TENNESSEE APPEALS COURT APPROVES ADOPTION OF YOUNG BOY BY LESBIAN

The Tennessee Court of Appeals upheld the adoption of a young boy by a lesbian, despite a challenge by the surrendering mother's parents. *In re Adoption of M.J.S.*, 2000 WL 1473867 (October 5). Although the majority affirmed the trial court's decision granting the lesbian's adoption petition, the case produced a vitriolic dissenting opinion, which decried the fate of this poor boy who would now be subject to social disapprobation and homosexual influences.

Christine Snyder surrendered custody of her six-month-old son, M.J.S., to Debra Sue Langston in judicial proceedings in Shelby County Juvenile Court on May 8, 1998. Two weeks later, but before Langston had filed formal adoption papers for M.J.S., Snyder's parents filed a petition seeking to adopt the child, to have the child returned to their custody, to obtain confidential information pertaining to Langston's adoption of the child, and to intervene in Langston's adoption proceedings. In addition to her own subsequent motion to adopt, Langston filed a motion to dismiss the Snyders' petition for lack of standing under the Tennessee adoption statutes.

Chancery Court Judge Walter L. Evans did not return the child to the Snyders, but did give them access to documents relating to the pending adoption proceeding, and classified the Snyders' petition as a motion to intervene. After these initial rulings, Langston filed a motion for summary judgment, asking the court to dismiss the Snyders' adoption petition for lack of standing and challenging their right to intervene. The Snyders acknowledged that their daughter had surrendered her parental rights to Langston and had given Langston custody of M.J.S.. Nevertheless, they insisted that the court conduct a "best interests" analysis to determine whether Langston or the Snyders should be permitted to adopt the child. Rejecting the Snyders' request for a contested hearing, the trial court granted Langston's motion for summary judgment and dismissed the Snyders' petition for adoption, but allowed them to participate in Langston's adoption proceedings as Intervenors for the purpose of presenting evidence as to the best interests of the child. After a hearing on the merits of Langston's petition, Evans granted a final decree of adoption to Langston. The Snyders appealed four components of Chancellor's decision: (1) granting Langston's motion for summary judgment and dismissing the Snyders' petition for adoption; (2) permitting the Snyders to intervene but solely for the limited purpose of litigating the best interest and welfare of the child; (3) accepting the home study report by Anne McGinnis, which recommended Langston as an adoptive parent; and (4) determining that Langston's home was suitable for the child.

The Court of Appeals, in an opinion by Judge Farmer, first provided an overview of Tennessee's statutory regime for adoption, the primary purpose of which is "to protect the best interests of children who are involved in the adoptive process." Farmer compared the proceedings for the voluntary surrender of parental rights with those surrounding an involuntary termination of those rights. In the former, the biological parent is given the right to surrender a child directly to a prospective adoptive parent, and while that decision is not absolute, the courts will defer to the parent's choice if in the best interests of the child. The wishes of a biological parent are not given the same consideration when the termination of rights is involuntary.

Farmer also reviewed the statutes to determine the rights of third parties to intervene in adoption proceedings. Third parties may participate for the purpose of contesting another individual's petition for adoption, or they may file an intervening petition for adoption. In the latter case, however, the court interpreted the statutes to require that an intervenor demonstrate that at some point during the proceedings, the party has met the requirement for standing namely, the party must either have physical custody of the child or be entitled to receive custody pursuant to a validly executed surrender of rights by the natural parent. For this reason, the court affirmed the ultimate decision by the chancery court to deny the Snyders' intervening petition for adoption because, even if they were not required to have custody at the time they filed their petition, the Snyders would not be able to meet that requirement at any time prior to the end of the proceedings.

Farmer also rejected the Snyders' technical arguments about Langston's fulfillment of pleading requirements, and affirmed the decision not to hold a full evidentiary hearing on the issue of whether their daughter's surrender of her rights had been procured through duress or undue influence.

Finally, reviewing the trial court's decision on the merits of Langston's petition for adoption, the Court of Appeals noted that the trial court's determination was entitled to "great weight" and would not be disturbed. The Snyders accused Langston of misleading the chancery court about the nature of her relationship with her "roommate," who remained nameless in the majority opinion. Judge Farmer acknowledged that Langston had admitted to a prior sexual relationship with her roommate, but noted that the sexual element of the relationship had been voluntarily terminated by the women upon Langston's filing of the petition for adoption. (The women share a home but have separate bedrooms.) Langston admitted to the trial judge that she and her roommate were currently "evaluating that relationship" but had no intention of being "sexual" in front of the children. She told the court that she and her roommate were loving friends, however, and would act lovingly towards each other in the home. Anne McGinnis, a licensed clinical social worker from the Adoption Resource Center, recommended that Langston's petition for adoption be approved, even though she was "fully aware of Langston's living arrangements and the nature of Langston's relationship with her longtime roommate."

The Court of Appeals noted that the Snyders had been given a full opportunity to cross-examine Langston about her living arrangements and McGinnis about her recommendations. Although acknowledging that Langston's home had a "nontraditional structure," Farmer reiterated that "the lifestyle of a proposed adoptive parent … does not control the outcome of the custody or adoption decisions, particularly absent evidence of its effects on the child." The Court of Appeals found no evidence in the record that "the rearing of this child by Ms. Langston will have an adverse effect on the child. We do not feel that this court can take judicial notice of this." Finally, the court rejected the Snyders' constitutional attack on the adoption statutes for lack of standing and for a failure to show that they had been harmed by the statutes in light of their active participation in the adoption proceedings.

In dissent, Senior Judge Tomlin rejected the majority's interpretation of the standing requirements of the adoption statute and would have allowed the Snyders to file their own petition to adopt M.J.S. Even assuming that this

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portion of the majority's analysis was correct, however, Tomlin denounced the majority's affirmation of the trial court's best interest analysis, finding that raising this child in the home of Langston and her "roommate," Angela Craig, who are "open practicing lesbians … cannot be and is not in the best interests of any child." Tomlin virtually ignored the fact that Langston had been chosen by the child's biological mother, and insisted that a comparative balancing test would have clearly demonstrated that the child should have been placed in the custody of the Snyders because of the harm that "will result in this child being reared in a lesbian 'family.'" Tomlin cited with approval *Roe* and *Bottoms* from the Virginia Supreme Court (denying custody to gay parents), and quoted an earlier opinion Tennessee appellate opinion, *Collins v. Collins*, 1988 WL 30173, which had transferred custody from a child's mother to her father because the mother was in a lesbian relationship. Ignoring the Supreme Court's rejection of these arguments in a racial context in *Palmore v. Sidoti*, 466 U.S. 429 (1984), Tomlin reiterated the reasoning from *Collins*: "[I]f the child remains with her mother, she faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt." Tomlin offered a selective review of other states' laws to argue that homosexuals are generally prohibited from adopting children, and usually are only allowed to adopt those children who are physically or mentally handicapped to such a degree that no other adoption alternatives were viable.

Tomlin also insisted that a boy raised in a lesbian household would become as morally deviant as his parents: "Although the child may be too young at present to understand and appreciate the deviant lifestyle of Langston and Craig, it will undoubtedly have an effect on him as he grows and matures.… His classmates will almost certainly taunt him. Parents of other children may refuse to allow their children to visit or play in his home.… Above and beyond all the social pressures, however, is the fact that he will be reared to believe that homosexuality and homosexual partnership is an acceptable alternative to homosexuality and marriage." Tomlin insisted that, at a bare minimum, a guardian ad litem should have been appointed to speak on behalf of this young child and prevent him from suffering such a horrible fate. There is cause for hope, however, in the fact that no other judge joined Tomlin's explicitly homophobic opinion.

In a brief concurrence, Judge Highers tried to lower the hysteria level by characterizing this case as "not [about] whether the members of this court approve [of] the homosexual lifestyle or the adoption of children by homosexuals, but rather whether the adoption of this child by this prospective parent is in the child's best interest." Highers noted that Tennessee, unlike Florida, does not have any per se rule disqualifying homosexuals from serving as adoptive or foster parents. Furthermore, there was no proof in the record of any "causal connection between Ms. Langston's status and harm to the subject child." Finally, Judge Highers was "not convinced … that a majority of other jurisdictions have expressed blanket disapproval of adoption by homosexuals, as the dissent suggests."

Diana L. Schmied of Germantown, Tennessee, and Hayden Lait, of Memphis, Tennessee, represented Langston in this appeal. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

11th Circuit Invokes *Bowers v. Hardwick* to Reject Constitutional Challenge to Alabama Law Against Sex Toys

Any doubt that *Bowers v. Hardwick*, 478 U.S. 186 (1986), would continue to wreak havoc in the 21st century was dispelled in a new decision by the U.S. Court of Appeals for the 11th Circuit, *Williams v. Pryor*, 2000 WL 1513756 (Oct. 12). The court rejected a facial challenge to Alabama's statutory ban on the sale of devices that facilitate genital stimulation, because such devices could be used for constitutionally unprotected sexual pleasure by "homosexuals." The court reversed — except as applied to four ostensibly heterosexual women — District Judge C. Lynwood Smith, Jr.'s decision striking down the statute on its face as not rationally related to a legitimate government interest. In an opinion by Circuit Judge Black, the court interpreted *Bowers* as permitting states to criminalize not only "homosexual sodomy" (the issue according to the Supreme Court's opinion in *Bowers*), but any activity, including masturbation, that might give gay men or lesbians sexual pleasure. In sharp contrast to this expansive reading of *Bowers*, the court dismissed *Romer v. Evans*, 517 U.S. 620 (1996), as having "no bearing" on the issue before it.

Two years ago, Alabama's legislature made it a crime to distribute for profit "any device designed or marketed as useful primarily for stimulation of human genital organs." A first offense is punishable by a fine and up to a year in prison or — no kidding — hard labor. Vendors of sexual devices and four women who use such devices joined together to challenge the statute. Plaintiffs alleged that the statute bore no rational relationship to a legitimate government interest and that it infringed — both facially and as applied — a fundamental constitutional right to sexual privacy.

Disposing of the first claim meant identifying a legitimate interest and finding a rational connection between the statute and that interest. Judge Black made short work of the first task, finding a legitimate state interest in the "safeguarding of public morality." (Specifically, the state had claimed the statute would discourage "autonomous sex.") The district court had relied on *Romer v. Evans* in finding the state's goal illegitimate. But in the appeals court's view, *Romer* dealt only with the unconstitutionality of "imposing an inability to obtain the protection of antidiscrimination laws." This, according to the court, had "no bearing" on the case before it.

The court then — in perhaps the weakest part of its opinion — disposed of claims that the statute, because it ignored the health-related uses of genital-stimulating devices (which, the court conceded, are prescribed in sexual and relationship counseling), is not rationally related to the public-morality purpose. It also rejected the district court's finding that the government's interest in reducing "sexual-stimulation … unrelated to marriage, procreation or familial relationships" is not rationally served by a statute that also affects possibilities for genital stimulation within marriage. According to Judge Black, "The criminal proscription on the distribution of sexual devices certainly is a rational means for eliminating commerce in the devices, which itself is a rational means for making the acquisition and use of the devices more difficult." Thus, the court explained (both tautologicallly and redundantly), "the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality." (Protecting its view of public morality is about the only thing the court accomplished!) In other words, the state's assertion that "autonomous sex" is immoral can justify any law expected to decrease the frequency (or perhaps the effectiveness) of such behavior.

