EUROPEAN COURT LENDS FURTHER SUPPORT TO TRANSSEXUALS' STRUGGLE FOR MARRIAGE RIGHTS IN BRITAIN

In an advisory opinion issued at the request of the Court of Appeal of England and Wales (Civil Division), the European Court of Justice ruled that British law was incompatible with the European Convention of Human Rights and Fundamental Freedoms, a treaty signed in Rome in 1950, to the extent that British law prevents a heterosexual couple, one of whom is transsexual, from fulfilling the requirements to enable one to qualify his or her partner for a survivor's pension. *K.B. and National Health Service Pensions Agency, Secretary of State for Health*, Case C–117/01 (January 7, 2004). (The opinion is available on the court's website: http://www.curia.eu.int/jurisp/)

The case involves K.B., a female nurse whose employment qualifies her for participation in the British National Health Service Pension Scheme, under which a surviving spouse of a covered health services worker is entitled to a pension. According to the court's opinion, "K.B. has shared an emotional and domestic relationship for a number of years with R., a person born a woman and registered as such in the Register of Births, who, following surgical gender reassignment, has become a man but has not, however, been able to amend his birth certificate to reflect this change officially," due to British statutes that deny transsexuals the right to have their birth certificates amended to reflect their desired sex. K.B. and R. would marry if they could, as demonstrated by the fact that "their union was celebrated in an adapted church ceremony approved by a Bishop of the Church of England and that they exchanged vows of the kind which would be used by any couple entering marriage." (In *Goodwin v. United Kingdom*, a judgment of the European Court of Human Rights issued on July 11, 2002, that court opined that Britain's refusal to allow transsexual people to marry in their preferred sex was a breach of their right to marry under Article 12 of the European Charter of Human Rights, but the British government has not yet altered its statutory law to conform with this decision.)

After their church marriage ceremony, K.B. applied to the Pension Scheme for a determination that R. would be entitled to a survivor's pension in the event of K.B.'s demise, and was told that he would not be so entitled because Britain does not recognize same-sex marriages and does not recognize sex changes for legal purposes, and so R. would not qualify as K.B's spouse for purposes of the Pension Scheme. Claiming that this was a violation of her right to equal pay for equal work, K.B. filed a case before an Employment Tribunal. However, both the Employment Tribunal and the Employment Appeal Tribunal rejected her claim, finding the Scheme to be non-discriminatory with regard to sex.

K.B. appealed to the Court of Appeal of England and Wales, which decided to seek an advisory ruling from the European Court before confronting the merits of K.B.'s claim. Arging before the European Court, the British government contended that there was no discrimination because all unmarried people are disqualified from achieving these benefits, regardless of the reason why they are not married, and cited prior European court rulings denying benefits claims on behalf of the same-sex partners of gay employees. (The European courts have yet to address the question whether denial of marriage to same-sex partners violates European law.) On the other hand, as K.B. argued, the European courts have in recent years shown increasing concern for the human rights of transgendered individuals.

The court noted that prior cases have dealt with unfavorable treatment that was "directly caused by, and flowed from," an individual's gender reassignment, but that this case presents a less direct situation, as the unequal treatment flows not from the gender reassignment but rather from Britain's refusal to recognize that reassignment as have effectively changed the individual's sex for purposes of the marriage law.

After observing that past cases had made clear that pension rights were an aspect of pay, subject to the equal pay for equal work requirements of European law, the court first stated that a nation's decision "to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law." However, where certain classes of people are categorically excluded from marrying, an issue of Community law arises.

Referring to the Court of Appeal of England and Wales as a "national court," the European Court of Justice stated: "However, in a situation such as that before the national court, there is inequality of treatment which, although it does not directly undermine the enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. As the Advocate General noted…, the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry." Inasmuch as the European Court ruled in *Goodwin* that denial of the right to marry in this situation violates Article 12 of the European Convention, then "Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. From fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirement of Article 141 EC [the equal pay rule]." Thus, concluded the court, "Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other."

The court concluded, however, that it is now up the Court of Appeal, upon receipt of this advisory opinion, to determine whether K.B. can rely on Article 141 EC to qualify R. for a survivor's pension. Implicit in this opinion is a not-so-subtle hint to the British government to get off the stick and comply with *Goodwin* by extending the right to marry in their desired sex to transsexuals by extending formal recognition to their gender reassignment procedures (which are, after all, paid for by British national health

LESBIAN/GAY LAW NOTES **January 2004**

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insurance system). A government bill has been pending for many months in the House of Commons; perhaps this new ruling will provide additional impetus for its advancement.

K.B. was represented before the European Court by her British counsel, C. Hockney and L. Cox, and by her barrister, T. Eicke. A.S.L.

LESBIAN/GAY LEGAL NEWS

New Jersey Legislature Enacts Domestic Partnership Law

On December 15, the New Jersey State Assembly approved a proposal domestic partnership bill, that would establish a state registry for same-sex partners and accord a limited number of rights, including domestic partnership benefits for state employees and some inheritance and tax rights. The vote was 41–28, with exactly 41 votes being needed for passage. (There were nine abstentions.) On January 8, the New Jersey Senate approved the same measure by a decisive vote of 23–9, with 8 abstentions, and a spokesperson for Governor James McGreevey, a Democrat, indicated that the governor was eager to receive the bill from the legislature for his signature.

The issue of domestic partnership had been on the legislative back-burner for a while. The sudden interest in quick passage the bill was rushed through during a lame duck session without extensive hearings or floor debate apparently arose from a decision granting summary judgment to the state in a lawsuit brought by Lambda Legal seeking same-sex marriage rights in New Jersey, *Lewis v. Harris*, Civ. Action MER-L–15–03 (N.J. Super Ct., Nov. 5, 2003). The trial judge in that case, Superior Court Judge Linda R. Feinberg, had rejected the plaintiffs' claims, holding that the state had articulated a rational basis for denying marriage to same-sex partners, but at the same time finding that there are serious inequities in state law and urging the legislature to do something to address them. One judge's statements alone would not have moved the legislature to such swift action, but many of the legislators evidently believed the truth of Lambda Legal's response to the decision: acceptance that a trial judge was likely to rule this way, and confidence that the case would be won on appeal. (The New Jersey Supreme Court has emerged as among the nation's most gay-friendly, including one case overruled by the US Supreme Court involving the Boy Scouts, and several cases on gay family law.) The legislature may be trying to address the most glaring inequities in an attempt to bolster Judge Feinberg's decision as it goes up on appeal.

Even this minimalist legislation went too far, as far as opponents of same-sex unions are concerned. John T. Tomicki, executive director of the League of American Families, a so-called "traditional values" group, said, "We'll take it to court." There were some suggestions that the measure violates equal protection by letting elderly straight couples register but not younger ones. *Philadelphia Inquirer*, December 16; January 8. A.S.L.

9th Circuit Endorses Workplace Diversity Policies Including Gays

A unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit, sitting in San Francisco, rejected a discrimination claim by a religious homophobe whose insistence on posting anti-gay materials in the workplace earned him a discharge for violating his employer's diversity policy. The January 6 ruling in *Peterson v. Hewlett-Packard Co.*, 2004 WL 26580, affirmed that employers have a right to include toleration for gay people as part of their diversity policies.

Richard Peterson, a 21–year employee in Hewlett-Packard's Boise, Idaho, office, reacted badly when the company posted a series of diversity posters in the workplace, including a poster picturing a gay employee just outside his work cubicle. As a militantly anti-gay Christian, Peterson feels that homosexuality is sinful and must be condemned vigorously. He retaliated by posting quotations from the Bible in large print on an overhead bin in his work cubicle, which could be seen by co-workers, customers and other people who passed through the adjacent corridor. He also wrote a letter that was published in the local newspaper, claiming that the company was "on the rampage to change moral values in Idaho under the guise of diversity" and that the company's campaign was a "platform to promote the homosexual agenda." Peterson had a bumper sticker on his car, which he parked in the company lot, stating "Sodomy is Not a Family Value."

Management officials demanded that Peterson remove the Bible quotations from his work station. He responded that he would do so only if the company would remove the diversity posters picturing the gay employee. The company refused to do this, and discharged Peterson for insubordination when he failed to change his position after some paid time off to think about it.

Peterson sued the company, claiming that it was engaging in discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating against employees on account of their religious beliefs or practices, and requires employers to make reasonable accommodations for religious employees. Peterson claimed that Hewlett-Packard was discriminating against him as a fundamentalist Christian, and was required to accommodate his beliefs either by letting him keep his posting or by removing the pro-gay posters. A federal magistrate judge in Utah, Larry M. Boyle, granted the employer's motion for summary judgment, and Peterson appealed.

Writing for the circuit court, Judge Stephen Reinhardt found that Peterson had mischaracterized the company's diversity program. Peterson claimed that the program was a "crusade to convert fundamentalist Christians to its values" and to "promote a homosexual lifestyle," but Reinhardt found from the evidence presented to the magistrate that the company had come up with the program for the purpose of increasing tolerance for diversity in the workplace. "Peterson may be correct that the campaign devoted special attention to combating prejudice against homosexuality," he wrote, "but such an emphasis is in no manner unlawful. To the contrary, Hewlett-Packard's efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our civil rights statutes generally." This assertion may appear to be a bit dubious, since federal law does not yet specifically ban sexual orientation discrimination, but Reinhardt cited two recent 9th Circuit decisions, both upholding sexual harassment claims under Title VII by employees who were or were perceived by others to be gay, in support of the statement.

Focusing more directly on what had happened to Peterson, Reinhardt noted Peterson's claim that the company's discharge was part of an "inquisition serving no other purpose than to ferret out the extremity of Peterson's views on homosexuality." Reinhardt did not find this to be very credible, noting that the company had previously established a policy against harassment, stating "Any comments or conduct relating to a person's race, gender, religion, disability, age, sexual orientation, or ethnic background that fail to respect the dignity and feeling of the individual are unacceptable," which Peterson had clearly violated by posting anti-gay quotes from the Bible at his work station.

Reinhardt also found that the company had acted reasonably by requiring Peterson to remove the Bible postings, since he had inflexibly demanded that the company omit sexual orientation from its diversity campaign. As the court had found that the company's inclusion of sexual orientation in the campaign had a legitimate business justification, it would present an undue hardship to the company to require it to abandon such efforts to make lesbian and gay

employees welcome in the workplace in order to accommodate a religious homophobe

Whether the company decided to let Peterson post his notices or gave in to his demand to remove the gay diversity posters, "either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation." Reinhardt concluded that Hewlett-Packard was not required to "accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce," and that requiring the company to take down the pro-gay diversity posters "would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce." To support this assertion, Reinhardt quoted from the Supreme Court's decision last spring in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), the important University of Michigan affirmative action case, in which the Court upheld the law school's affirmative action admission program on the ground that companies need to employ diverse workforces in order to thrive in "today's increasingly global marketplace."

This decision makes an important statement in the ongoing "culture wars" about homosexuality, as some anti-gay organizations, especially on the religious right, have argued against gay-affirmative workplace policies as being oppressive to Christian employees. In this opinion, the 9th Circuit decisively rejects the argument that "religious" employees suffer actionable discrimination when employers attempt to make their workplaces gay-friendly. Hewlett-Packard's stance here seems characteristic of many high-tech companies that have been among the first to recognize gay employee groups, realizing that high tech employment has been a magnet for talented gay workers. A.S.L.

Australia's High Court Revives Refugee Asylum Claim by Gay Bangladeshi Couple

The highest court of a country has ruled for the first time that coming out of the closet is a protected activity under international refugee law. Australia's High Court voted 4–3 in *Appellant S395/2002 and Minister for Immigration and Multicultural Affairs*, [2003] HCA 71 (Dec. 9, 2003), to reverse the country's lower courts and order a hearing for a gay male couple from Bangladesh whose petition to stay in Australia as refugees had been denied by both the Australian Refugee Review Tribunal (RRT) and the lower federal courts of that country.

The decision was the first by the highest court of a country to find that gay people can be considered as members of "a particular social group" under the 1951 International Convention relating to the Status of Refugees, and that if conditions in a country are such that only gays who keep their sexual orientation secret can avoid official persecution, then gay people who desire to live openly (out of the closet) may seek refugee status in countries that are parties to the Convention, such as Australia.

The United States applies the same formal standards to determine refugee status, and has administratively adopted principles during the Clinton Administration reaching similar conclusions concerning gay people being a member of a particular social group, but the U.S. Supreme Court has never addressed the issue of gay refugees, nor has the highest court of any other country that is a party to the 1951 Convention. On the other hand, the immigration authorities in many countries have come to the conclusion that gay people from countries where there is official persecution of openly-gay people may claim refugee status, and Australia is coming late to this conclusion.

As is common in high court decisions from British Commonwealth countries, there is no one opinion stating the views of a majority of the court, as it is customary for the judges to produce a multiplicity of opinions reflecting sometimes subtle differences in approach to the questions raised by the case. In this case, the majority ruling is embodied in two opinions, one attributed to Justices Michael Kirby (the only openly-gay member of the court) and Michael McHugh, the other attributed to Justices William Gummow and Kenneth Hayne. The differences in reasoning or emphasis between these two opinions are slight. Two opinions state the opposing views, upholding the decision of the RRT and the lower courts, one attributed to Chief Justice Anthony Gleeson and the other to Justices Ian Callinan and Dyson Heydon.

