centers for Disease Control (CDC), as it was then named, reported about a strange condition noted in a several gay men in San Francisco and New York. In the earliest years after that report, AIDS was mainly characterized in the press as a condition afflicting gay white men, and was at first called GRID (Gay-Related Immune Deficiency). By contrast, based on recent case reports, the Centers for Disease Control and Prevention (CDCP), as it is now called, says that more than half of new infections in the U.S. now occur among African-Americans (who comprise about 12% of the nation's population), and a substantial proportion of those are attributed to sharing of tainted IV equipment or heterosexual transmission. In a twentieth-anniversary retrospective article about AIDS published in the *Wall Street Journal* on May 30, the continuing difficulty of speaking about homosexuality in the African-American community is cited is one of the substantial barriers to successful programs to prevent HIV transmission.

After word got out that federal health officials were contemplating setting up a program to fund AIDS prevention activities that would channel funds only to religiously-affiliated organizations, there was such an immediate media uproar that the administration back-pedalled and said no religious test would be imposed on agencies applying for the grants. *Chicago Tribune*, May 18.

The U.S. State Department plans to end its policy of refusing to employ HIV+ foreign nationals at diplomatic posts around the world. Under current policy, foreign applicants to work at approximately 22 U.S. Embassies and consulates are required to undergo HIV screening and are denied employment if they test positive. This has been justified as an economic measure, the argument being that the foreign country, not the U.S. government, should incur the expense of health care for its HIV+ citizens. The new policy, being introduced with the approval of Secretary of State Colin Powell, is intended to serve as a human rights model that will encourage other governments to stop stigmatizing people with HIV/AIDS and treating them as unemployable. However, the Department will probably continue to test U.S. Foreign Service officers and their families; those who test positive may be restricted as to where they will be assigned, based on local health conditions and available treatment options. Applicants for the foreign service who test positive are not hired. The State Department expects to take a substantial hit in health insurance premiums under the new policy. *Los Angeles Times*, May 29; *New York Times*, May 31.

The Mississippi Department of Corrections, reversing ground, has decided to open education, vocational and drug-treatment programs to HIV+ inmates. Although Mississippi continues to maintain such inmates in segregated housing, its decision to allow them to participate in these programs was hailed by the ACLU's National Prison Project, whose litigation against such exclusions in the Alabama system resulted in a horrendous defeat in the 11th Circuit Court of Appeals. *Memphis Commercial Appeal*, May 2.

The Food and Drug Administration, responding to complaints filed by AIDS activists from San Francisco, has ordered pharmaceutical companies to "tone down" advertisements for AIDS medications, calling them "misleading" by depicting athletic men engaged in strenuous extreme sports activities such as mountain-climbing. The FDA observed that many persons on these medications suffer from a variety of side effects, including redistribution of fat from the face and arms to belly and back, which is quite discordant from the "buff" images presented in the advertisements. FDA marketing division chief Thomas Abrams wrote, "Images that are not generally representative of patients with HIV infection are misleading because they imply greater efficacy than demonstrated by substantial evidence, or minimize the risks associated with HIV drugs." Abrams also stated that the ads "do not adequately convey that these drugs neither cure HIV infection nor reduce its transmission." *San Francisco Chronicle*, April 28. A.S.L.

AIDS International Notes

Dr. Peter Piot, an epidemiologist who has been coordinating the international campaign against AIDS since 1995 on behalf of the United Nations, told the *New York Times* (May 28) that the world community should be as concerned about large-scale prevention activities as it is about treatment. Piot expressed concern that most of the attention of the world press has been focused on the issue of availability of drugs rather than prevention activities. Of course, prevention activities are more controversial, because they must confront issues of sexual activity and drug use with which many countries would rather not engage. Piot also pointed out that making treatment available is not merely a matter of affordable drugs, but also requires significant investment in public health infrastructure to ensure proper distribution and administration of medication.

The decision by major international drug companies to drop their suit in South African courts contesting a proposal to allow generic knock-offs of their AIDS medications to be sold in South Africa may sharply reduce the cost of such medications, but the government maintains that even the cost of the generics is too high. In an interview with *The Guardian*, an English newspaper, Health Minister Manto Tshabalala-Msimang said that the government will resist pressure from AIDS activists to purchase the medications for the 4.2 million persons with HIV in the country, both on grounds of cost and on the argument that the country lacks the infrastructure of clinics and trained workers to distribute and administer the medications properly. *Irish Times*, May 14.

Dr. Paulo Roberto Teixeira, head of the Brazilian program on HIV/AIDS, labeled as "unacceptable" a report on patent protections issued by the U.S. Trade Representative on April 30. Teixeira alleged that the Bush Administration is trying to prevent Brazil from taking effective action to provide low-cost generic versions of U.S.-patented AIDS medications to help stem the developing AIDS epidemic in South America, and that this represents a change from the policy pursued by the Clinton Administration during its last years in office. *New York Times News Service*, May 3.