Black then turned to a separate claim that the statute infringed a fundamental right to sexual privacy (both facially and as applied). The court characterized a series of Supreme Court right-to-privacy decisions, including *Griswold*, *Casey*, and *Roe v. Wade*, as dealing with the right to make decisions about procreation, not sexual conduct. "Extending the constitutional right to privacy to include a broad fundamental right to all sexual autonomy," wrote Black, "is directly precluded by [*Bowers v. Hardwick*]." In other words, "In light of *Bowers*, there would be no violation of any fundamental constitutional right to the extent application of Alabama's

statute infringed upon the sexual activity of homosexuals." (By referring to "the sexual activity of homosexuals," rather than "homosexual activity" or "homosexual sodomy," the court apparently meant to include the aforementioned "autonomous sex." That phrase, incidentally, has no apparent precedent in American case law.) In an ironic footnote, the court conceded that 15 years ago it had recognized exactly such a right, in *Hardwick v. Bowers* (as the case was called at the circuit court level), only to be slapped down by the Supreme Court. (However, in a construction used selectively to distance itself from past holdings it now regrets, the court attributed its earlier decision not to "this court" but to "a panel of this Court.")

Finally, the court turned to the as applied challenge, where it offered heterosexual genital stimulators some hope. The court made reference to the presumed sexual orientation of the four individual plaintiffs, noting that "Betty Faye Haggermaker and Alice Jean Cope are married women who use sexual devices with their husbands. Sherry Taylor-Williams and Jane Doe began using sexual devices in marital intimacy but both are now single." In the court's view, "the as-applied challenge raised by the plaintiffs, married or unmarried, implicate interests in sexual privacy different from those rejected in *Bowers*." (Could the court somehow believe that masturbation is gay when performed by some people, and straight when performed by others?) In any event, the court noted that application of the law to the four female users had been insufficiently explored below (the case was "tried" on the basis of stipulated facts).

It remanded to the district court for further consideration of whether the women had a fundamental right to use sexual devices. The upshot: To buy sexual devices in Alabama, women may now have to prove their heterosexuality, perhaps by marrying the ex-husbands of Doe or Taylor-Williams. Even that possibility, however, could be foreclosed: To find in the women's favor, the district court will have to determine the right in question to be "objectively, deeply rooted in this Nation's history and tradition." What evidence would convince the court that the right to use dildos and vibrators is deeply rooted it didn't say, but there should be no shortage of experts willing to testify on the point. *Fred A. Bernstein*

Federal Court Finds City Gay Rights Ordinance Would Provide Basis for Wrongful Discharge Tort Action

The Columbus, Ohio, City Code provision prohibiting discrimination on the basis of sexual orientation constitutes a clear public policy that may serve as the basis for a wrongful discharge suit against the State of Ohio, according to U.S. District Judge Marbley (S.D. Ohio). *Das v. Ohio State University*, 2000 WL 1470495 (Oct. 4).

Rini Das brought suit against Ohio State University alleging wrongful discharge. Das claimed that the University discriminated against her on the basis of national origin and sexual orientation. Das is an openly lesbian woman and a native of India. Ohio's discrimination statute, Ohio Revised Code 4112.02, does not prohibit discrimination on the basis of sexual orientation. However, the Columbus City Code, which itself is not binding on the State, does prohibit discrimination on the basis of sexual orientation. Das claimed that the Columbus City Code constituted a clear public policy and therefore she could rely on the City Code in her claim of wrongful discharge against the State.

In Ohio, a wrongful discharge claim may be maintained if the plaintiff can show that the employer's act of discharging the plaintiff contravened a clear public policy. Clear public policy can be based upon sources such as statutes, the Constitutions of Ohio and the United States, administrative rules and regulations and the common law. *Painter v. Grayley*, 70 Ohio St.3d 377, 639 N.E.2d 51 (Ohio 1994). Judge Marbley found that the list of public policy sources provided for in *Painter* was not exhaustive and that the Columbus City Code, prohibiting discrimination on the basis of sexual orientation, constituted clear public policy either as a statute or under the 'such as' penumbra. The court further found that violation of the public policy established by the Columbus City Code was of 'equally serious import' as the violation of a statute.

Having found that discrimination based upon sexual orientation could form the basis of a wrongful discharge claim under Ohio's public policy exception, Judge Marbley nevertheless found that Das failed to establish sufficient facts to support such a claim. Marbley found that the only facts alleged to support Das' claim were that she was the only open lesbian in her department and her supervisor had, on several occasions, stared at the rainbow flag hanging in Das' office. These facts were found insufficient to establish a claim for sexual orientation discrimination.

Das' national origin discrimination claims were dismissed because Ohio State University, as an arm of the State, is immune from suit under 42 U.S.C. 1983. Das' state law claims of national origin discrimination were also dismissed, because the facts alleged by Das failed to state a cause of action. Although unsuccessful for Das, Marbley's analysis clearly opened the door for other wrongful discharge suits predicated upon sexual orientation discrimination based upon the Columbus City Code and the public policy exception in Ohio. *Todd V. Lamb*

Michigan Appeals Court Finds Private Right of Action For Sexual Orientation Discrimination Under Detroit Charter

Reversing a dismissal by the trial court, the Michigan Court of Appeals ruled 2–1 that there is an implied private right of action under the Detroit city charter provision that bans sexual orientation discrimination. *Mack v. City of Detroit*, 2000 WL 1616080 (Oct. 27).

Linda Mack is a city police officer, hired in 1974. By 1987, she had advanced to the rank of lieutenant. She claims that because she rebuffed sexual advances by several male supervisors, she was subjected to discrimination and mistreatment. She argued that she rebuffed these advances because she is a lesbian, and that the consequent harassment violates the city charter's ban on sexual orientation discrimination. She also alleged intentional infliction of emotional distress, but that claim has fallen by the wayside.

The trial judge granted the city's motion to dismiss the claim, finding that the charter provision does not provide a private right of action, and that Mack's exclusive remedy is to file a discrimination complaint with the city's human rights agency, with its limited remedial powers.

Writing for the majority, Judge Mark Cavanagh found that the city charter did not support the contention that the administrative remedy was exclusive. Cavanagh emphasized a provision of the charter that he characterized as providing that remedies addressed in the charter for human rights violations are not exclusive: "This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal." Cavanagh also based the ruling on a reading of the Michigan Supreme Court's decision in *Pompey v. General Motors Corp.*, 189 N.W.2d 243 (1971), holding that the procedures established by the state's civil rights law did not create an exclusive remedy, and allowing a plaintiff to bring a civil action to redress employment discrimination prohibited by statute, where the only remedy expressly created by the statute was an administrative one.

Dissenting, Judge David Sawyer questioned whether a city has the legislative authority in Michigan to create a cause of action in the state courts through its charter. Sawyer questioned whether it was appropriate to subject the city to liability under its own charter provision. A.S.L.

Massachusetts Court Orders Public School to Let Transgendered Teen Dress According to Her Gender Identity

In *Doe v. Yunits*, Superior Ct. Civ. Action No. 00–1060–A (Mass. Super. Ct., Plymouth, Oct 11), Superior Court Judge Linda E. Giles ruled that a transgendered 15–year-old boy (identi-

fied in court papers as "Pat Doe") must be allowed to attend junior high school classes when presenting herself for class in herself identified gender. (The court referred to the plaintiff as "she" throughout the decision, in keeping with the plaintiff's gender identification and common practice among health professionals who deal with transgendered clientele.) To rule otherwise, the court stated, would be sex discrimination and a denial of the youth's rights of free expression under state constitutional law. The court distinguished Pat's right to attend school attired in this manner from other, more disruptive, conduct. This case was so fraught with tension that the judge had to deny a motion for recusal because, according to press reports, she herself is an "out" lesbian.

Pat Doe had begun attending South Junior High School in Brockton, a public school, in 1998 as a seventh grader. As Pat began attending eighth grade, she began to express her female gender identity by wearing girl's makeup, clothes and fashion accessories to school. The school's principal determined this to be in violation of the school's dress code, which prohibited disruptive or distracting attire. The principal would often send Pat home to change to attire which was more "gender appropriate." Sometimes Pat would change and return to school, and sometimes not. The school referred Pat to a therapist who diagnosed "gender identity disorder." The therapist "determined" that it was medically and clinically necessary for Pat to wear clothing consistent with the female gender and that failure to do so would do harm to Pat's mental health. The school rejected this as being too disruptive.

At the beginning of the 1999 school year, Pat was instructed to report to the principal's office at the beginning of every school day for the principal to determine if Pat's attire was appropriate. Pat's attire often included tight skirts, dresses, high heeled shoes and padded bras. Pat also go into trouble with classmates because of incidents with male students. A male student sought to attack Pat because Pat allegedly spread rumors that the two were engaging in oral sex. Another male student sought to attack Pat because Pat would allegedly blow kisses at him. Pat was alleged to have "grabbed the buttock of a male student in the school cafeteria." Pat was suspended at least three times for using the women's restroom after being warned not to. The decision states that "Plaintiff also has been known to primp, pose, apply make-up, and flirt with other students in class." Ultimately, it was determined that Pat would have to repeat the eighth grade the following year because so she missed so many classes.

As the current school year began, the school administration advised Pat's family that Pat would not be permitted to attend class if she attended class in outfits deemed disruptive to the educational process: girl's clothing or accessories. The school took the position that it was the plaintiff's own choice not to attend school because of the restrictions which they place on her attire, but did assign her a home tutor.

The family sued in state court on September 26, alleging violations of state law rights to free expression in the public schools, to attend public schools, and various rights guaranteed under the Massachusetts Declaration of Rights. They sought a preliminary injunction barring the school from preventing her attendance in class. No federal constitutional claims were asserted, nor did the trial court rely on any federal grounds in reaching her decision, though some federal case law was referenced in the decision.

Judge Giles granted this preliminary injunction, finding that there was a substantial likelihood that Pat would ultimately prevail on the merits. Having distinguished the question of attire for class from other forms of behavior, the court ruled that Pat's attire was expressive speech, conveying a message which was readily understood by those perceiving it (witness the hostile response of the school administration and some male schoolmates), and that the school board's policy effected a suppression of that speech. Under the court's ruling, the school board could not restrict Pat's attendance at school in female attire unless the attire was of a nature that a female student would also be excluded from class. The court was quite specific in stating that the school would be able to discipline Pat for conduct which was harassing or obscene. (The *Boston Globe* reported on Oct. 27 that the Brockton School District has appealed the decision, arguing in court papers filed Oct. 25 that Doe's attire "was and is distractive and disruptive to the learning environment."). *Steven Kolodny*

New York Family Court Awards Sperm Donor Visitation Rights

A Family Court judge sitting in Albany County, New York, refused to uphold the visitation agreement signed between a lesbian biological mother and a gay male sperm donor, holding instead that the best interests of the child required a more liberal visitation arrangement, giving the father more consistent and regular visits. *Matter of William "TT" v. Siobhan "HH" (Fam. Ct. NY, 2d Jud. Dep't.), N.Y.L.J. Vol. 224, No. 64 (October 2, 2000).*

Judge Maney's opinion sets out the relationship of the parties, how the respondent mother planned to conceive two children through artificial insemination and share co-parenting rights and responsibilities with her lesbian lover. The petitioner sperm donor was apparently not married to the mother. The intent of the arrangement was for the donor to be an important part of the children's lives, but not a part of the family unit, which was to consist solely of the two lesbian mothers and their children. The donor and his partner were given the right to visit the children in the lesbian couple's home or have the children in their home overnight, one day a week, one weekend a month, plus one week a year. The visitation arrangement worked well until the lesbian couple began breaking up. The donor alleges that, after they broke up, Anita "BB," the ex-lover, began interfering with his visits because, he alleged, his scheduled time conflicted with hers. According to the donor, Anita believed that she could unilaterally decide to take some of his visitation time. As a result of this and another unexplained conflict with the mother, the donor decided to file a petition for a court-ordered visitation schedule.