The case was complicated because it seems that the two men, whose identities are protected in the written opinion, told stories about their persecution in Bangladesh that the RRT found to be internally inconsistent and lacking credibility. One of the men spoke of having been sentenced to 300 lashes by a religious tribunal for being gay, for example, but upon examination by the RRT appeared to have no scarring on his body. (He explained that the entire sentence had not been carried out.) The RRT came to believe that the two men had actually managed to live together as a couple for several years in a "discreet" manner and to avoid any serious persecution by either the government, their families, employers or others. As Justices Callinan and Heydon indicated in their dissenting opinion, there is a difference in refugee law between actual persecution and social disapproval or ostracism that they may have suffered, and only actual persecution of some severity would count for purposes of refugee law.

The RRT concluded that if the men returned to Bangladesh and resumed the same lifestyle they had been leading, they would likely avoid any serious persecution. This conclusion was based on evidence that although Bangladesh maintains criminal sodomy laws, they are rarely enforced, and that people in that country prefer to avoid dealing with the issue of homosexuality, so gay people can avoid trouble by living discreetly. Consequently, the RRT concluded that the men had failed to show that they had a "well-founded fear of being persecuted for reasons of membership of a particular social group," the potentially applicable ground specified in the Convention, because they could avoid such persecution by continuing to live in a discreet manner. Wrote the RRT, "Bangladeshi men can have homosexual affairs or relationships, provided they are discreet." The RRT did conclude that an openly-gay person in Bangladesh would likely be subject to both official and unofficial persecution.

In disputing this finding, a majority of the court rejected the RRT's assumption that the protection of refugee law would only extend to persons who could not avoid persecution by hiding the fact of their membership in a particular social group. "Persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality," wrote Kirby and McHugh. "The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps — reasonable or otherwise — to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality."

In one of the opinions, the comparison was drawn with a Jew in the Nazi-occupied Netherlands during World War II who could avoid persecution by hiding in the manner of Ann Frank and her family in a secluded attic. As the majority observed, the issue not addressed by the RRT was whether such "discretion" is truly "voluntary." To draw the comparison to Ann Frank was to show how the RRT had failed to apply the Convention in a rational way to this situation.

While the dissenting judges supported their rejection of the appeal by observing that the petitioners had not made these precise arguments before the RRT, the majority justices were unwilling to approve a denial of refugee status

based on such a technicality. McHugh and Kirby observed that the RRT process is an inquisitorial process, not the more familiar adversary process of civil litigation in which each side carries the burden of raising all the arguments in favor of its position. In an inquisitorial proceeding, it is the fact-finder, the Tribunal itself, that is charged with raising and exploring all relevant arguments that might be made. Therefore, the majority deemed it appropriate to send this case back to the RRT for additional investigation before a decision can be made.

While it is possible that the two men from Bangladesh had not been entirely truthful (or perhaps had been confused or misunderstood) in their statement about the history of their treatment in their home country, the issue before the Tribunal was more properly whether they were seeking refuge from a society in which they had a reasonable apprehension that they could be subjected to persecution because they are gay.

The dissenters' arguments carried an implicit warning that the majority's view could open up Australia to refugee claims from gay people anywhere where there remain sodomy laws in effect or significant social hostility towards gay people. This prospect did not seem to bother the majority, who appeared inclined to respond that this is just why we have international refugee law. Amnesty International had intervened in the case on behalf of the Bangladeshi couple, who were represented by B. Levet and P. De Dassel. The International Lesbian and Gay Association had provided information about conditions for gay people in Bangladesh to the Refugee Review Tribunal, upon which it had based its conclusions. A.S.L.

Where Is Equal Protection Not? In the 6th Circuit, If You're a Lesbian?

In 1997, the U.S. Court of Appeals for the 6th Circuit revived an equal protection claim brought by a woman against whom DUI laws allegedly were selectively enforced based on her supposed sexual orientation. *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). The claim was sent back to district court. The district court, in 2001, found that even though an abuse-of-process claim based on the same facts was tried in state court and summary judgment granted to the defendants (police officers), the issue was not precluded, and could be heard in federal court. The 6th Circuit in the latest decision found that the issue was precluded, and could not be tried in federal court. The district court should have granted summary judgment to the defendants. *Stemler v. City of Florence*, 350 F.3d 578 (6th Cir. Dec. 2, 2003).

Susan Stemler claimed that the only reason she, rather than her friend's brutish, abusive, drunken boyfriend, was arrested in February 2004 was that the boyfriend accused Stemler of being a lesbian who wanted to abscond with his woman. The scenario [as reported in the November 1997 issue of *Law Notes*], sounds like the first draft of a screenplay for Thelma and Louise II.

While dancing at a bar with boyfriend Steve Kritis, Conni Black met Susan Stemler. They went to the ladies' room to discuss their boyfriends. Black told Stemler that she wanted to leave Kritis. Kritis burst into the restroom cursing, grabbed Black, threatened to kill her, slammed her against a toilet stall, and then pulled her out of the restroom. Black briefly passed out after Kritis slammed her into a wall. Kritis menaced Black with his fist.

At Black's request, Stemler agreed to drive her home. As they were leaving, Kritis hit Stemler in the head with a blunt object. Kritis chased Stemler's car with his truck, headlights off. Kritis rear-ended Stemler and tried to trap her car on a dead end street. When Kritis got out of his truck to pound on the window of Stemler's car and yell at Black (waking additional witnesses who called 9–1–1), Stemler drove around the truck. Kritis resumed the chase at 60 mph on a residential sidewalk. The 9–1–1 caller and another witness followed in their cars.

At a traffic light one of the witnesses flashed his lights at police Lt. Thomas Dusing (responding to the 9–1–1 call) and told him that Kritis appeared to be threatening the safety of the women. Dusing cut off the two vehicles at the intersection; Stemler ran out of her car to Dusing and cried, explaining that the drunken Kritis had assaulted the two and threatened murder. While Stemler was talking to Dusing, Kritis told Officer Reuthe that Stemler was a lesbian who was kidnapping his girlfriend. (Stemler denied that she is a lesbian.) Reuthe told Dusing that he smelled alcohol on Kritis, and went on to assert that Stemler was a lesbian. Despite Kritis's obvious intoxication, no one conducted a sobriety test on him or asked him to step out of the truck. (Later testing put his blood alcohol level way over the legal limit.)

Kritis repeated to Dusing that Stemler was a lesbian and asked him to bring Black to his truck. Dusing told Kritis that he would see what he could do and asked Kritis if he would testify against Stemler. Dusing's report claimed that he did not smell alcohol on Kritis, despite his contemporaneous statements to two witnesses that he did. Dusing ordered Officer Wince to test Stemler's sobriety despite her lack of DUI indicators (such as impaired balance). He found a blood alcohol level slightly over the legal limit, using a breathalyzer that Stemler alleges was improperly calibrated.

All the officers heard Kritis claim that Stemler was a lesbian, and they agreed with Dusing's decision to arrest Stemler for DUI. On Stemler's pointing at Kritis (who hadn't turned his headlights on) to ask Wince "Why don't you check him?", Wince pulled her arm behind her back and handcuffed her. A witness, angered by Stemler's arrest, told the complete story of the chase to two other officers. They told him that he didn't know what was going on, he should mind his own business, and he would be contacted to testify against Stemler. All records of this witness were lost. Meanwhile, two officers made a point of telling the 9–1–1 caller that Stemler was a lesbian; their certainty surprised the witness, in that Stemler was not a local resident.

Dusing ordered Black arrested for public intoxication "if she didn't want to leave with the male." Two officers then lifted the insensate Black out of Stemler's car and placed her in the passenger seat of Kritis' truck.

Kritis immediately drove off with Black, who again passed out. Five minutes later Kritis' truck broadsided a guardrail, throwing Black partially out of the passenger side window and severing her head in two. Kritis drove another 2.5 miles before stopping to flag down a passing motorist, who described Kritis as nonchalant, though obviously drunk. Police arriving at the scene saw probable cause to arrest Kritis without need of a field sobriety test.

Stemler, who claimed to have a small number of drinks, was tested a second time for DUI, and was again found to be over the legal limit. A forensic scientist concluded that the integrity of this sample was destroyed as Wince (for the first time in his career) held the sample for five days, didn't submit required documentation, then drove it to the lab personally. At Stemler's first DUI trial (resulting in a hung jury), Wince admitted that he had not completed an evidence card, which he produced at her second trial, claiming it was completed at the time of arrest. Stemler was acquitted.

Stemler then sued the City of Florence and law enforcement officials in federal court, alleging a violation of her rights to due process and equal protection of the laws. Because the state court found that the police had probable cause to arrest Stemler, her false arrest and malicious prosecution claims were properly dismissed by the district court. The court of appeals found itself "powerless" to review the due process issue of Wince's evidence tampering, reasoning that Stemler didn't raise it in her complaint, but only after Wince was dismissed from suit. However, the 1997 court opined, "this is the rare case in which a plaintiff has successfully stated a claim of selective prosecution." '

As alleged by Stemler, the "officers chose to arrest and prosecute her for [DUI] because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals… Kritis was similarly situated to Stemler (or, indeed, far drunker than she)," but they chose not to arrest him at the time they arrested Stemler because they perceived him to be heterosexual. The 1997 court rejected the defendants' cita-

tion of *Bowers v. Hardwick* as support for the proposition that it is always constitutional to discriminate on the basis of sexual orientation, holding that the police would violate the core principle of the equal protection clause by basing enforcement decisions on an "arbitrary classification," and noting that the availability of such a claim is not limited to groups accorded heightened scrutiny under equal protection jurisprudence.

The case was sent back to the federal district court, which in June 2001 refused to grant summary judgment for the defendant police officers. The court reasoned that the issue of the denial of equal protection based on selective prosecution had not been litigated in state court (even if the issue should have been raised), and determined that the 1997 *Stemler* decision implied that claim preclusion did not apply in this case. When Stempler brought her claim to federal court, the officers claimed that the issue of equal protection could not be heard under the Rooker-Feldman doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). That doctrine states that the power to hear appeals from state court judgments is exclusively held by the U.S. Supreme Court; lower federal courts cannot hear them if the purpose is to adjudicate claims inextricably intertwined with issues decided in state court proceedings.

The Kentucky Court of Appeals had held, in *Stemler v. City of Florence*, No.1996–CA–001318–MR at 23, that Stemler cannot establish that the officers had acted with an improper motive. The claim stated by Stemler was for "abuse of process"; one of the essential elements of the tort is an ulterior purpose. No such purpose was found, therefore, summary judgment for the police officers was warranted.

The 6th Circuit, in the 2003 appeal, had to decide whether the abuse-of-process complaint, decided in state court, also stated an equal protection claim. To maintain a claim of selective prosecution, the state must have initiated the prosecution with a discriminatory purpose. This is the same as the "ulterior" purpose required for "abuse of process," wrote Chief Judge Boggs for the court. Therefore, the state court's finding that the officers had no improper motive in arresting Stemler precluded the relitigation of the issue in federal court. Summary judgment for the officers in federal district court was warranted on the equal protection issue.

Other issues remain germane for federal courts, such as Stemler's claims regarding fabrication of evidence, and those relating to excessive force. The federal district court may rule on these issues without violating the Rooker-Feldman doctrine, because these were not litigated in state court. The court is only precluded from the issues of probable cause and the motive for Stemler's arrest. *Alan J. Jacobs* (summary of 1997 decision primarily written by *Mark Major*)

Ohio Appeals Court Rejects Transgender Marriage License Appeal

A divided Ohio Court of Appeals panel denied a marriage license to a transgendered man and his intended wife in *Application for a Marriage License for Jacob B. Nash and Erin A. Barr*, 2003–Ohio–7221, 2003 WL 23097095 (December 31, 2003). The majority opined that the existing marriage law does not contemplate such a marriage and only the legislature can make such a decision, while the dissent argued that as a matter of public policy such a marriage should be allowed.

Jacob Nash was born Pamela Ann McAloney in Massachusetts in 1964. Nash married Michael Michalak in Massachusetts, and they were divorced in 1998. Nash moved to Ohio in April 1999, and petitioned the Trumbull County Court of Common Pleas for a name change in December 1999. Nash submitted a copy of the Massachusetts birth certificate, designating Nash as female, together with the name change application. The application, changing Nash's name from Pamela Ann to Jacob Benjamin, was approved on July 5, 2000.

Soon after, Nash applied to a Massachusetts city clerk to correct his birth certificate to show male gender. To support the application, Nash submitted a letter from his family physician, explaining that he had undergone gender reassignment surgery. The City Clerk in Fitchburg, Massachusetts, issued a new birth certificate designating Jacob Benjamin Nash as male, on April 25, 2002.

A few months later, Nash and Erin Barr applied for a marriage license in Trumbull County, Ohio. The application requires applicants to list prior marriages, but Nash left that space blank. When the Trumbull County Clerk's office checked its records, they noted the name change, and when Nash returned to pick up the license, he was told that none would be issued. Nash and Barr sought a hearing, and prior to the hearing submitted a new, but unsigned, application disclosing the fact of Nash's prior marriage. At the hearing, Nash testified that his omission of the marriage from his first application was an oversight, but the trial court through it was more likely an attempt to mislead the court, and ordered that no marriage license be issued.

Nash and Barr appealed, submitting yet another license application. At a new hearing on the second application, Nash refused to answer questions from the court about his sex reassignment surgery. Nash's attorney argued that these questions were irrelevant, since Nash had a valid Massachusetts birth certificate designating him as male, and that should be conclusive of his gender for this purpose. The trial court disagreed, stating that "the refusal of Jacob B. Nash to permit the Court to make a reasonable inquiry… prevents the court from determining if the requirements for a marriage license have been met under the Ohio statutes."