The Kenya Coalition for Access to Essential Medicines announced a campaign to encourage the Parliament to pass the Industrial Property Bill 2000, which would enable Kenyans to obtain less expensive AIDS medications by allowing the production and/or importation of generic versions of patented medications. It is estimated that about 700 Kenyans die daily from AIDS complications. *The Nation* (Kenya), May 30.

We've seen no follow-up on a May 8 report in the *Orlando Sentinel* that the national legislature in Brazil was soon to vote on a bill that would legalize same-sex unions, allowing gay couples to transfer property assets and extend benefits like social security and health insurance coverage to their partners. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS:

Call for Papers and Conference Announcement: Assimilation & Resistance: Emerging Issues in Law & Sexuality, September 21 - 22, 2001, Seattle University School of Law, Seattle, Washington. On September 21 and 22, 2001, Seattle University School of Law will host a conference entitled Assimilation & Resistance: Emerging Issues in Law & Sexuality. The conference is aimed at exploring the tangled intersections between law and sexuality in the current political economy. Spe-

cifically, the conference seeks to examine the dynamic relationships between strategies of assimilation and those of resistance. Presentations and panel discussions will explore these issues from activist, scholarly, and teaching perspectives, endeavoring to address the further complexities that arise when taking full account of the complex ways that sexuality intersects with race, gender, and class. Confirmed speakers from the U.S. and Canada include Susan Boyd, Jodi O'Brien, Paula Ettlebrick, Darren Hutchinson, Peter Kwan, Ruthann Robson, Julie Shapiro, David Skover, Kellye Testy, and Claire Young. The conference organizers are calling for papers from others who wish to present their work at the conference. To apply, please submit a 2–5 page double-spaced abstract of your paper by either standard or electronic mail, on or before July 16, 2001. Presenters whose papers are selected for presentation at the conference will be notified by July 27, 2001. Please include a full return address (including electronic mail address) with all submissions. Submitted abstracts will not be returned. Registration for the conference will be available through Seattle University School of Law's web site, at http://www.seattleu.edu as of June 1, 2001. *** Submit abstracts by July 16, 2001 to: Professors Kellye Y. Testy & Julie Shapiro, Seattle University School of Law, 900 Broadway Seattle, WA 98122 ktesty@seattleu.edu; 206.398.4041 (phone) 206.398.4077 (fax).

LESBIAN & GAY & RELATED LEGAL ISSUES:

Carpenter, Dale, *A Conservative Defense of* Romer v. Evans, 76 Ind. L. J. 403 (Spring 2001).

Chisholm, B.J., *The (Back)door of* Oncale v. Sundowner Offshore Services, Inc.*: "Outing" Heterosexuality as a Gender-Based Stereotype*, 10 L. & Sexuality 239 (2001).

Fajer, Marc A., *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 Stanford L. & Pol. Rev. 37 (Winter 2001).

Flynn, Taylor, Don't Ask *Us to Explain Ourselves,* Don't Tell *Us What to Do: The Boy Scouts' Exclusion of Gay Members and the Necessity of Independent Judicial Review*, 12 Stanford L. & Pol. Rev. 87 (Winter 2001).

Garland, James Allon, *The Low Road to Violence: Government Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sexuality 1 (2001).

Hargis, Christopher S., *Queer Reasoning: Immigration Policy,* Baker v. State of Vermont*, and the (Non)Recognition of Same-Gender Relationships*, 10 L. & Sexuality 211 (2001).

Hunter, Nan, *The Sex Discrimination Argument in Gay Rights Cases*, J. of L. & Policy 397 (2001) (part of symposium on "Constitutional Lawyering in the 21st Century").

Kirby, Hon. Michael AC CMG, *Law and Sexuality: The Contrasting Case of Australia*, 12 Stanford L. & Pol. Rev. 103 (Winter 2001).

Leonard, Arthur S., Boy Scouts of America v. Dale*: The "Gay Rights Activist" as Constitutional Pariah*, 12 Stanford L. & Pol. Rev. 27 (Winter 2001).

Patrick, Jeremy, *A Merit Badge for Homophobia? The Boy Scouts Earns the Right to Exclude Gays in* Boy Scouts of America v. Dale, 10 L. & Sexuality 93 (2001).

Pizer, Jennifer C., and Doreena P. Wong, *Arresting "The Plague of Violence": California's Unruh Act Requires School Officials to Act Against Anti-Gay Peer Abuse*, 12 Stanford L. & Pol. Rev. 63 (Winter 2001).

Robson, Ruthann, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 Women's Rts. L. Rep. 15 (Fall/Winter 2000).

Schacter, Jane S., *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chicago-Kent L. Rev. 933 (2000).

Schultz, Vicki, *Talking About Harassment*, 9 J. of L. & Policy 417 (2001) (part of symposium on "Constitutional Lawyering in the 21st Century").