At the hearing, the parties agreed that the mother would have sole legal custody. But they were unable to agree upon a visitation schedule. The mother wanted the judge to enforce the original agreement, whereas the donor wanted more frequent visits on a set, regular court-ordered schedule that could not be discarded at the whim of the mother or her ex-lover. Judge Maney noted, based on uncontroverted testimony at the hearing, that the donor plays a significant role in the children's lives, is a fit parent, and has a close and loving relationship with the children. The judge noted that there was no evidence of any concerns about the donor's parenting skills or that the children would be harmed by more frequent visits with him. Because the standard in child custody and visitation cases is the "best interests of the child," the judge held that it was not bound by the agreement, stating that the relationship must be protected and encouraged, not restricted. Maney ordered the parties to follow a much more liberal and regular visitation schedule that permitted the donor to have visits with the children more than twice as often as the agreement would require. The judge also ordered the mother not to interfere unnecessarily with the donor's schedule.

Interestingly, the fact that all the parties involved were gay was not made an issue in the case. The court clearly treated the parties the same as it would had they been heterosexual. Judge Maney's visitation order was, in essence, a traditional visitation schedule, the same as those typically ordered in cases involving custody/visitation battles among heterosexual parents. *Elaine Chapnik*

Appeal Brewing in New York Co-Parent Visitation Case

In *Matter of J.C. v. C.T.*, published June 23 in the *New York Law Journal*, Westchester County, N.Y., Family Court Judge Joan Cooney upheld the right of a lesbian co-parent to seek visitation with the child she had been raising with her former partner. On October 19, Judge Cooney issued a ruling on the merits, granting permanent visitation rights to the co-parent. (The par-

ties' names were kept confidential in court records.) Cooney found that the co-parent, who had a nine-year relationship with the children's birth mother, was a "psychological parent" of the children.

The birth mother immediately petitioned the Appellate Division for the 2nd Department for a stay of the order, alleging irreparable harm if the co-parent were to be allowed visitation with the children, now age 4 and 2. On Oct. 20, Judge Anita Florio granted a stay until Oct. 30, when a panel of the Appellate Division was to consider whether a longer stay should be granted pending appeal.

Judge Cooney's decision, reportedly the first in New York to grant co-parent visitation rights, could be challenged in light of the New York Court of Appeals' ruling in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), which held that a co-parent, as a "biological stranger" of the child, does not have standing to seek visitation after the dissolution of a same-sex partnership. In her June 23 ruling, Judge Cooney claimed to distinguish the *Alison D.* precedent in light of subsequent developments in New York law. The appeal of this case may provide the opportunity for the Court of Appeals to reconsider its ruling, which has been rendered increasingly regressive by subsequent appellate rulings in other states authorizing visitation rights for co-parents. *Newark Star-Ledger*, Oct. 22. A.S.L.

Ultra-Conservative Anti-Gay Legal Group Denied Tax Exempt Status

A Missouri based organization that fabricated stories of "avowed homosexuals" attacking its supporters in order to raise funds for its conservative agenda was denied tax-exempt status by the United States Tax Court. *The Nationalist Foundation v. Commissioner of Internal Revenue*, 2000 WL 1507460 (Oct. 11).

The Nationalist Foundation had argued its work was sufficiently in the public's interest to warrant tax exemption. Among the group's stated objectives was to use litigation to counteract organizations it views as "the leftist threat," such as the NAACP Legal Defense Fund, Inc. and the American Civil Liberties Union. In upholding the IRS Commissioner's prior denial of exemption, Judge Cohen said that efforts to increase "social activism of pro-majority and rightist beliefs" were antithetical to the charitable and educational purposes of section 501(c)(3) of the tax code. Moreover, the court found that the organization's unwillingness to be forthright about its activities and its outright distortions were disqualifications under the IRS's administrative procedures.

Counsel for the Foundation, Richard Barrett, claimed the organization's due process and equal protection rights were violated, because it was treated differently from other similarly situated organizations. He noted that while many organizations on the IRS's list of tax-exempt groups have names containing words such as "Black", "Hispanic", "Jewish", and "Gay", there was a conspicuous absence of "White" organizations. The court was not persuaded to reopen discovery related to these claims, noting that the IRS's administrative procedures were held to be constitutional in a similar 1994 case also brought by Barrett.

In an effort to uncover the actual purposes of the Foundation, Judge Cohen scrutinized fund-raising letters describing events sponsored by the group. One letter stated that a New Hampshire rally calling for the abolition of Martin Luther King, Jr. Day was disrupted when homosexuals attacked the crowd. The Foundation claimed to have "photos of the terrorists in the act of attacking" its supporters. In actuality, the only photo was of three people holding a banner in opposition. *Travis J. Tu*

Oregon Appeals Court Revives Same-Sex Harassment Claims

Partially reversing a trial court decision, the Oregon Court of Appeals ruled on Oct. 4 that Mark Harris was entitled to a trial of some of his tort and statutory claims against Wally George, a supervisor, and Pameco Corp., his former employer, arising from incidents of alleged sexual harassment by George. *Harris v. Pameco Corp.*, 2000 WL 1470151.

Harris alleged that after he had voiced to George his negative views about homosexuality, George deliberately was physically demonstrative with him, subjecting him to unwanted touching and various kinds of sexual invitations. After leaving the company, Harris filed suit alleging a variety of tort and statutory claims under state law, including battery, intentional infliction of emotional distress, sex discrimination, and retaliation. The trial court granted judgment for the employer on all claims.

In an opinion for the court, Presiding Judge Edmonds found that the trial court erred in directing verdicts and granting judgments against Harris. For one thing, the court found that Harris's allegations, if believed by the jury, could make out claims for battery and intentional infliction of emotional distress. In addition, addressing a question of first impression under Oregon law, the court ruled that the Supreme Court's *Oncale* decision could be applied to Oregon's sex discrimination law, and that this was a case where the law might be found to be violated, although the question of the company's potential liability was not totally clear. However, Harris had alleged facts sufficient to state a retaliation claim, based on the company's conduct after he complained about George's actions. A.S.L.

Federal Court Rejects Title VII Harassment Claim by Transsexual

In *Broadus v. State Farm Insurance Co.*, 2000 WL 1585257 (U.S.Dist.Ct., W.D. Mo., Oct. 11, 2000), Senior District Judge Wright granted defendant's motion for summary judgment on claims of race, sex and disability discrimination brought by Karen S. Broadus, a preoperative female to male transsexual, against State Farm Insurance. Among other things, Broadus alleged that he (Broadus and all other parties used the masculine pronoun throughout the proceedings) was harassed by supervisor Brad Norton because of his sex.

Broadus ran into two problems in seeking to defeat the summary judgment motion. First, Judge Wright expressed doubt that transsexuals are protected from discrimination under Title VII. Although Broadus theorized his claim under the rubric of "gender stereotyping," in a deposition he stated that he was being harassed because of transgender issues and sexual orientation. Wright noted that Broadus sought to rely on the gender stereotyping theory adopted by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); however, Wright argued that Ann Hopkins was not transsexual, but rather "was a female employee at an accounting firm who was advised to 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,' if she wanted to become a partner in the firm." Wright also noted that to the extent Broadus's claim of discrimination was grounded in allegations of "homophobia" by Norton, it was not actionable under Title VII.

However, even assuming for discussion that discrimination based on transgender status might be covered under Title VII, Wright found that Broadus's factual allegations did not rise "to the level of unwelcome harassment," in that there were no tangible job consequences for Broadus of Norton's alleged mistreatment, and that some of the charges Broadus made against Norton involved the normal routine of the workplace, in which Norton did not treat other employees any differently.

Although it would be hard to characterize Broadus's deposition based on the brief mention in this opinion, the case reinforces the need for careful preparation of transgender plaintiffs for depositions in Title VII cases, in light of the rather delicate state of the law on this issue and the narrow theories under which some courts may be willing to entertain sex discrimination claims based on gender stereotyping theories. A.S.L.

Civil Litigation Notes

The U.S. Supreme Court refused to review the decision of the 7th Circuit in *Holman v. State of Indiana*, 211 F.3d 399 (7th Cir. 2000), cert. de-

nied, Oct. 2 (2000 WL 1203523), in which the lower court ruled that Title VII sexual harassment theory does not apply to a case involving a bisexual harasser (i.e., a harasser who goes after both men and women seeking sexual favors). The 7th Circuit's theory of the case was that Title VII requires a showing that the victim was harassed because of their sex, and in the case of a bisexual harasser it appears that the sex of the victim is essentially irrelevant.

The U.S. Supreme Court has also refused to review the New Jersey Supreme Court's decision in *V.C. v. M.J.B.*, 748 A. 2d 539 (April 6, 2000), cert. denied, Oct. 10, in which the state court held that a lesbian co-parent could qualify as a "de facto" parent for purposes of visitation and custody law.

In a ruling issued Oct. 5, Philadelphia Court of Common Pleas Judge Matthew Carrafiello rejected a preemption challenge to Philadelphia's domestic partnership ordinance that had been filed by William Devlin, head of the conservative Urban Family Council. The Philadelphia Fair Practice Ordinance, in addition to providing health benefits for registered same-sex partners of city employees, also provides domestic partners with an exemption from the city's real property transfer tax equivalent to the exemption offered married couples. Devlin vowed to appeal. Press Release, Center for Lesbian and Gay Civil Rights, Philadelphia, October 10; *Philadelphia Inquirer*, Oct. 7.

Those busy-bodies at the American Family Association Center for Law & Policy, who delight in filing lawsuits to challenge anything that might be gay-positive, are at it again. They ran into court in Boston seeking an injunction against a program that the Lexington, Massachusetts public schools were planning to hold in an area church, among other locations, under the title, "Respecting Differences: Creating Safer Schools and a More Inclusive Community for Gay and Lesbian People and Their Families." The AFA lawyers argued, quite implausibly according to U.S. District Judge Joseph Tauro, that the program violates the Establishment Clause of the First Amendment by promoting religion. According to an Associated Press report of Oct. 12, Tauro stated: "The weight of the evidence before me is that this is a secular event without any religious purpose or activity."

A strange abduction story has ended happily, at least for now. When he was 8 days old, Miguel Washington, the son of a mentally disabled woman, was placed with his uncle, Paul Washington, Jr., by the boy's grandfather, Paul Washington, Sr. Paul Jr., who is gay, has, together with his partner, been raising Miguel for the past ten years in Riverside County, California. But Paul Sr., having become unhappy about his grandson being raised in a gay household, abducted the boy during a fishing trip and flew him to Pennsylvania, depositing him with other relatives. In response, Paul Jr. went to Superior Court in Riverside County and obtained a temporary guardianship order on Oct. 10, as well as a civil protective-custody warrant for the boy's return. The court has scheduled a Dec. 4 hearing on Paul Sr.'s claim that it is not in the best interest of Miguel to continue living with his uncle and his uncle's male partner. *Riverside Press-Enterprise*, Oct. 24.