Appealing this ruling, Nash argued that he was being denied equal treatment under the law, and that Ohio should give "full faith and credit," as required by the Constitution, to his Massachusetts birth certificate.

Ohio is one of the many states that has reacted to the same-sex marriage struggle of recent years by passing a law specifying that Ohio has a strong public policy opposed to same-sex marriage.

Writing for the court of appeals majority, Judge Diane V. Grendell insisted that there was no equal protection violation here, asserting that equal protection is violated only if similarly-situated persons are not treated the same way. Grendell insisted that Nash and Barr are not similarly situated to marriage license applicants who do not present transgender issues. "Although a marriage license will normally issue based upon the sworn license application and submission of proper identification," she wrote, "when evidence arises that indicates the possible existence of a legal impediment to the marriage or raises a question regarding an applicant's identification, the court can do what is reasonable and necessary under the circumstances to quell the court's concerns and properly dispose of the matter."

As to the full faith and credit argument, Grendell stated that the Ohio court had given the appropriate weight to the Massachusetts birth certificate. Under the full faith and credit clause, said Grendell, the courts of one state must give a birth certificate from another state the same weight that a court from that other state would give it. Birth certificates are normally considered to be prima facie evidence of the facts they state, but such evidence can be rebutted. "In this case, the amended birth certificate submitted by Nash as evidence of his sex was rebutted by the evidence already in possession of the trial court, to wit, Nash's original birth certificate designating Nash's sex as female. Thus, the trial court gave Nash's amended Massachusetts birth certificate the proper full faith and credit, prima facie evidence of the facts contained therein."

All of this was merely prelude to the important holding: that unless instructed otherwise by the legislature, a Ohio court interpreting the state's marriage law will consider the kind of marriage proposed by Nash and Barr to be a same-sex marriage of the type ruled out by the public policy of Ohio. Citing and quoting from recent infamous decisions from Kansas and Texas that refused to recognize the validity of a marriage between a post-operative transsexual

and a person of the transsexual's former sex, Grendell quoted a 1987 Ohio appellate decision, *In re Ladrach*, 32 Ohio Misc. 2d 6, where the court stated that "if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals" to marry someone who has the same biological sex as the transsexual, it is the responsibility of the legislature to make the necessary statutory changes to reflect this change in public policy. Grendell also quoted and relied on a dissenting opinion from a case that had granted a name change so that both members of a same-sex couple could have the same surname.

Judge Judith A. Christley, dissenting, contended that the court was placing itself on the wrong side of history. "Throughout this country's history," she wrote, sarcastically, "federal and state governments have passed various laws grounded in concerns over what should be done to save people from themselves," and proceeded to cite chapter and verse about the legal regime that oppressed women as the "weaker sex" and banned interracial marriages. "The establishment of our current civil rights legislation required that we rethink the long established history and origins of our prejudices," she wrote. "Without exception, the continuation of those prejudices was defended in the name of natural law, the God-given order of things, and because it had always been that way. Then, as today, the defenders of the status quo always seemed to have God's lips to their ears."

"I understand that it is not always appropriate to apply modern sensibilities to prior decision. That being said, certain questions are so obvious, and certain results are so clearly wrong, that we must look back and, like Dr. Phil, wonder 'What were they thinking?'"

Judge Christley's final paragraph deserves to be quoted in full, as it is a legal classic:

"A person reading the above examples of legislation and judicial decision making would be appalled at the generalizations and outright ignorance used by courts and legislatures to justify obviously unconstitutional laws. Today, however, the majority holds that, in an effort to protect the institution of marriage, a transgender person may not marry someone belonging to that person's original gender classification. In doing so, it claims to be protecting the sanctity of marriage. My question to them is 'What is the danger?' How is anything harmed by allowing those, who by accident of birth do not fit neatly into the category of male or female, from enjoying the same civil rights that 'correct sex' citizens enjoy? The state's 'interest' in protecting the sanctity of marriage in this manner is totally suspect. I would hope that the General Assembly and the courts would have better things to do with their time than to manufacture ways to polarize and alienate significant portions of our citizenry when there is no need."

Nash and Barr are represented by Randi A. Barnabee and Deboarh A. Smith of Macedonia, Ohio. A.S.L.

School Censorship Of Anti-Gay Student Held Unconstitutional

A Michigan federal court has ruled that a public school violated the constitutional rights of one of its high school students when it prohibited the student from making an anti-lesbian/gay speech during the school's "2002 Diversity Week" and when it invited only pro-lesbian/gay clergy to speak on a panel concerning homosexuality and religion. *Hansen v. Ann Arbor Public Schools*, 2003 WL 22912029 (E.D.Mich. Dec. 5). U.S. District Court Judge Rosen granted summary judgment to plaintiff Elizabeth Hansen on her First Amendment Freedom of Speech and Establishment Clause claims, and on her Fourteenth Amendment Equal Protection claim. The court denied summary judgment to Hansen on her First Amendment Free Exercise claim, since the school did not require students to attend any of the Diversity Week events. The court also denied summary judgment to Hansen's parents, who separately alleged that the school had violated their constitutional right to control their daughter's religious upbringing and education.

For at least ten years, Pioneer High School sponsored "Diversity Week" with programming that included a general assembly, panel discussions on race, religion and sexual orientation, an 'open mic' session during lunch hour, and multi-cultural events involving food and music. Although the school's student council organized the week's events in the past, in 2002 the council solicited help from other student organizations because the event had grown too large to plan on its own. The Gay/Straight Alliance was the only organization to respond to the student council's call for help, volunteering in particular to run the panel on sexual orientation. High school students led panel discussions in the past, which dealt with the issue of sexual orientation very generally. For the 2002 panel, the GSA decided to implement several changes, including changing the topic from "sexual orientation" to "homosexuality and religion." The GSA also proposed that the panel consist of religious leaders from the Ann Arbor Community rather than high school students.

Hansen, a senior at Ann Arbor Pioneer High School and a member of an anti-lesbian/gay student organization called Pioneers for Christ, originally indicated that she wanted to speak as part of the panel on sexual orientation. When she learned that the format of the 2002 panel had been changed and would consist of clergy, she requested the opportunity to include on the panel a clergy member who would represent her views and those of the Pioneers for Christ. School administrators met to discuss how to address the situation. After being advised by the school's "Equity Ombudsman" an attorney responsible for ensuring compliance with the school district's non-discrimination and harassment policies — that Hansen had a right to have her views represented on the panel, the principal decided to cancel the homosexuality and religion panel discussion altogether.

After GSA's faculty advisor complained, school administrators held a second meeting days before Diversity Week was scheduled to begin. The school's principal concluded that the panel should take place after all, but that Hansen had forfeited her right to propose a speaker since she had not attended a "mandatory" meeting during the event's early planning stages. The school offered Pioneers for Christ the opportunity to lead its own panel discussion. The student organization declined, stating that it did not have sufficient time to make the necessary arrangements.

The homosexuality and religion panel discussion went forward as originally planned by the GSA. The panel consisted of two Episcopalian ministers, a Presbyterian minister, a Presbyterian deacon, a rabbi, and a pastor from the United Church of Christ. All panel members offered pro-lesbian/gay perspectives. According to deposition testimony, the panelists discussed the Bible and other sacred texts, explaining how passages referring to homosexuality had been misunderstood or mistranslated by others to mean that homosexuality was sinful or incompatible with Christianity.

Days before the start of Diversity Week, the school separately offered Hansen the opportunity to give a two-minute speech at the general assembly on "what diversity means to me." Hansen accepted the invitation, but when she submitted her proposed speech to administrators for review, the principal censored it. The principal specifically would not allow Hansen to read a paragraph in which she differentiated between racial diversity (which she supported "wholeheartedly") and diversity of "religious and sexual ideas and actions that are wrong." Hansen responded by commencing a lawsuit pursuant to 28 U.S.C. 1983 and 1988 against the school, its principal and assistant principal, the teacher responsible for coordinating the school's 2002 Diversity Week events, the faculty advisors for the GSA, and the school's Equity Ombudsman, for alleged violations of Hansen's First and Fourteenth Amendment rights.

In assessing Hansen's First Amendment claims, Judge Rosen noted that there are three legal categories of speech occurring with the school setting: student speech that "happens to occur on school premises" (which, according to the court, must be tolerated by the school "unless school authorities have reason to believe that the expression will substantially interfere with the work of the school or impinge on the rights of other students"), government speech,

such as a principal speaking at a school assembly (as to which the school "may make viewpoint based choices and choose what to say and what not to say") and school-sponsored speech as to which the school may exercise viewpoint neutral "editorial control" so long as its actions in doing so "are reasonably related to pedagogical concerns." Ruling that the homosexuality and religion panel and Hansen's speech both fell into the last category, Judge Rosen found that the school's actions were unconstitutional because they were neither viewpoint-neutral nor justified by pedagogical concerns.

For example, the school argued that it decided not to allow Hansen to participate in the planning of the panel discussion because Hansen failed to attend a mandatory planning meeting. According to the school, its decision furthered the goal of "teaching students to follow proper procedure." Using particularly harsh language, Judge Rosen called the school's proffered justification a pretext to avoid including unwanted viewpoints in the panel discussion: "The court is left to wonder what message concerning intellectual integrity the school is conveying to students by making an argument that is so transparently disingenuous and offensive in its Procrustean attempt to torture the facts ex post facto to justify its ultimate decision." Among other things, the court highlighted the fact that at first, school officials cancelled the panel outright when faced with the possibility of having to accommodate Henson, later reinstating the panel and finding grounds to exclude Henson only after receiving complaints from GSA. The record also established that there were others who did not attend the first mandatory meeting who nonetheless were permitted to participate in other Diversity Week programming.

The court similarly dismissed the school's claims that exclusion of anti-lesbian/gay perspectives on the panel served the pedagogical goal of "creating a safe and supporting environment for lesbian and gay students." Judge Rosen noted that the defendants failed to show why lesbian and gay students would be threatened or less safe by allowing the excluded speech, especially given testimony from school officials that there had been no reports or complaints of harassment or victimization because of a student's sexual orientation. Ultimately, the court concluded that the school's proffered justifications were insufficient to overcome Henson's constitutional claims. "The record makes clear that Defendants' actions were predominantly motivated by their disagreement with Betsy's and the PFC's message." The same findings led the court to conclude that the school's decision could not survive heightened review under Fourteenth Amendment jurisprudence. (Strict scrutiny standards governed the Equal Protection inquiry since speech, a fundamental right, was at issue.)

In addition to ruling in Hansen's favor on her Free Speech claims, the court found that the school's actions separately violated Henson's rights under the Establishment clause of the First Amendment, since the homosexuality and religion panel had an "overtly religious character," and was made up entirely of clergy and religious leaders hand selected for their religious beliefs, many of whom wore religious garb. The court found little difficulty concluding that the primary purpose of the panel was "to suggest preference for a particular religious view." By contrast, the court found no violation of the Free Exercise clause of the First Amendment. "Absent a showing that the plaintiff was required to affirm or deny a belief or engage (or refrain from engaging) in a practice prohibited (or mandated) by his or her religion, no claim for violation of free exercise rights will be sustained." Here, the court explained that although Hansen was not allowed to participate or have her viewpoint represented on the panel, she was able to and submitted questions to the panelists. Hansen also testified during her deposition that her views regarding to homosexuality did not change as a result of the panel. Finally, since students could opt not to attend the programs' events during the week, no violation occurred.

Hansen's parents pleaded separate claims against the defendants, on grounds that the school infringed on their rights as parents to control the religious upbringing and education of their children. Although Judge Rosen acknowledged jurisprudence under the Due Process clause of the Fourteenth Amendment that recognizes as a "fundamental liberty interest" the "interest of parents to make decisions concerning the care, custody and control of their children," on the facts of this case the court found no violation. Relying on recent decisions from the First and Second Circuits, the court concluded that "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to fashion a separate curriculum for each student which parents had genuine religious or moral disagreements with the school's choice or subject matter. The Court does not believe that the framers of our Constitution intended to impose such a burden on this nation's public schools."

The court ruled the individual defendants were not entitled to qualified immunity from liability, which applies if "an objectively reasonable official would not have understood, by referencing clearly established law, that his conduct was unlawful." Given that school officials themselves originally concluded Hansen "had a legal right" to have her view represented on the panel, Judge Rosen found that the defendants could not reasonably have understood their actions to be lawful.

Robert J. Muise of the Thomas Moor Law Center represented Hansen. Seth M. Lloyd of Dykema Grossett represented the defendants. *Ian Chesir-Teran*

Bisexual Alien Wins Stay of Removal

Devon Orville Ford's neighbors in Jamaica found him having gay sex in May 1991. After the neighbors attacked Ford, killed his lover, and burned down his house, Ford obtained a British passport and fled Jamaica for the United States. On Dec. 5, 2003, United States District Court Judge Rambo remanded Ford's case, seeking withholding of removal, for an individualized examination by the Board of Immigration Appeals, thereby giving Ford a narrow hope of remaining in the U.S. *Ford v. Bureau of Immigration and Customs Enforcement's Interim Field Office Director for Detention and Removal for the Philadelphia District*, 2003 WL 22885405 (M.D.Pa.).