Shapiro, E. Donald, Jennifer Long & Rebecca Gideon, *To Clone or Not to Clone*, 4 N.Y.U. J. Legis. & Pub. Pol. 23 (2000–2001) (part of symposium titled "Legislating Morality: The Debate Over Human Cloning) (authors suggests that lesbian couples may have a right to use cloning for reproductive purposes).

Sparling, Tobin A., *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 L. & Sexuality 187 (2001).

Varona, Anthony E., and Kevin Layton, *Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in* United States v. Morrison*'s Shifting Seas*, 12 Stanford L. & Pol. Rev. 9 (Winter 2001).

Weiss, Jillian Todd, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & Sexuality 123 (2001).

Student Notes and Comments:

Note, *The Irrational Application of Rational Basis:* Kimel, Garrett*, and Congressional Power to Abrogate State Sovereign Immunity*, 114 Harv. L. Rev. 2146 (May 2001) (critique of recent Supreme Court decisions finding states immune from civil rights actions brought in federal court).

Powers, Elizabeth A., *Constitutional Law: The Freedom of Expressive Association, an Organization's Right to Choose What Not to Say*, 53 Fla. L. Rev. 399 (April 2001).

Smart, Christopher W., *The First Amendment: Expressive Association or Invidious Discrimination?*, 53 Fla. L. Rev. 389 (April 2001).

Yatar, Eric K. M., V.C. v. M.J.B.*: The New Jersey Supreme Court Recognizes the Parental Role of a Nonbiological Lesbian"Mother" but Grants Her Only Visitation Rights*, 10 L. & Sexuality 299 (2001).

Symposia:

12 Stanford Law & Policy Review No. 1 (Winter 2001) includes a symposium titled "After the Gay '90's: The New Law and Politics of Sexual Orientation." Individual articles are noted above.

Specially Noted:

The annual "Law Day" issue of the *N.Y. Law Journal* published on May 1 included a brief article by LeGaL President Bob Bacigalupi, pointing out the importance of including transgender concerns in the struggle for lesbian and gay rights, dedicating LeGaL "to play a leadership role in raising consciousness" about the gap in strategic thinking that is willing to sacrifice transgender rights in the pursuit of lesbian and gay rights legislation.

Students at Tulane University Law School have published Volume 10 of *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*. Individual articles, notes and comments are listed above. Individual copies of the issue can be obtained at the following prices: $20 for institutions, $18 for individuals, $12 for students. There is an additional charge of $5 for overseas shipping. Contact the Business Manager, Law & Sexuality, Tulane Law School, 6329 Freret St., New Orleans LA 70118.

AIDS & RELATED LEGAL ISSUES:

Abrahamson, Daniel, *Federal Law and Syringe Prescription and Dispensing*, 11 HealthMatrix: J. of L-Med. 65 (Winter 2001).

Burris, Scott, *Introduction: Ask, Tell, Help*, 11 HealthMatrix: J. of L.-Med. 1 (Winter 2001) (introduction to symposium on syringe law).

Burris, Scott, Peter Lurie and Mitzi Ng, *Harm Reduction in the Health Care System: The Legality of Prescribing and Dispensing Syringes to Drug Users*, 11 HealthMatrix: J. of L.-Med. 5 (Winter 2001).

Lazzarini, Zita, *An Analysis of Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users*, 11 HealthMatrix: J. of L.-Med. 85 (Winter 2001).

Mehlman, Maxwell J., *Liability for Prescribing Intravenous Injection Equipment to IV Drug Users*, 11 HealthMatrix: J. of L.-Med. 73 (Winter 2001).

Rich, Josiah D., et al., *The Genesis of Syringe Prescription to Prevent HIV in Rhode Island*, 11 HealthMatrix: J. of L.-Med. 129 (Winter 2001).

Rose, Joseph W., *To Tell or Not to Tell: Legislative Imposition of Partner Notification Duties for HIV Patients*, 22 J. Leg. Med. 107 (March 2001).

Student Notes & Comments:

Cook, Shayna S., *The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act*, 99 Mich. L. Rev. 452 (Nov. 2000).

Daniels, John, *U.S. Funded AIDS Research in Haiti: Does Geography Dictate How Closely the Untied States Government Scrutinizes Human Research Testing?*, 11 Albany L. J. of Science & Tech. 203 (2000).

Niemeier, David P., *The Criminal Transmission of AIDS: A Critical Examination of Missouri's HIV-Specific Statute*, 45 St. L. U. L. J. 667 (Spring 2001).

Parks, Richard C., Doe v. Mutual of Omaha*: The Seventh Circuit Eviscerates the ADA's Protection of People with HIV/AIDS Against Insurance Policy Discrimination*, 10 L. & Sexuality 277 (2001).

Symposia:

Legal and Ethical Issues of Physician Prescription and Pharmacy Sale of Syringes to Patients Who Inject Illegal Drugs, 11 HealthMatrix: J. of L.-Med. No. 1 (Winter 2001) (individual articles listed above). ••• *Facing the Challenges of the ADA: The First Ten Years and Beyond*, 62 Ohio St. L. J. No. 1 (2001).

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.