Last month we reported that Elizabeth Bryant had reached a settlement with the City of New York over claims that she was subjected to harassment as an openly-lesbian police officer, but that the details of the settlement were sealed by the court. On Oct. 11, U.S. District Judge Kaplan issued an order unsealing the record at the instance of the city's three major newspapers, on the ground that neither the city nor the plaintiff objected to making the terms public. Newspaper subsequently reported that the settlement included $50,000 in financial compensation to Bryant, who was allowed to resign from the force instead of being fired.. *Bryant v. City of New York*, 2000 WL 1523284 (S.D.N.Y., Oct. 11); *New York Daily News*, Oct. 13.

Multnomah County, Oregon, Circuit Court Judge Marshall Amiton ruled Oct. 26 that the Oregon Citizens Alliance, intrepid promoter of anti-gay ballot measures, must begin paying damages to Catherine Stauffer, a lesbian activist who was forcibly removed from an OCA meeting in a public hall in violation of her civil rights. Stauffer won a $32,000 damage award in a 1992 trial, but the OCA claimed it was broke and unable to pay. Stauffer went into court in September seeking payment, noting that OCA had raised lots of money in connection with its newest anti-gay measure on the ballot this Nov. 7, and won an order freezing the OCA's finances until it begins making payment. On Oct. 26, Amiton ruled that the OCA violated the latest order by returning recent donation checks uncashed in order to avoid having assets to satisfy the judgment against Stauffer, and imposed a fine of $500 a day beginning Nov. 10 if OCA fails to make scheduled payments. *Portland Oregonian*, Oct. 28.

The Associated Press reported Oct. 26 that a federal district court jury in Iowa has awarded $54,493 in damages to Jacqueline M. Montagne, who sued the state on a claim that state officials had failed to take appropriate action to stem rumors that Montagne is a lesbian. The A.P. report is unclear about the precise legal theories Montagne advanced, but apparently she was claiming harassment and infliction of emotional distress, and included a claim that she was retaliated against for complaining in the first place. The damage award breaks down to $45,000 for emotional distress and $9,943 in back-pay based on a claim that Montagne lost a merited promotion due to the incident. Montagne works for the state-run Ameristar Casino in Council Bluffs. Her attorneys are also seeking a large fee award. *Montagne v. State of Iowa*.

The ACLU Lesbian & Gay Rights Project filed suit in U.S. District Court in Louisiana on Oct. 23 on behalf of Peter Oiler, a 45–year-old male truck driver, who was discharged by Winn-Dixie Stores after the company learned that he engaged in cross-dressing while off-duty. Oiler identifies as transgender, but not transsexual because he has no desire to transition through hormone treatment or surgery to a permanent female identity. The suit alleges a Title VII violation, based on the "gender stereotyping" theory recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Several recent circuit court of appeals decisions have cited *Price Waterhouse* for the proposition that discrimination on account of gender non-conformity may come within the ban on sex discrimination under Title VII. *ACLU Press Release*, Oct. 23.

On Oct. 23, Maryland Circuit Judge James Chapin granted a motion by Montgomery County to dismiss an action filed by the American Center for Law and Justice, which had challenged the county's decision to offer insurance and pension benefits for domestic partners of county employees. The ACLJ's lawyer, Vincent P. McCarthy, announced that an appeal would be filed to the Maryland Court of Appeals, the state's highest court, arguing that this ruling conflicts with a 1984 precedent in which the state's high court refused to recognize common law marriages. *Washington Times*, Oct. 24. A.S.L.

Criminal Litigation Notes

In a ruling that dissenting Circuit Judge Benavides argued "shocks the conscience," a panel of the U.S. Court of Appeals for the 5th Circuit ruled Oct. 27 that the district court erred in granting habeas corpus relief to Calvin Burdine, a gay man who was convicted of capital murder in a Texas court while his appointed attorney dozed through the testimony during both the guilt and sentencing phases of the case. *Burdine v. Johnson*, 2000 WL 1610328. A hearing before a state trial court considering Burdine's allegations about ineffective assistance of counsel concluded that his attorney, Joe Cannon (now deceased) had indeed slept through substantial portions of the trial, but the Texas appellate courts nonetheless refused to vacate his sentence. The federal district judge, finding that prior 5th Circuit precedent holds that a felony defendant is entitled to the active assistance of counsel at every moment of the trial, held that it must be presumed that Burdine's defense was prejudiced by his counsel's inattention. But a majority of the panel, in an opinion by Circuit Judge Rhesa Hawkins Barksdale, disagreed, finding that Burdine had waited many years to raise this claim, and that it

was impossible on the basis of the trial transcript to determine which testimony Cannon slept through. (News reports state that the testimony from the state court hearing indicated that he slept through a portion of Burdine's cross-examination during which the prosecutor asked potentially objectionable questions about Burdine's sexuality and possible sexual relationships with the victim and an alleged co-perpetrator of the murder.)

In *State of Louisiana v. Smith*, 766 So.2d 501 (La., July 6, 2000), the Louisiana Supreme Court rejected a state constitutional privacy challenge to a sodomy law. On August 31, the court denied a motion for rehearing, prompting a dissent to the denial of the motion by Justice Lemmon, who argued that the earlier opinion did not address an important issue newly raised in the motion: whether the current law applies to oral sex between consenting adults. In reviewing the history of Louisiana's sodomy laws, Justice Lemmon notes that in 1896 the legislature expressly inserted a prohibition on the commission of sodomy "with the sexual organs or with the mouth," but that during a 1942 revision of the criminal code, the legislature removed the phrase "with the mouth," thus leaving a question whether the defendant in this case, accused or oral sex, could be convicted under the law.

In *State of Maine v. Crosby* (U.S.Dist.Ct., D. Maine, Oct. 23), Judge George Z. Singal sentenced Robert Crosby, 43, to 28 months in prison for possessing child pornography images he downloaded from the Internet. Crosby was described in a news report as a quiet, gay man, who was "basically agoraphobic and who sought sexual release on the rare occasions he left his home by cruising for anonymous sex at interstate highway rest stops; otherwise, his sexual release came from viewing child porn on the internet. A licensed clinical social worker who has been treating Crosby since 1997 testified that he had a history of childhood abuse and neglect and suffers from post-traumatic stress disorder. Judge Singal rejected the argument that Crosby should be subject to house arrest rather than sent to prison, and ordered that federal marshals take note of the possibility of a suicide attempt by Crosby in jail. State authorities noted that four Maine residents who have been charged with computer child pornography offenses have killed themselves. This case raises serious questions about the policy underlying federal laws pertaining to child pornography. *Bangor Daily News*, Oct. 24.

In *Cuevas v. State of Florida*, 2000 WL 1505115 (Fla. 4th Dist. Ct. App., Oct. 11), the court rejected an attempt by Johanne Cuevas to rescind her guilty plea in a hate crimes case. The evidence showed that Cuevas was a member of a gang that abhorred gay people, and that she traveled with her gang from Broward County to Orlando for the purpose of beating up the victim, an open lesbian who was a member of another gang. Cuevas had admitted to this charge, and there were witnesses ready to testify about the reasons for the beating, which was severe enough to send the victim to the hospital. Cuevas claimed that she had not understood that due to the hate crimes statute her plea would subject her to an enhanced sentence, but the court found that this had all been explained to her at the time and there was no error in the plea or the sentence of ten years in prison.

In *Hodges v. State of Tennessee*, 2000 WL 1562865 (Tenn. Ct. Crim. App., Oct. 20), the court sustained a murder conviction and death sentence for Henry Eugene Hodges, who was convicted of murdering Ronald Bassett, a gay man who had hired Hodges as a sex escort. According to the court's fact summary, Hodges, who self-identifies as heterosexual, had over the years resorted to same-sex prostitution from time to time to earn money, and had a habit of assaulting and robbing his victims. According to the record testimony in this case, he brutally murdered Bassett in his bed by strangulation. Hodges raised twenty distinct claims on appeal, none going to the issue of guilt or innocence, but many raising significant flaws in due process in connection with his prosecution. A.S.L.

Legislative Notes

On Oct. 5, a U.S. Senate conference committee chaired by Sen. John Warner (R-Va.) Voted 11–9 to drop a provision embodying hate crimes language from the pending defense appropriations bill, even though conferees from both houses had been instructed to include the hate crimes provisions in the bill. The Republican leadership in Congress was implacably imposed to the measure, even though enough of their members had joined with Democrats in approving the addition of the measure to the appropriations bill. *Associated Press*, Oct. 6. If enacted, the measure would have created a federal penalty enhancement for crimes motivated by anti-gay bias.

The dust has finally settled on a busy California legislative session. Gov. Davis has approved the following measures of relevance to Law Notes readers: AB 1785, requiring public schools to include reporting of hate-motivated incidents and hate crimes and requiring the state education curriculum to include human relations education; AB 1856, providing civil liability for non-supervisory employees who engage in harassment that violates the Fair Employment and Housing Act; AB 1931, funding hate violence programs and training in public schools; AB 2418, forbidding discrimination on numerous grounds, including sexual orientation, in jury selection. However, Davis vetoed numerous bills of interest to the lesbian and gay community, including a measure to assist transgendered citizens to obtain appropriate documentation of their current gender; a measure to establish a state human relations commission, a measure allowing opposite-sex senior couples to register as domestic partners; extending family and medical leave rights to domestic partners and others; and a measure allowing San Mateo County to extend death and survivor's benefits to domestic partners of county employees. Oct. 10 Press Release, Calif. Alliance for Pride and Equality.

On Oct. 20, *Newsday*, a Long Island newspaper, published an op-ed article by former New York City Mayor Ed Koch, arguing in favor of passage of a measure pending in the New York City Council to amend the city human rights ordinance to ban discrimination on the basis of gender identity. Koch described how he had surveyed officials in jurisdictions that had passed such legislation, and was convinced by the results of his survey that passage was merited.

The Minneapolis, Minnesota, City Counciil voted Oct. 13 to ask the state to allow cities to offer health-care benefits for employees' domestic partners. A prior attempt to extend such benefits in 1993 resulted in a court ruling that state legislative change would be required to do so. *Star-Tribune*, Oct. 14. A.S.L.

Law & Society Notes

Four state-wide ballot questions involving lesbian and gay rights were scheduled for the general election on Nov. 7, and the ballots will likely have been counted and results announced by the time most readers receive this issue of *Law Notes*. In Oregon, a measure proposed by the infamous Oregon Citizen's Alliance is intended to gag Oregon public school teachers from saying a good (or even neutral) word that might somehow be construed as "promoting homosexuality." In Nevada, a proposed constitutional amendment would enshrine forevermore the definition of marriage as solely involving sex-discordant couples. In Nebraska, the anti-gay-marriage crowd goes even further with a proposed constitutional amendment that would ban not only same-sex marriages but also any recognition of same-sex relationships, including domestic partnerships or civil unions. The only pro-gay ballot measure, which was proposed by the state legislature in Maine, would ratify the legislature's adoption of a law banning discrimination on the basis of sexual orientation. (A prior such enactment by the legislature was repealed by voters two years ago during a special election held in the depths of a major winter storm in which only a small percentage of the electorate participated.) In the final days before voting, the Nevada and Nebraska anti-gay measures were predicted to pass, but so was the pro-gay measure. Polling showed that Oregonians were evenly split over

their measure, with results too close to make any prediction. *Seattle Times*, Oct. 29.