Ford was convicted of possession and intent to deliver cocaine, with a one to two year sentence. In 2001 the INS decided that the conviction was for an "aggravated felony," held a deportation proceeding and ordered that Ford be removed to Jamaica. An asylum officer reviewed the case, concluded that Ford had a reasonable fear of returning to Jamaica, and referred the case to Immigration Judge Walter Durling to consider withholding removal. Judge Durling did not reach Ford's claim under The United Nations Convention Against Torture, because he agreed that the persecution Ford would likely suffer upon return to Jamaica on account of Ford's bisexual identity invoked the restriction on removal at 8 U.S.C. 1231(b)(3). Durling also found no applicable exception to the restriction, noting that the small amount of cocaine involved and the relatively short sentence did not indicate a "particularly serious crime."

The Board then sustained an INS appeal, holding that Ford's conviction was for a "particularly serious crime." The Board remanded to Judge Durling, who concluded that Ford would more likely than not suffer torture on return to Jamaica and granted deferral of removal under the Convention. The Board then vacated the IJ's deferral of removal, on the appeal of INS successor agency Bureau of Immigration and Customs Enforcement. The Board held, on its interpretation of the record, that Ford failed to meet the burden of proof required for protection under the Convention.

The district court's jurisdiction to review Ford's habeas corpus petition is restricted to legal issues in the Board's decision, excluding its discretionary determinations. Judge Rambo concluded that Ford's entitlement, as an alien, to due process in removal proceedings was improperly denied, because the Board failed to make an individualized determination that Ford committed a "particularly serious crime." 8 U.S.C. 1231(b)(3) provides that an alien who

has been convicted of an aggravated felony with a sentence of at least 5 years imprisonment will be considered to have committed a particularly serious crime, and that the Attorney General may determine, notwithstanding the length of sentence imposed, that an alien has been convicted of a particularly serious crime. The court notes that while "traditionally, the Board utilized a case-by-case approach in analyzing aggravated felonies with a prison sentence of less than five years," in *Matter of Y-L, A-G, & R-S-R*, 23 I & N Dec. 270 (A.G.2002), the Attorney General held that "aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes'." The presumption can be rebutted only if six elements are established: (1) very small quantity; (2) very modest amount of money; (3) peripheral involvement by the alien; (4) absence of violence or threat of violence; (5) absence of organized crime or terrorist involvement; and (6) absence of adverse or harmful effect on juveniles. The decision in *Chong v. Dist. Dir. INS*, 264 F.3d 378 (3d Cir.2001), mandates that the Board analyze the specific facts of the case "rather than blindly following a categorical rule," although an individualized hearing is not required.

Judge Rambo found that, in the present case, the Board failed to provide "sufficient indicia" in its opinion that it considered the alien's interests, or any explanation as to why Ford did not meet the requirements of the exception carved out by the Attorney General. Petitioner Ford was represented by Ian Bratlie of PIRC. *Mark Major*

Colorado Appeals Court Rejects Claim of Juror Bias in Pedophilic Assault Conviction

In *People v Dembry*, 2003 WL 22965069 (Colo.App. Dec. 18, 2003), the Colorado Court of Appeals affirmed the conviction after jury trial of Anthony Dembry, an HIV+ man, of sexual assault of a child by one in a position of trust, sexual assault on a child as a crime of violence, and reckless endangerment. The court rejected Dembry's argument that an anti-gay juror should have been removed from the panel, or that the minor's past sexual history should have been presented to the jury.

Dembry had been a mentor of the victim, A.R., a twelve year old boy, through a child protection agency. In February 1999, Dembry picked up A.R., took him to his home, and assaulted him there. A.R. reported the assault. Physical examination of A.R. revealed rectal soreness and an anal tear. During a search of Dembry's house two days later, Dembry admitted the sexual contact, but claimed that A.R. had initiated the contact and that it was consensual. The search revealed HIV medications. Dembry conceded to the police that he knew he had HIV, but did not use a condom during the assault.

Though Dembry raised other issues on appeal concerning use of suppression hearing testimony at trial, the denial of a motion to sever, and minor cumulative errors resulting in an unfair trial, there were only two issues would be of real interest to our readers. The first concerned the denial of a challenge for cause of a potential juror whose brother had once been the victim of a sexual assault, and the denial of Dembry's attempt to introduce A.R.'s prior sexual history under the Colorado rape shield law.

One of the potential jurors had indicated in a jury questionnaire that it might be difficult to judge a case involving sexual assault fairly because the potential juror's older brother had once been sexually assaulted. He also stated that he thought homosexuality was wrong and unnatural. When questioned, the potential juror said that his older brother had been forced to perform oral sex on a female baby sitter in 1982. "He stated that he was not present when the assault occurred and was very young at the time. He also indicated that he had not formed an opinion about the incident, had not thought about it in several years, and would be able to separate his feelings about what happened to his brother if the facts of this case were dissimilar. The juror also explained that while homosexuality was against his philosophical beliefs, his beliefs would not prevent him from judging the case based on the evidence. He also indicated that the mere fact that one is homosexual does not bear on whether that person is a pedophile." The trial court denied a challenge for cause. The Court of Appeals ruled that the denial of the challenge was not an abuse of discretion, because the potential juror had indicated that his personal experiences would not improperly influence his decision. The court cited a prior case for the proposition that a potential juror's concern about his ability to set aside prejudice or preconceived belief about some aspect of the case does not warrant automatic exclusion for cause.

Dembry asserted that the trial court had abused its discretion by denying his motion to introduce evidence that A.R. had been sexually assaulted previously and was undergoing counseling for these assaults, that A.R. "was a perpetrator of sexual assault," and that A.R. "had had conversations with others concerning his own sexuality and defendant's sexuality." Dembry had sought to introduce evidence concerning these matters under exceptions to the Colorado rape shield law. Colorado's rape shield law prohibits introduction of evidence concerning the victim's prior sexual history unless it comes under one of three statutory exceptions: (1) it is evidence of a victim's prior sexual contact with the accused; (2) it is evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or similar evidence; or (3) if the defendant makes an offer of proof showing that the evidence is relevant to a material issue in the case. Even if admitted, this evidence is still subject to the usual rules of evidence.

The Court of Appeals affirmed the trial court. The Court of Appeals ruled that Dembry's evidence did not relate to A.R.'s prior sexual contact with him, or that it would tend to show that such contact with someone else may have been the source of the anal tear at issue. Rather, it was to be used because it was relevant to whether Dembry employed force to assault A.R., on the theory that A.R. was already predisposed to have "homosexual, pedophilic experiences." The court stated that this was exactly the type of evidence that the rape shield law was intended to exclude. This evidence of predisposition was ruled irrelevant in determining whether Dembry had used force against A.R. on the date in question. *Steve Kolodny*

Failure to Prove Supervisor Was a Lesbian Sinks Sexual Harassment Claim

In *Noto v. Regions Bank*, 2003 WL 22965568 (U.S. Ct. App., 5th Cir., Dec. 17, 2003) (not officially published), the court of appeals affirmed per curiam a decision by the U.S. District Court for the Middle District of Louisiana, granting summary judgment to the employer in a sex discrimination case revolving around a female supervisor's verbally and physically demonstrative conduct towards the plaintiff, Sandra Lynn Noto. "Title VII prohibits discrimination," wrote the court, "not overly effusive behavior."

According to the evidence recited in the opinion, Loan Officer Paula Faron, Noto's supervisor, was a naturally demonstrative person, touching and kissing subordinates, telling them that she loved them, and so forth. The evidence showed that she did this indiscriminately to both male and female workers. Noto claimed that she had told Faron this conduct made her uncomfortable, but that Faron had not changed her ways. When Noto was discharged, assertedly for various work-related deficiencies, she sued under Title VII, claiming sex discrimination and retaliation, but a magistrate judge granted the company's motion for summary judgment.

Ruling on her appeal, the 5th Circuit panel found that Noto's theory of the case seemed to be a sexual harassment theory that might fit into the category of subjecting an employee to unwanted sexual advances. However, in light of the factual circumstances, the court found that Noto could not prevail unless she could show that Faron was a lesbian who was showering her attentions on Noto out of sexual desire. However, during her deposition, Noto conceded that she did not know Faron's sexual orientation, and Faron herself denied being a lesbian. Thus, the harassment case fell to pieces. The retalia-

tion case fared little better, since the company cited credible reasons for the discharge that had nothing, at least on their face, to do with the mild complaints that Noto had made about Faron's conduct. A.S.L.

Federal Civil Litigation Notes

California — After the 9th Circuit ruled in *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (Apr. 8, 2003), that school officials would not enjoy qualified immunity from claims that they had violated the constitutional rights of gay students to be protected from homophobic violence in the schools, the school district was quick to begin negotiating a settlement of the case. On Jan. 6, 2004, a settlement was announced, approved by a federal district judge in San Diego, under which damages totaling $560,000 will go to the student plaintiffs and a roughly equal amount will be paid to their attorneys as fees for handling the five-year litigation. The settlement requires the school district to institute mandatory annual training on harassment based on sexual orientation or gender identity, to be taken by administrators, teachers, staff, and high school and middle school students. *Los Angeles Times*, Jan. 7.

California — The ACLU of San Diego and Imperial Counties has announced that the San Diego City Council has agreed to request that the federal court enter a final judgment based on its ruling in July 2003 that the city's preferential lease of public parkland to the Boy Scouts is in violation of public anti-discrimination policy, which will trigger a provision in the lease that provides for termination in the event the lease is held to be unlawful. According to a Jan. 8 press release from the ACLU, the city has also agreed to end all of its financial support for the Scouts as required by the lawsuit, so long as the organization continues to discriminate against gay people and atheists. The suit was brought by two San Diego families whose sons would not be able to join the Scouts under current policies, one because the family are atheists, the other because the family is headed by a lesbian couple. *Barnes-Wallace v. City of San Diego*, Case No. 00cv1726l. A January 9 report on the settlement in the *Los Angeles Times* said that the city would pay the ACLU $790,000 for legal fees and $160,000 for court costs, and that the Boy Scouts, co-defendants in the case, had refused to settle and would continue their attempt to appeal the judge's ruling that the preferential lease was unconstitutional. The settlement came after the 9th Circuit indicated on Dec. 17 that an attempt by the city to appeal a preliminary ruling against it by the trial judge was premature. *San Diego Union-Tribune*, Dec. 19.

Colorado — The ACLU of Colorado has filed suit on behalf of a bunch of students from Palmer High School in Colorado Springs, whose gay-straight alliance has been denied the same right as other student groups to meet at the school. The complaint notes that there are about 50 gay/straight alliances operating in other Colorado high schools without incident. The school district is taking the position that only curriculum-related groups are entitled to meet on school property, presumably in an attempt to avoid the Equal Access Act requirements for equality toward non-curricular groups. Some administrators at the school urged the students to make it an after-school club. Meanwhile, the lawsuit questions the school's classification of such groups as the Mountain Bike Club as curriculum-related. *Denver Post*, Dec. 14. Given how these cases have proceeded in the courts, one must question the competence of the legal advisors for the board of education.

N.D. Illinois — Here's a strange case. Chassappi Rain, a former tenured teacher employed by the Chicago Board of Education, claimed to have been subject to sex discrimination under unusual circumstances. He was attending a seminar at the University of Chicago with some of his public school faculty colleagues. He had a conversation with a co-worker before the program began, during which the conversation turned to dating and when Rain indicated he was looking for a girlfriend but said he was not interested in dating two other women on the faculty suggested by the co-worker, she said, "Well, what about your boyfriends?" in the hearing of some other faculty members. Rain responded profanely, and later wrote an "open letter" to this co-worker which he circulated to other faculty members who may have overheard the conversation, angrily denying that he was gay and making obscene, racist and sexist statements about the co-worker. For which he was fired from his tenured position. A board of education hearing officer had upheld Rain's discharge, finding that the letter he had written was "vicious, sexist and racist" and that Rains seemed not to appreciate its inappropriateness. U.S. District Judge Coar found that Rains failed to allege a prima facie case, and in any event that the writing of this letter was sufficient to warrant his discharge from a tenured teaching position.

S.D. N.Y. — U.S. District Judge Lawrence McKenna granted summary judgment to the government defendants on claims by individuals who were arrested during a vigil held in New York City to mourn the death of Matthew Shepard. *Bryant v. City of New York*, 2003 WL 22861926 (S.D.N.Y., Dec. 2, 2003). Judge McKenna found that the constitutional due process and equal protection claims asserted against the city for police actions during that vigil were without merit. Many more people showed up than the organizers had anticipated. The organizers of the vigil, which took place relatively spontaneously just days after Matthew Shepard's death, had not secured a permit for a street demonstration, and police officers were somewhat overwhelmed by the large turnout, struggling to keep the marchers on the sidewalks and out of traffic. Ultimately 115 people were arrested. The heart of the complaint in this lawsuit was that the police held arrestees overnight and did not issue them the usual desk appearance tickets under which they might have been quickly released with a date assigned to report back. The court found that this did not amount to a constitutional violation, and that the regulations governing issuance of such DAT's confers discretion on the police. In this case, the senior officer present ordered that no DAT's be given, testifying later that he did not want to tie up his overwhelmed forces in the necessary paperwork, and was concerned about quick releases to people who might then come right back and rejoin the demonstration, which in the view of police was out of control.