Gay legal rights achieved new visibility during the Presidential and Vice Presidential Debates, when the candidates were asked about their positions on same-sex marriage. Predictably, none of the candidates support same-sex marriage. The Democratic candidates both supported some form of civil union or other legal recognition for same-sex couples. The Republican presidential nominee, in typical fashion, skirted the issue and said he opposed "special rights" for gays. The surprise was the Republican Vice Presidential nominee, Dick Cheney (father of "out" lesbian Mary Cheney), who said that family recognition was a state law issue and it was up to states to decide what kind of families they want to recognize.

Delta Air Lines announced that it will extend medical and dental benefits, optional life insurance and short-term disability benefits to same-sex partners of its employees in the U.S. effective July 2001. Bereavement leave and family medical leave coverage for partners will begin immediately. Delta's action was seen as a response to a lobbying effort by the Georgia Equality Project, which has been working on winning over major private sector employers for domestic partnership recognition. Another recent success reported by GEP is Atlanta Gas Light. *Atlanta Constitution*, Oct. 6.

The *Washington Post* reported on an unusual immigration situation on Oct. 28. Katherine and Pat Spray applied for a marriage-based visa, but it turned out that their marriage was invalid because Pat had not formally divorced from his prior marriage. The usual routine in such cases is for the Immigration Service to allow the offending party to correct the situation, but in this case, The District Director ordered the immediate expulsion of Katherine, who is an Irish citizen. Why the departure from the norm? The Sprays' theory: It is because both of them are transgendered, Katherine having been born a man and Pat having been born a woman. However, after the couple went to the press about their case, the INS agreed to deal under which they each pleaded guilty to one misdemeanor count of possessing a false identification document with intent to defraud the government, and U.S. District Judge Raymond Jackson sentenced them each to three years' probation. The INS agreed not to use the conviction to prevent Katherine from getting a green card to stay in the U.S. The couples live in the Norfolk, Virginia, area.

California Governor Gray Davis rejected parole for Robert Rosenkrantz, a gay man convicted of second degree murder and sentenced to 17 years to life in prison. Rosenkrantz, who has been incarcerated for 16 years and has been a model prisoner, earning a college degree, has become something of a cause celebre in California. He committed his murder at age 18, shooting a man who had "outed" him to his family (who then rejected him) and who had broken his nose the previous week, assaulting him with a flashlight. Rosenkrantz had armed himself and then confronted the man, demanding that he recount the "outing." The man laughed at him, and Rosenkrantz, enraged, shot him ten times, killing him. Davis's decision, released on Oct. 28, reiterated the planned and premeditated aspects of the crime, concluding that Rosenkrantz remained a danger to society. *San Diego Union-Tribune*, Oct. 29.

Reaction to the Supreme Court's *Dale* decision continued during October, as school boards, city councils, United Ways and other organizations grappled with the contradiction between their own non-discrimination policies and their continuing relationships with an organization whose policy of anti-gay discrimination had been held to be sheltered by the First Amendment. The Scouts remained unrepentant, however. On Oct. 31, the *Providence Journal* reported that the Narragansett Council of Boy Scouts, which had asked the national organization to reconsider its policy, had received a written response from the national organization, reiterating its decision to stick to its policy of denying membership to openly gay men.

The Santa Fe, Texas, school board voted 4–3 on Oct. 19 to reject a proposal by two members to prohibit books in the school library that include vulgarity, profanity, or references ot homosexuality and "other deviant behavior." *San Antonio Express-News*, Oct. 21.

The Salt Lake City School District has approved the East High Gay-Straight Alliance and another club on social issues in the gay community as extracurricular clubs, according to a report in the Oct. 6 *Deseret News*. The school district had first reacted to the proposal to start a gay club at East High School by banning all extra-curricular clubs, and endured two lawsuits brought by gay rights groups on behalf of the clubs. Finally, the district capitulated in the face of student protests about the ban on extra-curricular clubs.

The Bristol Warren Regional School Committee in Rhode Island voted to reject a proposal to amend the district's anti-discrimination policy to include a specific ban on sexual orientation discrimination. The existing policy bans discrimination on the basis of all categories covered by federal law. The proposed amendment would have added the phrase: "or on the basis of sexual orientation in accordance with Rhode Island General Laws." *Providence Journal*, Oct. 24.

How much detail about their private lives should employees have to reveal to employers in order to qualify for domestic partnership benefits for their partners? In Ames, Iowa, faculty members of the University of Iowa are unhappy about the requirement that they sign a form authorizing the university's human resources group to conduct investigations to determine the bona fides of alleged partnerships as a prerequisite to gaining benefits for same-sex partners at the three public universities of the state. The president of the faculty senate complained that the university does not investigate the bona fides of "common law or conventional relationships" involving heterosexual couples. *Des Moines Register*, Oct. 24.

The board of directors of the Owensboro, Kentucky, chapter of Big Brothers-Big Sisters voted 10–9 on Oct. 25 to ban gay people from serving as adult mentors in the program. According to the executive director of the program, board members had raised concerns about "health issues and fear that it would create confusion among children over sexual-preference matters," according to an Oct. 27 report in the *Ornaldo Sentinel*.

The latest development under the Solomon Amendment, which forbids federal financial assistance to schools of higher education that bar military recruiters, was a Pentagon interpretation issued last spring abolishing the "unit exemption" concept, under which the refusal of law schools to allow military recruiters on campus had not disqualified other elements of a university from receiving federal money. The first prominent casualty of this appears to have been New York University Law School, which had been a leader in banning military recruiters due to the Armed Forces' discriminatory policy against gay people, but which was forced by the University administration to end the ban when significant federal funds to other departments of the university were threatened. When an Army JAG recruiter showed up on campus for the first time in years, angered students staged protests and signed up for the interviews to confront the recruiter. The experience was so daunting that an Air Force JAG recruiter who was scheduled to visit the school cancelled his appointment. (Based on a News Advisory issued by the Bisexual, Gay and Lesbian Law Students Association at NYU on Oct. 27). A.S.L.

European Community Set to Ban Employment Discrimination Based on Sexual Orientation

On Oct. 17, the Council of the European Union, consisting of the employment ministers from the governments of the 15 member states, reached political agreement on a Directive banning employment discrimination based on religion or belief, disability, age or sexual orientation. (Separate legislation on sex and racial or ethnic origin has already been passed.) The Directive will be formally adopted by the Council under Article 13 of the European Community Treaty (which gives the Council legislative power in relation to discrimination and only requires consultation of the European Parliament) in the next month or two, after the text (in

the 11 EC languages) has been finalised. It will probably be known as "Council Directive 2000/__/EC of _____ 2000 establishing a general framework for equal treatment in employment and occupation." Once the final text has been published in the Official Journal of the EC, member states will have three years to pass national legislation implementing the Directive's provisions on religion or belief and sexual orientation, and six years in the case of disability and age.

No official, final, public version of the English text exists yet. The unofficial version differs in important respects from the Nov. 25, 1999 proposal of the Commission (the EC's executive), http://europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0565.html. The Directive prohibits direct discrimination (disparate treatment), indirect discrimination (disparate impact), and harassment ("unwanted conduct ... with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment") based on sexual orientation, in hiring, promotion, working conditions (including dismissals and pay), vocational training, and participation in organizations of workers, employers and professionals.

The two most controversial issues relating to sexual orientation were the scope of an exception for religious institutions and the application of the Directive to employment benefits for same-sex partners. Article 4(2)(a) seems to permit religious institutions to discriminate only on the basis of religion and not on any other ground, i.e., a Roman Catholic institution can refuse to hire Muslim teachers but not lesbian and gay Roman Catholic teachers (and priests?). However, Article 4(2)(b) permits "churches ... to require individuals working for them to act in good faith and with loyalty to the organisation's ethos." Nothing in the Directive expressly excludes employment benefits for same-sex partners from the prohibition of sexual orientation discrimination in relation to pay, but a recital (currently no. 21) provides: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon." Because the recital is not legally binding, the European Court of Justice could ignore it, or could limit it to cases where a benefit is provided only to married different-sex partners of employees and has not been extended to unmarried different-sex partners, as in *Grant v. South-West Trains*, Case C–249/96, [1998] ECR I–621. Once it is finally adopted, the Directive will be roughly the equivalent of the U.S. Congress passing the Employment Non-Discrimination Act. The 15 EU member states have a population of over 360,000,000, and in 7 member states with over 230,000,000 people (Austria, Belgium, Germany, Greece, Italy, Portugal and the United Kingdom), there is currently no legislation banning sexual orientation discrimination in employment. The Directive will also become part of the *acquis communautaire*, meaning that the 13 applicant countries (Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, Turkey) must pass national legislation implementing the Directive if and when they are admitted to the EU. Perhaps anticipating the Directive, the Romanian Government issued an executive "Ordinance on Preventing and Punishing All Forms of Discrimination" on Aug. 31 (http://accept.ong.ro/news.html#ordinance), which is much broader than the Directive and includes sexual orientation and employment. *Robert Wintemute*

Developments in U.K., Canadian and Australian Law

United Kingdom: On Sept. 19, in *MacDonald v. Ministry of Defence*, No. EAT/121/00 http://wood.ccta.gov.uk/eat/eatjudgments.nsf (posted Oct. 2), the Scottish Employment Appeal Tribunal became the first court or tribunal in the United Kingdom to accept fully the argument that sexual orientation discrimination is also sex discrimination. The EAT held: (1) that "the word 'sex' in the [Sex Discrimination Act 1975] should be interpreted to include, 'on grounds of sexual orientation'"; (2) alternatively, that the correct comparator for a gay man is a heterosexual woman, and for a lesbian woman is a heterosexual man; and (3) that the intrusive questioning of the gay applicant prior to his dismissal from the Royal Air Force was sexual harassment contrary to the Act, either because a heterosexual woman would not have been subjected to this treatment, or because "if the nature of the conduct is both sexually related and blatantly unacceptable there is no need for a comparator." The decision, which conflicts with *Smith v. Gardner Merchant*, [1998] 3 All ER 852 (Court of Appeal of England and Wales), will probably be appealed to the Scottish Court of Session, and then possibly to the House of Lords. Compensation for dismissed lesbian, gay and bisexual members of the armed forces is potentially much greater if the dismissal qualifies as sex discrimination than if it is only a violation of the right to respect for private life in Article 8 of the European Convention on Human Rights.

Transsexual employees are already protected under the Sex Discrimination Act 1975 as a result of *P. v. S. and Cornwall County Council*, Case C–13/94, [1996] ECR I–2143, and the Sex Discrimination (Gender Reassignment) Regulations 1999. However, it is not clear whether this protection extends to employment benefits where either the employee or their partner is transsexual. On Oct. 4, the Court of Appeal of England and Wales referred *Bavin v. NHS Trust Pensions Agency*, [1999] ICR 1192 (EAT), to the European Court of Justice, to determine whether European Community sex discrimination law requires that an employer provide a survivor's pension to the transsexual male partner of a non-transsexual female employee. Under the employer's pension plan, only a married different-sex partner qualifies for a survivor's pension. The applicant employee and her partner are considered legally a same-sex couple and are unable to marry. The ECJ will have to decide whether to extend *P.* or apply *Grant v. South-West Trains*, Case C–249/96, [1998] ECR I–621 (EC law did not require benefits for lesbian employee's female partner).

Canada: On Oct. 5, Bill C–501, http://www.parl.gc.ca/cgi-bin/36/pb_prb.pl?e, introduced by Svend Robinson, an openly-gay New Democratic Party MP, had its first reading in the House of Commons of Canada's federal Parliament. It would rename the Marriage (Prohibited Degrees) Act, as the Marriage Capacity Act, and provide that: "A marriage between two persons is not invalid by reason only that they are of the same sex." Without the support of the governing Liberal Party, it is unlikely to become law.

Australia: After passage by the state Parliament of Victoria, the Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000, Act No. 52/2000, http://www.dms.dpc.vic.gov.au/sb/2000_Act/A00744.html, received royal assent on Sept. 12 and became law. For the definition of "gender identity," see [2000] LGLN 106. *Robert Wintemute*

Other International Notes

The Equal Status Act went into effect in Ireland, banning discrimination in public accommodations on the basis of gender, sexual orientation, disability, religion, and membership in the Gypsy community. The act creates a government agency, the Office of the Director of Equality Investigations, to receive complaints and applies to both the public and private sectors. *Irish Times*, Oct. 25; *New York Times*, Oct. 26.

New Zealand's Law Commission has recommended that same-sex couples be allowed to adopt children, as part of a comprehensive overhaul of the country's adoption laws. *The Press*, Sept. 30.

The *Globe and Mail* reported that the British Columbia Court of Appeals ruled Sept. 20 that a school board is entitled to ban children's books depicting same-sex couples from curricular use. The ruling stemmed from an incident in which a gay kindergarten teacher in Surrey sought to use several children's books depicting gay couples. The school board voted to ban the books at the request of some parents. Wrote Justice Kenneth Mackenzie for the unanimous court: "Discrimination aside, parental views of

matters of sexual orientation are entitled to be respected." A.S.L.

Professional Notes

In connection with the N.Y. Law School Journal of Human Rights' symposium commemorating the 20th anniversary of this newsletter, U.S. Rep. Gary Ackerman (D.-N.Y.) proclaimed October 14, 2000, to be "Professor Arthur S. Leonard Day" in New York's 5th Congressional District. The symposium was attended by more than 150 members of the N.Y.L.S. community and guests, and a subsequent issue of the journal will include the anthology of Law Notes stories from the past 20 years that was distributed to those in attendance, as well as edited versions of the papers delivered by many of the panelists.

The Howard Brown Health Center in Chicago has bestowed its Friend for Life Award on Lambda staff attorney Heather C. Sawyer in recognition of her important advocacy work for people living with HIV/AIDS. A.S.L.

AIDS & RELATED LEGAL NOTES

Tennessee Appeals Court Upholds 26–1/2 Year Prison Term for HIV+ Woman Who Had Unprotected Sex With Others

Pamela Wiser, of Tennessee, was convicted of twenty-two counts of having unprotected sex while knowing she was HIV+, and was sentenced to serve 26–1/2 years in prison by Bedford & Marshall Circuit Courts Judge Charles Lee. She appealed the sentence, arguing that it was excessive inasmuch as few of her victims actually contracted HIV from the experience, but was rebuffed in a unanimous decision by the Tennessee Court of Criminal Appeals, *State v. Wiser*, 2000 WL 1612363 (Oct. 30).

In a lengthy recitation of Wiser's sexual history, Judge Woodall's opinion shows that she met most of her sexual partners in bars, and that usually it was the man who proposed having sex. Although she claimed that she frequently disclosed her HIV status to her sexual partners, they all testified that she did not do so, and actually answered in the negative when asked if she was infected or if they should use "protection." Wiser came to the attention of the police when 29–year-old Barry Cozart developed symptoms of HIV infection and then tested positive. Cozart's mother, who knew Cozart had a sexual relationship with Wiser, contacted the police. According to some reporters who testified at the trial, Wiser told them she had been infected by a former boyfriend and was out to get revenge by sleeping with men without protection.

The court concluded that several enhancement factors and no mitigating factors under Tennessee's sentencing guidelines applied to this case, and that the trial court had carefully weighed the time elements, the number of victims, and the seriousness of the offense in imposing sentence. The court also found no error in the trial court's decision to make the sentences imposed consecutive, noting particularly the trial court's conclusion that Wiser is a "dangerous offender" so that a lengthy sentence was required to protect the public. It appears from the court's summary of the testimony that Cozart was the only one of Wiser's numerous sexual partners actually to contract HIV, but it also appeared from the testimony that some of her other victims suffered significant emotional distress upon learning about her activities. A.S.L.

New York Court Evaluates AIDS Treatment in State Prison System

In a lengthy opinion published in the *New York Law Journal* on Oct. 6, New York Supreme Court Justice Marcy Kahn ruled based on a detailed hearing record that medical treatment for inmates with HIV/AIDS in the New York State prison system is sufficiently good to reject an attempt by a man with AIDS who has pled guilty to serious drug dealing offenses to avoid a prison sentence. *People v. Anonymous* (N.Y.Sup.Ct., N.Y. Co., Criminal Term, Part 44). The motion had been referred to Justice Kahn for determination by the sentencing judge.

The anonymous defendant, whose identity is protected from publication under HIV confidentiality rules, pled guilty to two class C felonies involving drug sales, and was promised concurrent terms of 3 to 6 years in each case. After the plea agreement was reached with the prosecutor, the defendant advised the judge who was taking the plea that he has been suffering from AIDS for several years, and that his treating physician, Dr. Conrad Fischer, had told him that a prison sentence of this magnitude would cause his death. The sentencing judge postponed sentence and ordered a special hearing on the question of the effect that the proposed prison sentence would have on the defendant. After the hearing before Justice Kahn, the defendant moved for modification of his sentence agreement. Justice Kahn denied the motion.

Stories about the inadequacy of treatment for persons with AIDS within the New York State prisons were common from the 1980's through the mid–1990's, lending credibility to the defendant's arguments. However, based on testimony provided by Alexis Lang, Regional Medical Director fot he Downstate Region of the State Department of Correctional Services, as well as documentary evidence submitted by the prosecution and the defendant, Justice Kahn determined that the basis for the defendant's doctor's opinion appeared to be outmoded information, deriving from that doctor's experience during the early 1990's treating state prison inmates who were referred to St. Clare's Hospital in Manhattan, where the doctor (who testified as defendant's expert witness) was then employed. Dr. Fischer also had more recent contact with prisoners with AIDS, but these prisoners came from the New York City jail system, not from the state prison system, and Justice Kahn found Fischer's testimony about conditions in the city jails to be irrelevant to the sentencing issue.

Perhaps more importantly, Kahn placed significant weight on statistics showing that New York State inmates with AIDS seemed to fare as well as, if not better than, people in the general civilian population, when it came to survival rates, and a recent study of medical care in the state prisons by the Correctional Association of New York, a non-governmental watchdog group on prison conditions, while finding various faults, seemed to indicate that many of the common problems identified in Dr. Fischer's testimony derived from the early–1990's patients had been ameliorated by the end of the 1990's. According to the hearing record, the state prisons now determine inmate health status upon initial processing and have taken steps to ensure that there are no significant delays in making available currently approved AIDS medications. Upgrading of record-keeping has also lessened the likelihood of serious interruptions in medication when inmates are transferred between facilities, according to the testimony of Lang and the Correctional Association report. The record indicated that all the medications that the defendant is currently receiving under Fischer's care are available within the prison system. Furthermore, recent policy changes have made it possible for the defendant to continue under the care of his own physician, although the logistics would have to be worked out.

"Although the Correctional Association Report makes clear that more can and should be done to improve the level of medical care afforded to DOCS inmates," wrote Justice Kahn, "including the hiring of better trained physicians, it does not establish that the treatment available to prisoners with HIV fails to meet national standards. To the contrary, the Report confirms that DOCS provides state-of-the-art medication, including ART, and has succeeded in achieving a remarkable reduction in AIDS-related deaths in recent years.… Under the particular circumstances presented in this case, it appears highly likely that defendant will be able to continue his current treatment regimen and obtain adequate medical services while he serves his state prison sentence."

Justice Kahn concluded that although this was not the "rare case" that would justify vacating the defendant's prison sentence on humanitarian grounds, it was "appropriate for this court to attempt to fashion procedures that will assure continuity in defendant's essential treatment regimen without interruption while he is incarcerated by issuance of a supplemental order at the time of sentence, settled on notice, to ensure the implementation of this decision."

Due to her background as an "out" lesbian and former president of the Lesbian and Gay Community Services Center in New York, Justice Kahn's ruling is expected to carry particular credibility with AIDS service providers in tempering the customary assertions that the state prison system presents a serious risk to defendants living with AIDS. A.S.L.

2nd Circuit Panel Upholds Denial of Injunction Against NYC on AIDS Housing

In a per curiam panel decision issued Oct. 25, the U.S. Court of Appeals for the 2nd Circuit rejected an appeal by advocates for homeless persons with AIDS from a decision by U.S. District Judge William H. Pauley (S.D.N.Y.) to deny preliminary injunctive relief on the claim that New York City is violating Section 504 of the Rehabilitation Act and Title II of the Americans With Disabilities Act by failing to afford adequate housing facilities for persons such as the plaintiffs. Although the City is already operating under an injunction issued Sept. 19 by U.S. District Judge Sterling Johnson (E.D.N.Y.) in a case seeking similar relief, the appellate panel found that this action, styled *Wright v. Giuliani*, 2000 WL 1591121 (2nd Cir., Oct. 25), is not "moot" because of some differences in the relief sought.

The conceptual problem this brief per curiam addresses is how to determine whether there is discrimination in the provision of facilities when the plaintiffs have not offered evidence that poor city residents who don't have disabilities are being given better housing facilities. For this court, the lack of a comparator sharply undermines the likelihood of success on the merits. (This seems to reflect a different philosophy of construing the relevant laws from that which Judge Johnson embraced in *Henrietta D. v. Giuliani*, No. 95 CV 0641 (SJ) (E.D.N.Y., Sept. 19, 2000); Johnson apparently accepted the argument that if the facilities were inadequate to meet the needs of plaintiffs, then their provision was discriminatory.)

As a practical matter, this decision would seem to have little effect so long as Judge Johnson's preliminary injunction is in effect, but it may presage a future appellate decision vacating Johnson's injunction if it reliably signals how the court will view the merits of the case. A.S.L.

HIV+ Delaware Prisoner Loses 8th Amendment Claim

Plaintiff Maxcell Clark, an HIV+ inmate at Somerset prison in Delaware, brought a pro se Section 1983 action alleging violations of his civil rights under the 8th Amendment as well as state law negligence and medical malpractice claims. *Clark v. Doe*, 2000 WL 1522855 (U.S.Dist.Ct., E.D.Pa., October 2000). Clark also has hepatitis C, and makes a number of allegations concerning his treatment for these illnesses, mostly involving a failure to properly administer medication. Defendants are a host of medical personnel connected with the prison, all of whom moved for dismissal of the complaint. Plaintiff also moved for leave to file an amended complaint and made a renewed request for counsel, as the court had previously been unsuccessful in finding counsel to appoint for him.

Specifically, Clark enumerates a number of incidents where his requests for a medical examination were delayed, or met with a demand for greater detail of his medical need. He also states that double portions meals were required by his condition and were improperly denied by prison authorities, that many times milk was not provided when he was given oral medications pursuant to his physician's orders, and failure to dispense his HIV medications timely during the day. Other allegations were made concerning changes in treatment during his two-week temporarily transfer from the Camp Hill prison to his present location. Clark put in a request for these additional drugs and received a written response stating that the prison officials had verified his medications with the former correctional facility's medical personnel who stated such drugs were not part of his treatment. He also states that he was given Advil instead of ibuprofen, an unnecessary test for tuberculosis and was treated for oral thrush with alcohol swabs instead of medication Clark had understood the doctor had prescribed.