N.D. Ohio — High school principals around the country seem to have a slow learning curve when it comes to absorbing the lessons of *Nabozny v. Podlesny*, 92 F.3d 446, 453–54 (7th Cir.1996), which found a constitutional violation where school officials failed to take effective action to protect a gay high school student who was being subjected to verbal and physical harassment by other students. In the current spate of litigation against incompetent school administrators, U.S. District Judge Carr has denied a motion for summary judgment brought by a high school principal and assistant principal in *Schroeder v. Maumee Board of Education*, 2003 WL 22989063 (N.D. Ohio Dec. 8, 2003), on claims of equal protection and violation of Title IX, although the court did grant summary judgment on a First Amendment claim and found the board of education insulated from the Equal Protection claim. According to the complaint, Matthew Schroeder had become a vocal exponent of gay rights after learning that his older brother Chris was gay, quickly incurring the wrath and harassment of his school-mates. Complaints by Matthew and his mother to the principal and assistant principal were allegedly unavailing; Matthew kept being harassed (and sometimes provoked into bad conduct by the harassment), and the principal even used the "f word" against him and told him he would be safer if he stopped talking about gay rights. (Of course, the defendants deny many of the factual allegations, but that's neither here nor there on a motion for summary judgment.) Ultimately the school officials said they could not guarantee his safety and he ended up with home tutoring. Judge Carr found that he had stated a valid equal protection claim, and also a sex discrimination claim under Title IX of the Education Amendments Act of 1972, but that the principal's remarks did not rise to a First Amendment violation. The su-

perintendent of schools, also named as a defendant, was able to plead sufficient ignorance and cluelessness about the homophobia rampant in his school district to win dismissal from the case.

Puerto-Rico — In *Lee-Crespo v. Schering-Plough del Caribe, Inc.*, 2003 WL 23095261 (U.S. Ct. App., 1st Cir., Dec. 31, 2003), the 1st Circuit affirmed summary judgment for the employer in a same-sex harassment case brought by a former salesperson who claimed that her female supervisor had mistreated her in various ways and that the company had retaliated against her for complaining. A lengthy opinion by Circuit Judge Lynch sets forth in great detail a long story of petty slights and personality differences, but concludes that there was not sufficiently severe or pervasive harassment here to make a good sex discrimination claim under Title VII. There was no allegation that the supervisor was a lesbian, just that she was bossy and intrusive in dealing with her female underling, and it appears that the decision to terminate the plaintiff's employment had to do with work deficiencies, according to the court, and not to her complaints. A.S.L.

State Civil Litigation Notes

California — Sending a wakeup call to internet organizations that they may be subject to the laws wherever they are doing business, a gay male couple has filed suit in San Francisco Superior Court against Adoption.com, an Arizona-based internet organization that provides a vehicle for potential adoptive parents to advertise their availability to pregnant women seeking a placement for unwanted children. Rich and Michael Butler were turned down by Adoption.com, which does not knowingly allow advertisements from same-sex couples. The Butlers argue that this violates California laws, which forbid sexual orientation discrimination by businesses selling services to the public. The suit was filed on Dec. 16. The National Center for Lesbian Rights, which is representing the Butlers, sent a letter to Adoption.com last year, which drew the response that the organization refused to list the Butlers because, to quote a newspaper report, "scientific research has shown children thrive best in a traditional two-parent household." The letter does not cite any studies, however, and almost all the published scientific research to date appears to refute that statement. The Butlers have been certified by the state of California as eligible to adopt a preschooler, and they have been seeking an "open adoption" where the child knows its biological mother, which they feel is optimal for the health of the child. *San Jose Mercury News*, Dec. 17.

California — Concluding that a group of Republican state legislators were unlikely to prevail on the merits of their claim that California's recently-enacted domestic partnership law was a violation of Proposition 22, a successful ballot measure from a few years ago that banned same-sex marriage in the state, Sacramento Superior Court Judge Thomas M. Cecil denied the plaintiffs' motion for preliminary injunction against the operation of the statute. In a brief, unpublished order filed in mid-December in *Knight v. Davis*, No. 03AS05284 (Dec. 18, 2003), Cecil also stated that "the Court does not find that plaintiffs have sufficiently demonstrated the requisite degree of imminent and irreparable harm necessary to justify the provisional remedy."

District of Columbia — Interpreting and applying the recent U.S. Supreme Court decision in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which had held that awards of punitive damages must be proportional to the actual injury suffered by a plaintiff, the District of Columbia Court of Appeals vacated a punitive damages award of $4,812,500 in a same-sex harassment case, *Daka, Inc. V. McCrae*, 2003 WL 23018830 (Dec. 24, 2003), and remanded for reconsideration of the punitive damages award. Upon finding that the company a created a sexually hostile environment in which a female supervisor had harassed the female plaintiff, the jury awarded $187,500 in compensatory damages and the aforementioned amount in punitives. After noting that the jury could properly have found that the company acted in a reprehensible manner in this case, the court nonetheless concluded that the punitive damages award was excessive in light of the *State Farm* ruling. Wrote Justice Farrell, " In our case, the most relevant civil penalty appears to be the gradation of monetary penalties permitted by the DCHRA (over and above compensatory damages), most pertinently D.C. Code sec. 2–1403.13(E–1)(iii), which allows the Human Rights Commission upon finding that a respondent 'has been adjudged to have committed 2 or more unlawful discriminatory practices' during a 7–year period to impose a penalty of $50,000. We do not suggest, any more than did the Supreme Court, that a penalty such as this approaches the limit of what a civil jury could award in punitive damages, but the fact remains that it bears no relationship to the $4 million award here."

Indiana — One of the important benefits of marriage, of course, is divorce… That is, having a court's assistance in dividing up assets when a couple decides to split and cannot make the division amicably. In a lawsuit filed in Kosciusko Superior Court, Kimberly Granger is seeking the assistance of the court in dissolving her civil union (contracted in Vermont) with Janua Riley. The women lived together as domestic partners beginning in 1997, had a civil union in Vermont once that option became available in 2000, and decided to part ways in October 2003. According to an online news report by 365Gay.com (Dec. 18), the women "lived in a jointly-owned residence and shared incomes and property in a family-type arrangment." Granger claims that Riley is wrongfully seeking to retain control of jointly-acquired and owned property. According to a report in the *Warsaw Times Union* relied upon by 365Gay.com, Granger is suing for palimony, partnership dissolution, partition of real estate, and other claims not specified in the news report. The lawsuit also alleges fraud and conversion on the part of Riley. Granger's lawyer, David Cates, said that the court should find a "statutorily implied partnership" and make an equitable division of assets after resolving the ownership issues. A judge in Iowa recently did just that, in an unpublished opinion that is being protested by several members of the Iowa legislature, who have asked that state's Supreme Court to required the trial judge to rescind his order. *Sioux City Journal*, Dec. 6; *Des Moines Register*, Dec. 12.

Iowa — Sioux City District Judge Jeffrey Neary caused some consternation to local conservatives in November when he granted a divorce to Kimberly J. Brown and Jennifer S. Perez, a lesbian couple who had contracted a civil union in Vermont in 2002. Responding to the unrest, which had prompted a group of state legislators to file a petition in the state Supreme Court to have the divorce vacated, Neary revised his ruling and filed a new decree, conceding that he lacked jurisdiction to grant a divorce to a couple that was not legally married, but insisting that he could exercise the equitable powers of the court to dissolve a civil union. Neary claimed that he had been unaware that the uncontested divorce decree he had been asked to sign involved two women, but nonetheless, he said, "We can't turn people away from our court system and say we can't resolve your disputes." The new order provides: "The petitioner and respondent are declared to be single individuals with all the rights of an unmarried individual, including, but not limited to, the right to marry." The same conservatives who were outraged the first time remained outraged and vowed to continue challenging Neary's action. The chairman of the Family Law Section of the Iowa State Bar Association, Daniel Bray, told the *Des Moines Register* (Dec. 31), "The important thing to recognize is that the political argument being made is that to grant a divorce is to recognize gay marriage. But the legal argument is: Does the court have jurisdiction to grant legal remedies that are requested? And Judge Neary is clearly within what the law would allow." The question is significant, because Vermont imposes a one-year residency requirement on at least one party to a civil union to create jurisdiction to grant a dissolution. And, it appears, the majority of civil unions contracted in Vermont since the new status was created have been contracted by out-of-state

couples who visited Vermont specifically to enter into such a union.

Iowa — The Iowa Supreme Court ruled on Dec. 17 that a male grocery clerk who was discharged for refusing to remove an ear stud had not stated a claim for sex discrimination under the state's human rights law. *Pecenka v. Fareway Stores, Inc.*, No. 154/02–1979, summaried in BNA *Daily Labor Report* No. 246, 12–23–03, p. A–7/8. Justice David Wiggins, writing for the court, found that the company's policy, which allowed women but not men to wear ornaments through their ears, violated neither the state's sex discrimination ban nor Title VII of the Civil Rights Act of 1964. The court held that employer dress codes that mandate different rules for men and women are not significant enough to present cognizable legal claims under the sex discrimination laws as affecting terms and conditions of employment. The court's decision was unanimous.

Massachusetts — What did the Supreme Judicial Court actually mean when it ruled in *Goodridge v.Department of Public Health*, 2003 WL 22701313 (Nov. 18, 2003), that same-sex partners are entitled by the Massachusetts Constitution to equal treatment under the Commonwealth's marriage laws? Some public officials, including the governor and the attorney general, are staking their claim on a civil union bill as the answer. The Senate leaders decided to test the waters, and actually gave provisional approval to such a bill, in a resolution that asks the Supreme Judicial Court for an advisory opinion. Evidently, the court is taking this seriously, as the *Boston Globe* reported on Dec. 17 that the court has requested briefs from "interested parties" as to whether a civil union bill that accords rights under state law for same-sex partners should be sufficient to meet constitutional requirements. A reading of the entire majority opinion of the court in *Goodridge* would suggest not, but some commentators were speculating that the court's four-member majority was soft enough that one or two judges could be separated from the others in light of the uproar following the decision and be persuaded to approve the civil unions alternative. Some interpreted the court's call for briefs as a weakening in its resolve, but Harvard professor Lawrence Tribe cautioned against reading too much into it, telling the *Globe*: "It's certainly not unprecedented and, in a case of this kind, anything less might have struck many people as signaling an unwillingness even to hear people out." But Tribe reiterated his own view that the court's opinion was "unambiguous" in requiring full marital rights for same-sex partners. On Jan. 5, a letter was delivered to state legislators signed by former Governor William Weld and former Attorney Generals Scott Harshbarger and James Shannon, stating that there was "no legal justification" under the court's opinion for a civil unions substitute for marriage. Another co-signer of the letter was Boston Bar Association President Renee M. Landers. The letter was written primarily by Prof. Tribe. The legislature was scheduled to meet in joint session on Feb. 11 as a constitutional convention to consider yet again a proposed state constitutional amendment to ban same-sex marriages, but even if it is approved at that time, the process of public approval would delay its adoption for several years, while the Supreme Judicial Court's deadline for action runs out in a matter of months. *Boston Globe*, Jan. 5. ••• Meanwhile, the *Boston Business Journal* (Dec. 30) reports that late in December the Supreme Judicial Court rejected a request by a group calling itself Massachusetts Citizens for Marriage to force the state's secretary of state to deliver a proposed constitutional amendment banning same-sex marriage to the legislature for its consideration. Of course, this was a totally unnecessary move, since there are such proposals pending in the legislature which may be taken up at its next joint session in February.

New Mexico — The New Mexico Supreme Court has refused to review a lower court decision rejecting a challenge by a community association that was opposed to the grant of permission for a new, lesbian-friendly subdivision in San Miguel County to be called Birds of a Feather Resort Community, according to the *Albuquerque Journal* of Jan. 7. The court's announcement on Dec. 29 that it was denying certiorari left in place a decision by the San Miguel County Commission. Previously, a state appeals court had also rejected an attempt by the Los Ruederos Neighborhood Association to stall construction of the subdivision. The community association had contended that the subdivision was unlawfully marketed to women only, in violation of the Fair Housing Act, but the developer insists that it is not a women-only community, and that anybody is welcome to purchase. After consulting with federal housing officials, the developer modified the website advertising the development to make clear that families with children were welcome as well.

New York — In an opinion that is totally opaque with respect to the facts of the case, the New York Appellate Division, First Department, affirmed an order by the Supreme Court in Manhattan rejecting defendant's motion to dismiss Mark A. Taylor's sexual orientation discrimination claim against NYU Medical Center. *Taylor v. NYU Medical Center*, 2003 WL 22953229, 2003 N.Y. Slip Op. 19543 (Dec. 16, 2003). In light of so many important substantive decisions being denied publication in New York, it is puzzling why this brief memorandum was authorized for publication by the Office of Court Administration; perhaps because the court set forth, in the abstract, the order of proof in a sexual orientation discrimination claim under the New York City Administrative Code, pointing out that it would be premature to dismiss Taylor's claim, since he had made out a prima facie case of discrimination and had not had an opportunity to offer any rebuttal to the defendant's alleged non-discriminatory reason for its challenged actions. Also, "Since defendants have not given plaintiff a chance to respond factually to their argument on behalf of the individual defendant in reliance on *Patrowich v. Chemical Bank* (63 N.Y.2d 541, 542), made for the first time on appeal, and indeed, only in their reply brief, we do not reach it," concluded the court per curiam, without shedding any light on what this case is about.
New York — In *Hitchcock Plaza, Inc. v. Clark*, 2003 N.Y. Slip Op. 51524, 2003 WL 23109709 (N.Y.City Civ. Ct., Dec. 19, 2003), Judge Gerald Lebovits had to deal with a demand for sanctions against an individual who, as a witness in a pending landlord-tenant case involving her mother (the tenant), was alleged to have spat upon an attorney for the opposing party and called her a lesbian. The opinion includes a thorough recitation of the contested facts of the incident, and a detailed review of the legal treatment of spitting as a mechanism of harassment and degrading conduct, but concludes that since the spitter, one Beverly Clark-Griggsby, was a witness rather than a party, the case was not appropriate for judicial sanctions, and instead should be referred to court administration for further action, inasmuch as Ms. Clark-Griggsby , a retired city worker, had been serving as a guardian ad litem in the Housing Court.