District Judge O'Neill granted the defendants' motion to the dismiss, ruling that case law is clear that neither an inadvertent failure to provide adequate medical care nor inmate disagreements as to the kind of treatment constitute 8th Amendment violations. The court relied primarily on the seminal case *Estelle v. Gamble*, 429 U.S. 97 (1976) and its progeny, ruling that Clark's allegations, even if proved, fail to show that the defendants exhibited deliberate indifference to serious medical needs, or that their acts or omissions were so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness.

The court found most of Clark's allegations revolved around differences of opinion as to the proper course of treatment. Clark believed that certain medications should not have been discontinued when he arrived at the second facility; prison officials disagreed. Larger food portions were not continued at the second facility pending its own examination. The court found that the defendants had take action as to all of Clark's complaints and requests, even if he was not satisfied with the results. A substitute of Advil for ibuprofen, a non-immediate but reasonable response time to medical requests and a change from meds-with-milk to meds-with-meals is not a deprivation of the minimal civilized measures of life's necessities.

The court also denied Clark's motion to amend his complaint, reasoning that since the complaint alleges no facts that might raise defendants' conduct to the level of deliberate indifference required to bring a claim of cruel and inhuman punishment under the 8th Amendment, any amendment thereto would be futile. *K. Jacob Ruppert*

$35M Verdict Against Blood Fractionators Time-Barred

The Court of Appeal of Louisiana for the Fourth Circuit affirmed a trial judge's dismissal of a wrongful death action by a PWA plaintiff's survivors on timeliness grounds, vacating a $35 million jury award against four healthcare companies. *Smith v. Cutter Biological*, 2000 WL 1483223 (La.App. 4 Cir., Sept. 6) (unpublished).

Hemophiliac Kenneth Dixon began treatment with factor concentrate, a fractionated blood product, in 1976. In 1982, Dixon and his family began keeping logs of his use of factor concentrate by date, quantity, and brand name. In 1985 Dixon's hematologist tested a sample of his blood stored in July 1982, and informed Dixon of the presence of HIV antibodies. The court found "it is more probable than not that [the hematologist] told Ken that testing positive for HIV did not mean he, Ken, would contact AIDS," but "between 1985 and 1990, information from his treating physicians and other sources came to his attention letting him know that HIV (commonly referred to as the AIDS virus) infection destroys the immune system, and that it leads to AIDS which is fatal." In 1988, Dixon developed pneumonia, and was referred to an HIV/AIDS specialist, who "frankly" told Dixon that HIV was attacking his immune system, and that he "would eventually progress to AIDS, get opportunistic infections and die."

In his thirty-two page opinion, writing for a four judge panel, Judge Byrnes recognizes the likelihood "that Ken tried to deny in his own mind that his HIV would lead to AIDS or that he would die of AIDS ... for youths think, frequently, that they will proverbially live forever." Unfortunately, the court concludes that, while Dixon filed suit against the factor concentrate manufacturers in 1993, under the scenario most favorable to him, he knew or should

have known of the existence of a cause of action against them no later than 1989, when he received a letter from Bayer Corporation notifying him that his HIV would result in AIDS. The court points to evidence such as media coverage of the HIV/AIDS connection, 1984 changes in labeling of factor concentrates, Dixon and his parents' extensive contact with the hemophilia community, the parents' contemporaneous safe-sex warning, and the parents' emotional reaction to the HIV diagnosis, to infer that Dixon's knowledge of the connection may have existed prior to 1989. Citing a case wherein a cause of action for fear of having been infected with HIV "without accompanying physical injury" was allowed, the court reasoned that "if a cause of action exists for a [reasonable] fear of HIV infection ... without actual infection, per force a cause of action accrues when one has actual knowledge of" infection.

Louisiana's law of prescription, like a statute of limitations, bars an action from being pursued after the elapse of a one year period beginning "when damage to the plaintiff has manifested itself with sufficient certainty to support accrual of a cause of action ... the date the plaintiff suffers actual or appreciable damage, even though he may thereafter come to a more precise realization of the full extent of his damage or may incur further ... damage because of the completed tortious act." Thus Dixon's petition alleging that the four companies had negligently allowed their medicine to become contaminated with HIV, and then fraudulently concealed their wrongful conduct in order to insulate themselves from litigation, would have been timely if filed by 1990. Under standards set in *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, the trial court also rejected the argument, advanced by Dixon's parents, that prescription was interrupted because of the continuing nature of the tort inflicted on Dixon. The court was unconvinced by the theories of reinfection, aggravation of infection and viral loading advanced by Dr. Andrew Pavia on behalf of Dixon's parents' wrongful death claim. *Mark Major*

Louisiana Appeals Court Rejects Malpractice Claim Against Blood Bank

The Court of Appeal of Louisiana reversed a District Court finding that a blood distributor could be sued for medical malpractice. *Patin v. Tulane Medical Center Hospital*, 2000 WL 1483352 (La.App. 4 Cir., Aug. 16). The blood distributor had supplied blood which contained HIV.

Patin received blood transfusions at Tulane Medical Center in 1980 supplied by Touro Infirmary. The blood contained HIV. He found out in 1997 that he had contracted HIV and sued in January 1998 for malpractice. Touro filed an exception of prematurity, claiming the Louisiana Medical Malpractice Act (MMA) required that medical malpractice claims be submitted to a medical review panel prior to filing.

The MMA defines malpractice as 69any unintentional tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient..." and "all legal responsibility of a health care provider arising from defects in blood, tissue, transplants, drugs and medicines..."

Writing for the three member panel, Judge Michael Kirby found that for malpractice to occur in the transfer of blood there had to be a "health care provider-patient relationship between Touro and Patin," which did not exist in this instance. In dismissing Touro from the claim, Judge Kirby wrote that it was "clear that the shipment of contaminated blood is not caused by a dereliction of professional skill, it is a ministerial or clerical function and does not require any specialized training or knowledge." *Daniel R Schaffer*

Malpractice Claim for False Positive HIV Test Not Time-Barred

Reversing a ruling that had dismissed Charmaine Carter's malpractice claim, the Louisiana Court of Appeal, 4th Circuit, ruled in *Carter v. Grant*, 2000 WL 1618316 (undated slip opinion), that the time for filing her claim against the doctor and hospital did not begin to run until her negative status was confirmed with an antigen test, since the doctor had dismissed the correctness of a negative ELISA test result after Carter had twice tested positive.

Carter served 14 months in Jefferson Parish prison for theft, and then was placed in a drug rehabilitation program that required HIV testing. She was tested in December 1992, and Dr. Carter told her she had tested positive. A second test administered at defendant New Orleans General Hospital thereafter was also positive. After she completed the rehabilitation program, Carter was referred to the New Orleans AIDS Task Froce for counseling, further testing, and monitoring of her T–4 cells. Because her T–4 count was much higher than would be expected of somebody who was HIV+ and not taking meds, Carter requested a third HIV test through the Task Force, and it came up negative in February 1994. When she told Drs. Carter and Grant, her treating physicians while in jail, about this, they told her to get an antigen test. Due to the expense, she was unable to get such a test until the lawyer she had retained fronted the money for her. A second ELISA test was negative in April 1995, and an antigen test was negative in June 1995. She filed her malpractice claim in December 1995.

The trial court bought the defense argument that the time began to run from the February 1994 test result, making her suit untimely under Louisiana law. But the appeals court concluded, especially since the doctors had advised her to get the antigen test rather than rely on the ELISA test as a clean bill of health, that the time for her to file began to run in June 1995, making her December 1995 filing timely. A.S.L.

11th Circuit Asks Georgia Supreme Court to Clarify State Estoppel Doctrine in HIV Discrimination Case

The U.S. Court of Appeals for the 11th Circuit has asked the Supreme Court of Georgia to decide whether a man who alleges he was fired illegally because of his HIV status should be collaterally estopped from prosecuting his employment discrimination suit under the Americans with Disabilities Act. *Shields v. Bellsouth Advertising and Publishing Co.*, 2000 WL 1451604 (Sept. 29). According to the defendant BAPCO, plaintiff Paul Shields should not be permitted to proceed with his case because a Georgia state court previously denied Shields unemployment benefits after concluding that he had been fired for misconduct, not because he was HIV+.

In 1981, defendant BAPCO hired Shields as a sales representative to solicit local advertisers for "The Real Yellow Pages." BAPCO fired Shields in 1995 after he had a "nasty" argument with a customer. Shields filed a grievance under the collective bargaining agreement challenging his dismissal. After an arbitration hearing, Shields received full reinstatement, backpay, and retroactive seniority, but resigned only one month after returning to work. In addition to his grievance, Shields applied for and was granted state unemployment compensation benefits. BAPCO appealed the claims examiner's initial ruling, and argued during the ensuing hearing that Shields was fired due to misconduct. Shields attributed his termination to the fact that he was HIV+, but did not offer any substantive evidence in addition to his own testimony to support that contention. The hearing examiner affirmed the claims examiner's ruling. On appeal, the Georgia Superior Court reversed the findings of the claims examiner, concluding that Shields had been fired because he disregarded company rules as a result of his altercation with BAPCO's customer. Shields subsequently filed a federal lawsuit alleging under the ADA that BAPCO fired him because of his HIV status. On BAPCO's motion to dismiss, the district court ruled that Shield's ADA suit was barred because he already had litigated the question of whether he was fired for being HIV+.

Circuit Judge Marcus explained on behalf of the unanimous 11th Circuit panel that there was a question as to whether, under Georgia law, a decision concerning unemployment benefits constitutes "a prior adjudication" for purposes of collateral estoppel. The court noted: "Al-

though it is true that Shields raised the HIV issue at his administrative hearing, that issue was offered only as a possible alternate explanation for BAPCO's termination motives and was not the focal point of his benefits claim. Simply put, this case turns on a difficult interpretive question concerning Georgia collateral estoppel law." The court certified a narrowly-worded question to the Supreme Court of Georgia, and shall withhold its final decision about the district court's decision to grant BAPCOI's motion to dismiss pending an answer.

This case emphasizes the pitfalls that a pro se litigant can face during an administrative hearing. It also is a warning to counsel to check local collateral estoppel rules prior to making factual arguments during administrative hearings, especially if an aggrieved client anticipates filing a subsequent employment discrimination suit, whether under federal, state or local laws.

Shields is represented by Milton Dale Rowan & Neis, LLP. *Ian Chesir-Teran*

Puerto Rico Federal Court Rejects HIV Discrimination Claim

In *Cajigas v. Order of St. Benedict*, 2000 WL 1469300 (U.S.Dist.Ct., D.P.R., Sept. 21), U.S. District Judge Casellas granted a motion for summary judgment to the defendant, Order of St. Benedict's (OSB) against plaintiff Rafael Velez Cajigas's action under Title I of the Americans with Disabilities Act of 1990 (ADA). Cajigas claimed that he was discriminated against because of his alleged HIV+ status and was wrongfully terminated from his job as a schoolteacher at the OSB run private Catholic school Colegio San Antonio Abad (CSAA).

Cajigas worked under a one-year employment contract, which had a clause that stated that each one-year contract was not renewable, but was granted on a yearly basis dependent on performance and other relevant factors. The OSB evaluation determined that Cajigas had difficulty controlling his classroom, had excessive late days (sometimes for two hours or more), and had seemed intoxicated at CSAA on several occasions. Most importantly, Cajigas's medical records did not indicate that he was HIV+, and he was not generally regarded as being HIV+. Also, the OSB offered Cajigas the first one-year contract based on the impression that Cajigas would enter into the Order as a novice in due time. Cajigas claimed that he had told Father Oscar Rivera during confession that he was HIV+ and argued that because most teachers were rehired year after year, he had an expectation that he too would be rehired.

Under the ADA, an employee who is terminated as a result of his disability may obtain relief if he can prove: (1) that he was disabled under the meaning of the ADA; (2) that the employer did not provide a reasonable accommodation for his disability; (3) that he suffered an adverse employment action as a result of the disability. A claimant may alternatively establish his case indirectly using the prima facie case and *McDonnell Douglas* burden shifting methods developed under Title VII of the 1964 Civil Rights Act, showing under a preponderance of the evidence standard that: (1) he was disabled under the meaning of the ADA; (2) he was qualified to perform the essential functions of the job, with or without reasonable accommodation; (3) was subject to an adverse employment action by a company subject to the act; (4) was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (5) suffered damages as a result.

Based on the facts presented, the district court determined that Cajigas failed to establish all of the elements necessary to continue with his ADA claim. Moreover, Cajigas failed to establish that the decision not to rehire him was actually discriminatory (even assuming that he was actually HIV+), and that the OSB had legitimate reasons not to extend another contract to him. The OSB only had a contractual obligation to act in good faith when considering whether to rehire him and nothing more. *Leo L. Wong*

South African Constitutional Court Protects HIV-Positive Employees

On Sept. 28, in *Hoffmann v. South African Airways*, http://www.concourt.gov.za/summaries/2000/saasum.html, the Constitutional Court of South Africa held that the respondent's policy of refusing to employ airline cabin attendants who are HIV+ violates the right to equality in Section 9 of the 1996 South African Constitution. The appellant had been hired, subject to a pre-employment medical examination, including an HIV test. Because he tested positive, although he was otherwise healthy, he was deemed "unsuitable" for employment. The respondent justified its policy on four grounds. First, flight crew had to be fit for world-wide duty, including yellow fever endemic countries. Because HIV+ persons may react negatively to a yellow fever vaccine, they may not take it, risking contracting the disease themselves and spreading it to others, including passengers. Second, HIV+ persons risk contracting opportunistic diseases, transmitting them to others, and being unable to perform emergency procedures. Third, the life expectancy of HIV+ persons "was too short to warrant the costs of training them." Fourth, other major airlines had the same policy.

After reviewing the medical evidence, Justice Ngcobo, writing for the unanimous, 11–judge court, concluded that the first two justifications could only apply to HIV+ persons with CD4 counts below 300–350, which was not the case for all HIV+ persons or for the appellant. Indeed, the respondent had conceded that its policy could not be justified and was unfair. But the court still had a duty to determine whether the dismissal violated the Constitution. This duty did not, however, extend to reviewing the respondent's policy of pre-employment testing, which was for the Labour Court under the Employment Equity Act 1998, ss. 7(2), 50(4) (prohibiting testing unless the Labour Court finds that it is justifiable).

As an organ of the state, the respondent was subject to Section 9(3) of the Constitution: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Are persons living with HIV a group that is protected under Section 9(3)? "People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. ... [T]hey have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position .... Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. ... [A]ny discrimination against them can ... be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law."

The respondent had clearly discriminated against the appellant because of his HIV status, and the medical evidence did not justify it. Moreover, the respondent did not test existing employees for HIV, or take into account the "window period," during which an individual could be infected with HIV but test negative. This "discrimination on the basis of prejudice and unfounded assumptions ... is manifestly unfair." What if the respondent's customers, because of their own irrational fears, chose other airlines that refused to employ HIV+ cabin attendants? "We must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. ... Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. ... The fact that some people who are HIV positive

may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive. The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution."

Justice Ngcobo therefore concluded that "the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution, ... or whether people who are living with HIV ought not to be regarded as having a disability ..." He ordered the respondent to offer to employ the appellant as a cabin attendant from the date of the Court's order. *Robert Wintemute*

AIDS Litigation Notes

Shirley Dilliard, of Allentown, Pennsylvania, was sentenced to 6 to 23 months in Lehigh County Prison after pleading guilty to four counts of prostitution. When she was arrested during a local police sting operation, she told officers she was HIV+. Lehigh County Judge Robert L. Steinberg also fined Dilliard $250 and imposed as a parole condition that she be referred to an AIDS outreach unit. *Allentown Morning Call*, Oct. 11.

Trial judges continue to routinely order HIV testing of convicts, but sometimes the appellate courts intervene. In *State of Washington v. Cross*, 2000 WL 1514848 (Wash. App., Div. 2, Oct. 12), the defendant was convicted of conspiracy to manufacture a controlled substance, and the trial court imposed mandatory HIV and DNA testing, characterizing this as a "drug offense." Writing an unpublished opinion for the court, Judge Wang pointed out that the state law authorizing local health departments to conduct HIV tests of persons convicted of drug offenses, RCW 69.50, requires the court to find that the offense involved the use of hypodermic needles to justify such a testing order, and that no such finding was made in this case.

On May 23, 2000, the 9th Circuit ruled in *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, that a direct threat posed by a job applicant to his own health and safety from the performance of the job for which he applied did not supply an affirmative defense under the Americans with Disabilities Act. On September 26, the court's opinion was supplemented by a dissenting opinion by Circuit Judge Trott, who criticized the majority opinion as "bizarre" and argued that somebody whose physical condition would support the view that performing the job would kill him could not possibly be considered "qualified" to perform the job. A.S.L. @H2 = AIDS Legislative Notes

On Oct. 20, President Clinton signed a bill reauthorizing for five years the Ryan White CARE Act, which authorized more than $1 billion a year for AIDS prevention and treatment activities. In an expansion of eligibility definitions, the new version of Ryan White factors in HIV infections as well as actually diagnoses of AIDS in determining how money will be allocated, and specifically approves $20 million a year for programs to reduce perinatal HIV infection, as well as $30 million to assist programs that encourage those who test HIV+ to notify their partners. Associated Press, Oct. 21.

California has amended the Fair Employment and Housing Code to specify that the determination whether a person has a disability covered under the Code will be made without consideration of mitigating measures, such as medication, assistive devices, or corrective lenses. The amendment, which was introduced by Assemblymember Sheila Kuehl, ensures that Californians who would not be protected by the federal Americans With Disabilities Act due to the Supreme Court's 1999 trio of narrowing decisions, will still be protected under state law. BNA *Daily Labor Report* No. 193 (10/4/00). A.S.L.

AIDS Law & Society Notes

Dramatically illustrating the selective incidence of HIV/AIDS in the U.S., the Centers for Disease Control and Prevention reported Oct. 3 that during the fiscal year July 1, 1999 through June 30, 2000, nearly 70 percent of new reported HIV infections were among African-Americans and Hispanics, and African-Americans alone accounted for more than half of the newly reported cases. *Memphis Commercial Appeal*, Oct. 4.

An HIV home test kit marketed on the internet lacks federal approval and produces inaccurate results, according to federal authorities who secured a guilty plea on Oct. 25 from Stanley Lapides, a New Jersey man, to charges to distributing misbranded medical devices with intent to mislead. Lapides' plea in U.S. District Court in Newark brought national press service coverage to the issue, with authorities stating that only one home test kit for HIV has been approved by the Food and Drug Administration, the Home Access Express HIV–1 Test System, which sends blood samples to a laboratory for testing. *Atlanta Constitution*, *Washington Post*, Oct. 26. A.S.L.

AIDS Law International Notes

Press sources reported in October that South African President Thabo Mbeki has decided to refrain from commenting further about the issue of the role of HIV in the AIDS epidemic, having decided that his comments are distracting attention from efforts by the government to help curb the epidemic in South Africa. *New York Times*, Oct. 17. Mbeki's views were implicitly refuted by the nation's Constitutional Court in its factual recitation in *Hoffmann v. South African Airways*, reported above, where it matter-of-factly stated that AIDS is caused by HIV. On September 28, Mbeki's predecessor, Nelson Mandela, addressing a Labour Party conference in England, stated that he subscribed to the orthodox view that HIV causes AIDS, and specifically expressed disagreement on this point with Mr. Mbeki. *Daily Telegraph*, Sept. 29.

The *Guardian* reported on Oct. 25 that Mr. Justice Gage of the British high court ruled against the deportation of an HIV+ man from Columbia, pending the outcome of his ex-partner's petition for asylum. The judge ruled that to deport the man, a father of three, while his children remained in England with his ex-partner would create a serious risk of breaching his right to respect for family life, protected under article 8 of the European convention on human rights, which was incorporated into English domestic law on Oct. 1. A.S.L.

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Cain, Patricia A., *Privileges and Stereotypes: A Commentary*, 3 J. Gender, Race & Justice 659 (Spring 2000).

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Carbado, Devon W., *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467 (Aug. 2000).

Crusto, Mitchell F., *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 Georgia St. Univ. L. Rev. 517 (Spring 2000).

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Specially Noted:

The Georgetown Journal of Gender and the Law has published its First Annual Review of Gender and Sexuality Law, vol. 1, no. 2 (Spring 2000). The issue is almost 800 pages long, and attempts a comprehensive summary in the areas of Equal Protection, Abortion Rights, Expressive Conduct, Family Law, Education Law, Employment Discrimination Law, and Anti-Violence Law. The forward by Suzanne Goldberg and a student note on ENDA are listed separately above. Call the Journal at 202–662–9460 to inquire about obtaining copies.

Prof. Patricia Cain's new book, *Rainbow Rights*, is a noteworthy addition to the burgeoning literature on the development and trajectory of lesbian and gay law. We had the opportunity to read it in galleys in order to give the publisher a book jacket quote, and we found it to be an engrossing reading experience. Highly recommended. It can be ordered directly from the publisher at 1–800–386–5656. ISBN No. 0–8133–2618–4.

Prof. Ronald Dworkin's new book, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press), includes a lengthy treatment of the *Romer v. Evans* Colorado

Amendment 2 case, arguing, among other things, that Justice Scalia was correct in arguing that the Court's majority ruling is conceptually inconsistent with the 1986 decision in *Bowers v. Hardwick*, in which the Supreme Court had sustained the constitutionality of Georgia's sodomy law on the ground that the state could ban "homosexuality sodomy" in order to effectuate the presumed moral views of a majority of Georgians.

On Oct. 12 the *Chicago Daily Law Bulletin* published "Law Schools Viewed Through Prism of Sexual Identity" by Martha Neil, an article reporting on a new brochure published by the Law School Admission Council reporting on the sexual orientation policies of the nation's law schools. Copies of the brochure can be obtained from the LSAC at Box 40, Newtown, PA, 18940, or by visiting and downloading from the LSAC website: www.lsac.org.

The journal *International Legal Materials*, vol. 39, no. 4 (July 2000), has published the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* and the *South Africa Promotion of Equality and Prevention of Unfair Discrimination Act*.

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Specially Noted:

In the Oct. 20 issue of the Journal of the American Medical Association, Dr. Lawrence Gostin published an article titled "A Proposed National Policy on Health Care Workers Living With HIV/AIDS and Other Bloodborne Pathogens," in which Gostin, a recognized national leader on health care policy, backs away from his earlier published stand that had supported various disclosure requirements for HIV+ health care workers.

EDITOR'S NOTE:

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