New York — On Dec. 22, the N.Y. Court of Appeals denied a petition by Paul Priore for leave to appeal the unanimous decision of the Appellate Division, First Department, which rejected his sexual orientation discrimination charge against the New York Yankees. See *Priore v. New York Yankees*, 761 N.Y.S.2d 608 (N.Y.App.Div., 1st Dept., May 29, 2003).

Tennessee — The Tennessee Court of Appeals ruled on Jan. 6 that a chancery court's order to a gay father in a pending divorce case restraining him from "taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle" was not specific enough to justify sentencing the father to two days in jail for contempt for having told his son that he is gay. *Hogue v. Hogue*, 2004 WL 34510. Cher Lynn Hogue accompanied her divorce petition with a request for the temporary restraining order, alleging that the child's counselor had advised against letting the child know that the father was gay or having any exposure to the father's gay "lifestyle" and associates. Williamson County Chancery Judge R.E. Lee Davies responded by issuing the ex parte restraining order quoted above. Several months later, Cher Lynn petitioned for contempt against her husband Joseph, claiming that he had told the child he was gay and that Joseph's lover was present in the house when the child was there

for the agreed visitation time. Davies responded by sentencing Joseph to two days in the county jail for telling his son he was gay, and by placing restrictions on visitation to exclude the lover totally and cut down visitation, as well as giving Cher Lynn sole discretion on decisionmaking about the child (apart from emergencies that might arise during visitation). On appeal, Judge Frank G. Clement wrote that the restraining order as phrased was too ambiguous to justify jailing Joseph under these circumstances, but that otherwise it was well within the discretion of Davies to issue. The order will expire when Davies issues his final ruling in the divorce. One suspects that Joseph's attempt to assert any parental rights will be limited by the final divorce decree, perhaps leading to another appeal. A.S.L.

Criminal Litigation Notes

Federal — 5th Circuit — Upholding a denial of a habeas corpus petition to a Texas man who was sentenced to death by the state courts in an anti-gay murder case, a per curiam U.S. Court of Appeals, 5th Circuit, panel found lacking in merit Donald Aldrich's that his constitutional rights were violated when the prosecutor made an argument to the jury that he would present a danger to other prisoners due to his homophobia and thus should be executed. *Aldrich v. Dretke*, 2003 WL 22843146 (Dec. 1, 2003). Prosecution and defense counsel engaged in some disputation before the jury about whether Aldrich might be entitled to parole in 35 years, depending upon the sentence rendered by the jury. A.S.L.

Legislative Notes

California — Opponents of the new domestic partnership law, which was signed into law by former governor Gray Davis shortly before he was voted out of office, had vowed to collect sufficient signatures to put a repeal initiative on the ballot at the same time as this spring's presidential primaries, but they missed the rather short deadline. A referendum petition had been filed by Republican legislators Pete Knight and Ray Haynes, but they could not come up with enough signatures in time for this balloting round. They might still attempt to get on the ballot for the general election in November. *Equality California Press Release*, Dec. 22.

Connecticut — Stratford — The Town Council rejected a proposed collective bargaining agreement with the union representing the town's clerical workers because it contained a provision for health and other benefits for same-sex partners of employees. Although the vote took place in a closed meeting, it was reported that some council members raised objections based on their personal religious beliefs, and others based on expense concerns. According to a report about the vote in the Dec. 10 issue of the *New Haven Register*, about a dozen Connecticut municipalities offer domestic partnership benefits to employees, as does the state under its collective bargaining agreement. The union is considering demanding arbitration of a new contract.

Kansas — In Kansas, the legislature has a Special Committee on Claims Against the State that hears claims by individuals that they are being denied rights that the state should recognize. The committee recently rejected a damage claim from Christopher Sorrel, a state inmate who identifies as transgendered and was seeking compensation for being denied hormone therapy in prison. Sorrels claims to have cross-dressed as a woman since age 13, and to have been taking hormones for ten years prior to incarceration, but the state prison system refused to allow Sorrels to continue with the medication. Sorrels argues that the Corrections Department is showing "deliberate indifference" to her "serious medical needs," exactly tracking the language of the 8th Amendment jurisprudence that has proven effective for transgendered inmates in several other states. The legislature evidently doesn't care, and, to judge by an Associated Press report picked up by the *Miami Herald* on Dec. 19, even seems a bit confused about what Sorrels is asking for. The chair of the committee said it was not the state's obligation to fund "elective surgery," but at this point Sorrels isn't asking for that; she's asking for hormone therapy (which for many transgendered people turns out to be the extent of treatment they want). Sorrels, serving an 18–month sentence for forgery, is eligible for parole in 2004.

Massachusetts — The State Senate voted unanimously on Dec. 11 to ask the Supreme Judicial Court for an advisory opinion on whether the adoption of a civil union bill, similar to that adopted in Vermont in 2000, would be sufficient to comply with the court's decision in *Goodridge v. Department of Public Health*, 2003 WL 22701313 (Nov. 18, 2003). In *Goodridge*, the court voted 4–3 that denial of access to civil marriage violates the state constitutional rights of same-sex couples. Many state legislators have stated strong hopes that a civil union law will meet the constitutional requirement of equal treatment described by the court in Chief Justice Marshall's opinion. At the same time, Gov. Mitt Romney is pushing for a state constitutional amendment to reserve marriage solely for opposite-sex couples, although such an amendment would have to be approved in two successive legislative sessions and pass a referendum vote that could be scheduled no sooner than 2006. *Associated Press*, Dec. 12.

New York — Southold — Southold, Long Island, officials voted on Dec. 16 to create a domestic partnership registry program, only the third municipality on Long Island (Nassau and Suffolk Counties) to do so, according to a report in *Newsday* on Dec. 17. Supervisor Joshua Horton stated that it was "a positive and historic step that can improve the quality of life for many at the expense of no one." Although the registry will not directly confer any benefits, it will provide an official government certificate that employers can rely upon in deciding to extend benefits to domestic partners of workers. A proposal for a county-wide registry has been stalled before the Suffolk County Legislature for some time; in the interim, gay rights groups have been trying to get each township to set up a registry. So far, East Hampton and Southampton have answered the call.

Washington State — King County — The Metropolitan King County Council voted on Dec. 15 to require that all contracts for more than $25,000 with the county require the contractor to provide domestic partnership benefits to unmarried partners, or alternatively to refrain from providing benefits to any partners of employees, married or otherwise. (In other words, they adopted a non-discrimination policy regarding benefits, rather than a mandate that benefits be given.) The ordinance was passed on an 8–5 vote, with all the dissenters being Republicans and one Republican, Councilwoman Jane Hague of Kirkland, crossing lines to vote with the majority Democrats. The council responded to evidence that San Francisco's similar ordinance had raised contractors' costs all of one percent, thus countering fears that this would be a big expense item, but Republicans on the council questioned the accuracy of these figures, one calling the proposal "this unnecessary, costly, anti-family legislation." (It's difficult to understand how people can characterize as anti-family something that will expand the definition of families to take in more couples, including couples raising children.) *Seattle Times*, *Seattle Post-Intelligencer*, Dec. 16. A.S.L.

Law & Society Notes

Passing of a Giant — One of the great figures in the gay rights struggles of the 1960s and 1970s has passed away. Dr. Judd Marmor, age 93, died Dec. 17 in Los Angeles. Dr. Marmor, a nationally prominent psychiatrist, was a leader in the struggle to get American psychiatry to accept that homosexuality was not a sign of mental illness and, as a Vice President of the American Psychiatric Association, participated as a leader in the events that culminated in the vote by members of that Association to remove the diagnosis of "homosexuality" from the Association's authoritative listing of mental illnesses, the Diagnostic and Statistical Manual (DSM). His 1965 book, *Sexual Inversion*, was among the earliest to call upon the psychiatric profession to rethink its position on homosexuality. Shortly after the vote on changing the

DSM, Dr. Marmor was elected president of the Association, and spoke out forcefully in support for equal rights for gay people in American society, while continuing to lead the opposition to those who sought to practice "conversion therapy" by subjecting gay people to shock treatments, lobotomy, and other attempts to "convert" them. (That effort ultimately triumphed during the 1990s when the Association went on record as disapproving such treatments). Dr. Marmor was a graduate of the Columbia College of Physicians and Surgeons, and practiced as a psychotherapist mainly on the West Coast, where he also taught at UCLA. *San Francisco Chronicle*, Dec. 18; *New York Times*, Dec. 19.

U.S. Military Policy — To mark the tenth anniversary of the adoption of the "Don't Ask, Don't Tell" policy on gays in the military, the Servicemembers Legal Defense Network arranged to have three high-ranking retired military officers who had been critical of the policy "come out" as gay in a *New York Times* article published on Dec. 10. Brig. Gen. Virgil A. Richard and Brig. Gen. Keith H. Kerr, both of the Army, and Rear Adm. Alan M. Steinman of the Coast Guard had all remained deeply in the closet during their active military careers, and all insisted that the policy was ineffective and had undermined the core values of the military. Admiral Steinman had been Surgeon General of the Coast Guard prior to his retirement. General Kerr had been involved with military intelligence groups for most of his active career. • • • The U.S. Naval Academy's Alumni Association Board voted by secret ballot to reject a proposal for formal recognition of a gay alumni group. According to a spokesperson, the discussion prior to the vote emphasized that the Association's chapters were organized according to geographical lines, not special interests. This was rebutted by Academy alumnus Jeff Petrie, who is an organizer of the gay alumni effort, who pointed out that there is a recreational vehicle chapter of the Association. Petrie also rejected the criticism that this chapter would not be open to any alumnus who wanted to join, pointing out that there was no requirement that an individual be gay to join his proposed new alumni association chapter. In other words, we all know why it was voted down, but they are not going to say it out loud. By the time Petrie submitted his application to the alumni association, his efforts had produced a group of 43 gay alumni, of whom 15 live in the San Francisco Bay Area, where Petrie is employed as publications editor and events coordinator at the California Palace of the Legion of Honor. Petrie announced that the group would continue, even without official recognition. Its website is www.usnaout.com. *San Francisco Chronicle*, Dec. 9, 2003.

Democratic Candidates and Marriage — A correction. In the December *Law Notes*, we stated that none of the individuals contending for the Democratic presidential nomination supported same-sex marriage. Actually, the three candidates generally deemed least likely to win nomination, based on potential voter polls, have stated their support: Rev. Al Sharpton, former Senator Carol Mosely-Braun, and U.S. Rep. Dennis Kucinich. The other candidates all stated support for some sort of civil union approach to the issue.

Michigan Executive Order — Michigan Governor Jennifer M. Granholm, a Democrat, issued an executive order on December 23 banning sexual orientation discrimination in the workplace for employees of the executive branch of the state government. The order, designated ED 2003–24, covers approximately 55,000 state employees. BNA *Daily Labor Report* No. 2, 1–6–04, p. A–10. Two high elected Republican officeholders in the state, Attorney General Mike Cox and Secretary of State Terri Lynn Land, while insisting that they do not discriminate in their offices on this basis, stated that they do not acknowledge the governor's right to establish employment policies governing their departments, as they are independently elected heads of those departments. A spokesperson for the governor countered that as elected head of the executive branch, she had the authority to impose this rule on all executive departments of the state government. Conflict ahead? *Detroit Free Press*, Jan. 9.

Transgender Harassment — The board of trustees of Michigan State University in East Lansing voted to add "gender identity" to the school's policy against harassment, but did not add that category to the school's ban on discrimination. When questioned about the discrepancy, the university's president, Peter McPherson, told the *Lansing State Journal* (Dec. 6) that he was concerned about legal issues, such as a specific definition of gender identity, which he said was not legally clear. He also said that harassment was easier to define than discrimination. One wonders where he is getting this stuff? The university's current policy against discrimination includes "sexual orientation."

California Domestic Partnership — An attempt by opponents of California's new Domestic Partnership Law to get a repeal question on the ballot in March coincident with the presidential primaries failed. Signatures were not presented to the government in time, although it is still possible that the proponents of the ballot question could gather enough questions to get on the general election ballot in November. *Equality for California Families*, Press Release, Dec. 5, 2003.

Controversial Polling — The *New York Times* stirred up a tempest among gay rights advocates by its lead front page article on Dec. 21, reporting on a New York Times/CBS News poll that purported to find "strong support" for a constitutional ban on same-sex marriage, according to the headline. Actually, the poll found that 55 percent of respondents favored such an amendment, with 40 percent opposed and the rest undecided. Critics of the poll (and the article, which quoted many more supporters of the amendment than opponents) argued that 55 percent support is not "strong support" when it comes to enactment of a constitutional amendment, and that proposed amendments with much greater levels of public support have been kicking around for years without making any real progress to enactment. The *Times*'s new public advocate columnist was flooded with complaints, and responded in a column published on January 4, questioning the news judgment of making the results of a poll the lead news story for the day but rejecting the notion that 55 percent is not "strong support" when it would be considered a substantial margin in a typical election campaign. Critics of the article also focused on the incomplete reporting of President George W. Bush's articulated position, which the public advocate columnist characterized as a mistake rather than a deliberate bias in the story.

Non-Discrimination Policies — The University of South Carolina's administration has added "sexual orientation" to the characteristics covered by the university's policy forbidding discrimination. The faculty senate has been advocating for this change for ten years, but the president had resisted it on grounds of concern about vulnerability to lawsuits. *Grand Rapids Press*, Dec. 12.

Corporate Policies — Extending a campaign begun by his predecessor, New York City Comptroller William C. Thompson, Jr., has filed shareholder proposals on behalf of NY City Pension Funds with ten major corporations seeking the addition of "sexual orientation" to their corporate anti-discrimination policies. On Dec. 22, Thompson announced that his campaign had an early success, as CSX Corporation, one of the targets, had voluntarily amended its policy. But a CSX spokesperson denied that the change was in response to Thompson's filing of the shareholder initiative, insisting that the company had been working on revisions of its policy for months before the shareholder filing was received and the timing was coincidental. Well, maybe... *Florida Times-Union*, Dec. 23.

Gays Empowered — The *San Francisco Chronicle* (Jan. 8) reports that San Francisco's new mayor, Gavin Newsom, vowing to have a diverse administration, has appointed a gay man, Steve Kawa, to be his chief of staff, and a lesbian, Joyce Newstat, to be his policy director. A.S.L.

International Notes

Australia — Family Court Judge Sally Brown in Melbourne declared that two gay men, identi-

fied in court papers only as Mr. X and Mr. Y, were entitled to parenting orders for a baby boy born to a surrogate mother with whom the men had made an arrangement in the U.S. *The Age*, Dec. 13, reported that this was believed to be the first time that a gay couple in Australia had been granted parenting orders for a child "born into their relationship." Wrote Justice Brown, "I am satisfied it is in Mark's best interests for significant decisions relating to his welfare… to be made by both of the people who treat him as their son, and that he can only benefit from their informed involvement in all aspects of his life." Mr. X was the sperm donor and thus was, without contest, the father, although the news report indicated that there is contrary authority from some other courts concerning the parental status of sperm donors in Australia.

Australia — The *Independent* (Jan. 9) reports that Tasmania, once known for its legal hostility to gay people, has now became a leader in gay rights law, passing legislation that lets same-sex partners register their relationship and gain "the same pension, medical and parenting rights as married couples." The measure extends as well to other types of "significant and caring" unions, such as elderly friends who live together. Ironically, sodomy was only decriminalized in Tasmania in 1997, later than any other Australian state, several of whom now lag behind the island state in extending legal rights to gays. Under the new Relationships Act, the terms "husband" and "wife" and "de facto (common law" are now to be replaced by "partner."

Canada — The *Globe and Mail*, Canada's most widely-circulated and influential daily newspaper, has an annual year-end feature on Nation Builders. This year, the feature, published on Saturday, Dec. 13, designated as Nation Builders for 2003 the three Ontario Court of Appeals judges who ordered that same-sex couples be immediately accorded the right to marry in that province. They are Chief Justice Roy McMurtry, Justice Eileen Gillese, and Justice James MacPherson. Wrote the newspaper: "The Court of Appeal ruling was an example of the willingness of the nation's judges to go with speed and precision where politicians only dither. In a year when Canada drew a forceful line with the United States by refusing to join the war in Iraq and moving ahead with the decriminalization of marijuana, the legalization of same-sex unions was the most concrete sign of the country's determination to be a socially liberal place, where differences can be celebrated and choice will be honoured. Suddenly, Canada — as The Economist cheekily pointed out — was cool. The freedom to pledge those time-honoured vows of love reverberated far beyond the couples who lined up to say them. For all of this, Chief Justice McMurtry, Judge Gillese and Judge MacPherson have been named The Globe and Mail's Nation Builders of the year."

Canada — The *Globe and Mail* (Dec. 19) reports that Judge Valmond Romilly in Vancouver has done an unusual thing, finding that the prosecutor's recommended sentence for a teenager convicted of participating in the fatal gay-bashing of Aaron Webster in 2001, should be given the maximum possible sentence of three years. The underaged defendant, who was not named in the news report, was part of a group of teens who went into Vancouver Parks armed with baseball bats and golf clubs, specifically seeking out gay men to beat up. The youth in this case had pled guilty to manslaughter, not denying his role in the death of Webster. Judge Romilly said at the sentence, with some disgust, that this seemed to be "entertainment" for the unrepentant young thugs, and he seemed unhappy that he could not impose a longer sentence.

China — The *Straits Times* (Jan. 2) reports that A-gang, a male-to-female transsexual, has been legally married to Xiaoli, a woman, after having had a successful sex reassignment operation in May. According to the news report, originating in Chengdu, the Chinese government issued the certificate for what some would now see as a same-sex marriage but others, refusing to recognize the sex-change, would see as an opposite-sex marriage.

Germany — The national parliament decided on Dec. 13 to authorize a government expenditure of approximately $610,000 towards the construction of a national memorial to gay people who were persecuted or killed by the Nazi regime during the period 1933–1945, in addition to a planned memorial for Jewish victims of the Nazis. According to one news report published in the *Chicago Tribune* on Dec. 14, "An estimated 10,000 to 15,000 gay men were deported to concentration camps, where few survived." The memorial will be built on the edge of the Tiergarten in central Berlin, near the Brandenburg Gate. Thus, it will be quite centrally located.

Great Britain — The Family Division of the High Court will be getting its first openly-gay judge, the *Daily Mail* reported on Dec. 17. Mr. Justice Roderic Wood QC, was to be appointed the weekend before Christmas. Wood has been a circuit judge since last year, and has been a practicing lawyer, specializing in cases involving children, since 1974. He has frequently appeared on behalf of the government in such cases. Said a colleague: "He is very tall, with a very deep, gravelly voice, piercing eyes and an imposing presence. He can sometimes appear quite frightening — but then that applies to all judges. He deserves to be a judge. I am sure the fact that he is gay would not have influenced his appointment in any way."

Great Britain — One consequence of the repeal of Section 28 of the Local Government law, which had forbidden local government units from spending any money that might "promote homosexuality," is that public funds can now be used for sensitivity training for school teachers. The Local Government Association has sent out guidance to local education authorities, advising that teachers should be given "sexuality training" to give them a better understanding of issues confronting gay students. *Daily Mail*, Jan. 7.

Israel — In Israel there is constant struggle about the status of rabbis who are not affiliated with the Orthodox Jewish religious establishment. The *Forward* reported on Dec. 12 about a lawsuit pending in the Tel Aviv District Court concerning the Prison Service's refusal to allow a Conservative rabbi to meet for a pastoral session with two lesbian prisoners. There were purportedly fears that the lesbian prisoners wanted the rabbi to perform a marriage ceremony for them. The *Forward* reported that there had been rumors that the Prison Service had agreed to allow Rabbi David Lazar, who is the spiritual leader of a Conservative congregation in Ramat Aviv, to visit the two women, and that if this occurred, the court hearing scheduled to take place in January would be cancelled.

Israel — Marriage in Israel is under the control of the Orthodox Jewish Rabbinate, and Jews who do not desire or qualify for Orthodox Jewish weddings go out of the country to get married. (Legal marries performed outside the country are normally recognized within Israel, even if not performed by orthodox rabbis.) A coalition of non-orthodox groups is attempting to get the Knesset (Parliament) to consider creating an option of civil marriage, or opening up marriage to the extent of letting non-orthodox rabbis conduct weddings, and gay groups have been trying to become part of the coalition to seek same-sex marriage rights. In the meanwhile, a minor party that is part of the governing coalition, Shinui, has introduced a bill granting common-law couples (both opposite-sex and same-sex) some legal rights, and the measure survived a first reading in the legislature on Dec. 29, by a vote of 24–16, invoking a comment from a spokesman for one of the religious parties in the governing coalition: "The legislature is passing laws worthy of Sodom and Gomorrah." *Ha'aretz*, Dec. 30. And, Israel still awaits the first test case of a couple legally married in Canada or the Netherlands or Belgium seeking recognition for their marriage in Israel.

New Zealand — Statistics New Zealand, the government agency with responsibility for planning and administering the next national census due to be held in 2006, considered including a question about sexual orientation on the census form, but after trying out various questions on focus groups, concluded that there were enough "issues" about "public acceptability" of this question as to raise "concerns" about "the accuracy of any data that might be collected," so the question will be omitted. Some gay advocates had sought inclusion of the

question on the grounds that policy decisions are made by the government based on census data, and it would be useful for the government to know the size of the lesbian and gay population as it made such decisions. *Dominion Post*, Dec. 10.

Scotland — Scotland's smallest council intends to be the first local authority in the country to hold same-sex "commitment ceremonies," reported the *Scottish Daily Record* and *The Herald* on Jan. 8. Clackmannanshire Council, based in Alloa, has announced that it is ready to start hosting ceremonies in its register offices effective immediately. Although the ceremonies will have no legal standing at present, the council's administrator indicated that they would be offered to "accommodate changing service needs."

Taiwan — It has been reported that President Chen Shui-bian's administration is planning to introduce gay rights legislation that might include marriage rights, but the lack of visible progress towards this, combined with inflammatory remarks by a legislator from the ruling party, led to a demonstration by gay rights groups outside the party headquarters on Dec. 23. The legislator, Ho Shui-sheng, had stated that allowing legal same-sex unions could lead to the annihilation of the country because gay couples cannot reproduce. When controversy ensued, Ho apologized publicly for his remarks, insisting he was merely stating a medical opinion rather than personal bias against gays, but the gay rights groups demanded that the party impose discipline on Ho. *China Post*, Dec. 24. A.S.L.

Professional Notes

The *National Law Journal* named Ruth Harlow, former legal director of Lambda Legal, as its "Lawyer of the Year" for 2003, for her leadership of the legal team that won the important Supreme Court victory in *Lawrence v. Texas*. In a lengthy cover story, the NLJ details how Harlow was the chief strategist in the case that led to the abolition of laws against consensual sodomy in the U.S., a half-century goal of the lesbian and gay rights movement. Ironically, Harlow decided that the victory in *Lawrence* was the appropriate finish to her legal career, and left Lambda to return to school so that she can pursue her dream of becoming an architect.

Massachusetts Lawyers Weekly has named Mary Bonauto, an attorney at Gay & Lesbian Advocates and Defenders, as Massachusetts Lawyer of the Year for her triumphant victory in arguing the *Goodridge* (same-sex marriage) case at the Supreme Judicial Court. Breaking with precedent, this is the second time the publication has bestowed this honor on Bonauto, according to a GLAD press release issued Jan. 7.

Gary Buseck, long-time executive director of GLAD, will be the new Legal Director at Lambda Legal Defense and Education Fund. Buseck is a veteran attorney in the struggle for lesbian and gay rights, having waged substantial pro bono litigation for GLAD prior to joining the organization in an executive capacity. As Legal Director at Lambda Legal, he will captain the nation's largest team of attorneys devoted full-time to lesbian and gay rights and AIDS legal issues, with regional offices in Chicago, Los Angeles, Dallas, and Atlanta in addition to the NYC headquarters office on Wall Street. Interestingly, Buseck's predecessor as executive director of GLAD was Kevin Cathcart, who is now the executive director of Lambda Legal.

The Honorable Paul Feinman, an elected New York City Civil Court Judge who is a longtime member of LeGaL, has been designated an Acting Justice of the New York State Supreme Court in New York County, effective January 2, 2004. A.S.L.

AIDS & RELATED LEGAL NOTES

Mass. S.J.C. Suspends Lawyer for Concealing HIV Status of Client's Deceased

In an opinion by Justice Greaney, the Massachusetts Supreme Judicial Court imposed a one-year suspension from practice on Robert A. Griffith, an attorney who had concealed the HIV+ status of his client's deceased from opposing counsel and the court in a proceeding to determine damages stemming from the decedents demise while in the custody of law enforcement officers. *Matter of Robert A. Griffith*, 2003 WL 22882799 (Dec. 9, 2003).

Griffith had been retained by Delores Gonsalves to represent her as executor of the estate of Morris Pina, Jr., her brother, who died on June 16, 1990, after being arrested by New Bedford police officers and while in custody. Gonsalves suspected her brother was the victim of foul play. Griffith's investigation turned up sufficient evidence to justify filing a wrongful death action against the city and individual officers. The investigation also turned up the name of Pina's personal physician, the hospital at which he had been treated, and the fact that he had been treated for HIV infection. Griffith decided to keep all of this a secret, and when the trial proceeded from the liability phase, which he won, to the damages phase, he proposed to introduce an expert on the subject of Pina's expected lifespan and future earnings, without informing the expert, the court, or the defendants that Pina was HIV+ or had even been treated in a hospital.

Ultimately Griffith's scheme collapsed during the lengthy trial, when Gonsalves was being cross examined on the stand and admitted that her brother had been treated by a particular doctor for "hepatitis." One of the defense attorneys happened to know that this particular doctor was at that time the only one in New Bedford treating HIV patients, served a subpoena on the doctor, and discovered Pina's HIV status. Pina died at a time prior to protease inhibitors when being HIV+ might have been very relevant evidence about an individual's projected lifespan and future earning capacity. When defense counsel called Griffith on this, he confessed and ultimately admitted he had known for quite some time about Pina's HIV status. The trial judge imposed a fine on Griffith and ordered publication of the finding that Griffith had engaged in misconduct, but the trial judge did not refer the matter to state disciplinary authorities.

However, the state's Bar Counsel, learning of these events through the publication, filed a petition for discipline with the relevant board. The board determined that Griffith violated disciplinary rules by assisting his client in preparing false answers to interrogatories and by failing to disclose Pina's HIV status during the hearing on plaintiff's demand for hedonic damages. Griffith was arguing all through this that he was preserving Pina's confidentiality in his HIV-related records, and that a Massachusetts law prevented him from revealing Pina's HIV status. But this appeared to miss the point, since nothing in the law forbade Griffith or his client from responding honestly to questions about the identity of Pina's doctor or of any hospital in which he had received medical treatment, which would have been sufficient information to alert the defendants of the need for further investigation. The board concluded that Griffith should receive a public reprimand, weighing against the seriousness of the offense his uncertainties about what to do with information that was protected against disclosure by a state law.

The bar counsel was dissatisfied with this sanction, arguing that for this kind of active concealment and falsification Griffith deserved a two-year suspension from practice. The Mass. SJC agreed that suspension was an appropriate remedy in this circumstance, disagreeing with the board about the issue of confusion about the statute as a mitigating cause. (There was also some disagreement about other mitigating factors.) But the court also noted that Griffith had already been fined, and that the trial judge had ordered publication of his findings, so Griffith had already suffered some punishment for his bad deeds. In the event, the court decided to impose a one-year suspension. A.S.L.

Federal Court Rejects HIV Discrimination Claim by NYC Bus Driver

On December 12, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York dismissed claims of HIV-related discrimination brought by Douglas Gajda against the Manhattan and Bronx Surface Transit Operating Authority. *Gajda v. Manhattan and Bronx Surface Transit Operating Authority*, 2003 WL 22939123.

Gajda, a bus operator for the Transit Authority, applied for leave under the Family Medical Leave Act in March 2002 on the ground that he was HIV+. In response to his application for leave, the Transit Authority directed Gajda to report to a staff position for assessment of his condition on April 29, 2002. During that examination, Gajda indicated that he was HIV+ and taking various medications for his condition. At that time, the Transit Authority requested that Gajda provide them with his medical history concerning HIV so that it could be determine whether the HIV infection interfered with Gajda's ability to operate a bus.

Over the course of the following five months, Gajda refused no fewer than six requests to provide the Transit Authority with the medical information it had requested. In the meantime, Gajda was put on restricted work status with pay pending receipt of his medical records. Following Gajda's six consecutive refusals to provide the requested medical information, the Transit Authority suspended him without pay. After several months without salary, Gajda finally acquiesced and, in January 2003, produce the requested medical information, whereupon he was re-certified and allowed to return to work as a bus operator.

In his lawsuit, Gajda claims that the Transit Authority violated the provision of the Americans with Disabilities Act that states that "a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business and necessity." 42 U.S.C. 12112(d). However, the Transit Authority has an unambiguous obligation to conduct its operations in the interests of public safety. In that vein, the Transit Authority has a policy of dealing with employees who are HIV+ by classifying them into one of four categories: Group I (Acute HIV syndrome), for whom no operational work is acceptable; Group II (asymptomatic infection) and Group III (persistent generalized lymphadenopathy), for whom work is acceptable; and Group IV (other disease), which requires individual evaluation.

The court held that the Transit Authority had every right in the face of Gajda's statement that he was HIV+ to request information that would enable it to make a more comprehensive assessment of Gajda's fitness to work as a bus operator and the risk that he posed to the public. Judge Rakoff went on to point out that, in the absence of such an inquiry, the transit authority would have been negligent to simply rely on Gajda's representations.

Gajda's other theory of liability, also dismissed by the court, was that rather than suspending him without pay, the transit authority should have pursuant to the "reasonable accommodation" requirement of the ADA, given him a position in which he could function with his disease. The court, however, found that Gajda's suspension was the direct result of his refusal to supply the records necessary for assessing what such reasonable accommodation would be. As a result, the court dismissed all of Gajda's claims. *Todd V. Lamb*

AIDS Litigation Notes

Federal — 4th Circuit — North Carolina — In an unpublished opinion issued per curiam, the 4th Circuit rejected Howard Baxley's call for recalculation of his federal prison sentence for viatication fraud. *U.S. v. Baxley*, 2003 WL 23009857 (Dec. 24, 2003). Baxley pled guilty to four mail fraud counts based on his having purchased four life insurance policies with total face value of $501,340 without disclosing on the applications that he was HIV+. He then sold the right to collect on those policies to a viatical investor, receiving $38,866 on the sale. In calculating his sentence under the federal sentencing guidelines, the district court followed the rule that the sentencing level is proportionate to the loss that would result from the intended fraud, in this case, initially, the $501,340 that the insurance companies would have to pay out on policies they had been fraudulently induced to sell (but that they could not cancel, presumably, due to incontestability provisions that went into operation before they learned of the fraud). The trial judge, considering this amount to be inflated under the circumstances (after all, the insurance companies had received and would continue to receive premium payments), reduced the amount of loss to $250,000 before imposing sentence, but this wasn't good enough for Baxley, who claimed that it still overstated the actual loss, which really could not be knowable at this time. Baxley claimed that the court had failed to follow circuit precedent, but the appeals court found that circuit precedent had been superseded by a new addition of the official commentary to the sentencing guidelines that purported to change or clarify the rule for calculating sentences in fraud cases. In any event, the appeals court found that the district judge acted appropriately in imposing sentence based on its estimate of the potential losses to the insurers.

Federal — 10th Circuit — Colorado — The U.S. Court of Appeals for the 10th Circuit ruled in *Hunt v. Ortiz*, 2003 WL 22963114, that the federal district court in Colorado had correctly dismissed all of state prisoner William Hunt's claims arising out of the prison's response to his refusal to submit to HIV testing. The court found that its prior precedents made clear that inmates do not have the right to refuse HIV testing. In this case, Hunt was also claiming that the fact of his refusal was bandied about in the prison, subjecting him to some hazing and ostracism from others who assumed that because he refused testing he knew he was HIV+. While the court expressed some sympathy, it found that there was no constitutional violation, since the fact of declining a test was not itself medical information. The court also found that Hunt had failed to exhaust administrative remedies on some of his claims before filing suit.

Federal — N.D. Texas — In *Montgomery v. Cockrell*, 2003 WL 23118957 (Dec. 30, 2003), Magistrate Judge Stickney of the N.D. Texas rejected a claim by an HIV+ Texas state prisoner that he was constitutionally entitled to a hardship parole so that he could move from prison to a nursing home where he could get "better" HIV-related treatment. "Plaintiff has not stated a constitutional claim because he has no liberty interest in obtaining parole, so he has no claim for violation of due process in the procedures attendant to his parole decision," wrote Stickney, observing that mere disagreements about the nature of treatment provided did not arise to the level of "deliberate indifference" necessary to trigger a constitutional claim of denial of medical care by an inmate.

California — Dumb or brilliant? In *People v. Newton*, 2004 WL 25314 (Cal. Ct. App., 5th Dist., Jan. 5, 2004) (not officially published), defendant Robert Dale Newton was convicted after a jury trial of committing a lewd and lascivious act on a minor, to wit, placing one of his hands inside a girl's panties and holding onto her vagina for a few seconds while saying "ooh." For this, he was sentenced to 13 years in prison and required to submit to AIDS testing. Although he did not object to the testing at the hearing, he subsequently appealed the testing order on the ground that the trial judge had not articulated any factual basis for believing that his conduct had exposed the victim to his bodily fluids. Ruling per curiam, the appeals court found that his failure to object at the hearing had waived his right to appeal the lack of an articulated finding of probable cause; on the other hand, the court said, if the record would not hypothetically support a finding of probable cause, it could set the testing order aside. But, wrote the court, "In this case, the implied probable cause finding has sufficient evidentiary support. There was skin-to-skin contact between the defendant and the victim; he rubbed

her vagina with his fingers. Bodily fluids such as sweat or saliva could have been transferred from defendant's fingers into her vaginal canal. In *People v. Hall* (2002) 101 Cal. App. 4th 1009, AIDS testing was upheld where the defendant's sweat may have made contact with a facial abrasion that the victim had sustained during a struggle with defendant, and it rejected defendant's contention that sweat was not a bodily fluid… We likewise conclude that '[i]t is possible" that a bodily fluid could have been transferred from defendant to the victim during the unlawful touching." Quick, somebody notify the CDC to add rubbing a vagina with sweaty fingers to its list of possible modes of HIV transmission, so they can establish a new category for epidemiological tracking of the epidemic! Or, alternatively, somebody contact whatever body is responsible for judicial training in California to arrange for some new seminars on the mechanisms of HIV transmission for the harried criminal trial bench. Or at least, somebody point out the difference between finger contact with intact skin and finger contact with an abrasion…

Florida — The 5th District Court of Appeal ruled in *Woodson v. State*, 2004 WL 40521 (Jan. 9, 2004), that a man who pled nolo contendere to a charge of lewd and lascivious battery had violated the terms of his probation by, among other things, failing to submit promptly to an HIV test and reveal the results to his victim. Dwaine Woodson argued that the probation order did not specify when he should get the test, and his initial refusal should not be counted as a probation violation, but the court determined that when the legislature authorized the HIV test as an element of probation for sex offenders, it intended prompt compliance in order that the information be useful to the victim.

Pennsylvania — Medicaid — For the second time in two months, Lambda Legal has vindicated an HIV+ person's access to transplant surgery in the face of insurer resistence. On Dec. 8, Pennsylvania Adminstrative Law Judge Bernadene G. Kennedy ruled on William Jean Gough's appeal of the Pennsylvania Medicaid Program's refusal to pay for a liver transplant because Gough is HIV+. The Medicaid Program took the position that it would not pay for transplant surgery for anybody with a "severe life-limiting disease." But Gough, who appealed this ruling with the assistance of Lambda Legal and the AIDS Project of Pennsylvania, pointed out that he was successfully dealing with his HIV-infection through the conscientious use of currently available medications. Finding that a "severe life-limiting disease is an illness that no longer responds to curative treatment," ALJ Kennedy voiced disagreement with the state's interpretation of its policy in this case. Lambda Legal had previously been successful in persuading Kaiser Permanente, a major West Coast insurer, to pay for a kidney transplant for an HIV+ person, making similar arguments. *Pittsburgh Post-Gazette*, *Philadelphia Inquirer*, Dec. 11.

Washington State — The Washington Court of Appeals has upheld a 300–month exceptional prison sentence for Steven Leroy Vanderpool, an HIV+ man who was convicted of first degree child molestation. *State v. Vanderpool*, 2003 WL 22970973 (Dec. 18, 2003) (unpublished opinion). While a guest at his sister's house, Vanderpool was observed "kneeling beside the bed where 3–year old CB was sleeping… CB's penis was exposed, his underwear off to the side, and his legs open. Police found the top of a butter container, with a glob of butter on it, on the bed near where the child was sleeping." Vanderpool later admitted to police that he touched the boy's penis, and he also volunteered at some point during questioning that he was HIV+, a fact that the trial judge took into account in imposing a sentence about double the maximum authorized under state sentencing guidelines for this offense. The court of appeals upheld the sentence and rejected a variety of arguments on appeal, including that the case had been prejudiced by the prosecutor's mention of Vanderpool's HIV status during her opening argument to the jury. The appeals court, in an unpublished opinion by Judge Kato, found that the judge had instructed the jury to ignore the comment about Vanderpool's HIV status, and that it should be presumed that the jury had followed instructions. A.S.L.

AIDS Law & Society Notes

New York — Dramatically demonstrating the demographic shifts in the incidence of AIDS, a CDC epidemiologist studying New York City Health Department data announced that women now account for more than third of the new HIV diagnoses in New York City. 35% of the 6,662 new cases of HIV infection reported to the City Health Department in 2001, the last year for which data were complete when the study was done, occurred in women. The same study showed that a majority of those diagnosed with HIV infection in New York City in 2001 were African-American. *Newsday*, Jan. 1, 2004.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT POSITION ANNOUNCEMENT

EXECUTIVE DIRECTOR Gay & Lesbian Advocates & Defenders (GLAD) seeks an Executive Director with vision and leadership to build on 25 years of ground-breaking work. GLAD is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. The Executive Director must understand and articulate legal and policy issues, have an aptitude for fundraising and public relations, successfully engage diverse communities as well as exercise nonprofit fiscal and managerial skills. Please send resume and cover letter by February 27, 2004 to SearchCommittee@GLAD.org or to Search Committee, GLAD, 30 Winter Street, Suite 800, Boston MA 02108.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Bradney, Anthony, *Developing Human Rights? The Lords and Transsexual Marriages*, 33 Fam. L. (UK) 585 (Aug. 2003).

Coester, Michael, *Same-Sex Relationships: A Comparative Assessment of Legal Developments Across Europe*, 4 European J. L. Reform 585 (2003).

DeCoste, F.C., *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 Alberta L. Rev. 619 (Sept. 2003).

Jelsema, Mindi M., *Zoning Adult Businesses After* Los Angeles v. Alameda Books, 47 St. L. U. L. J. 1117 (Summer 2003).

McCafferty, Charlotte, *Discrimination, Gays and the Family*, 2003 Int'l Fam. L. 155 (Sept. 2003).

Mitchell, Jeff, *Title VII's "Sex Life"*, 24 Women's Rights L. Rep. 137 (Spring 2003).

Moon, Jaewan, *Obscenity Laws in a Paternalistic Country: The Korean Experience*, 2 Wash. U. Global Studies L. Rev. 353 (2003).

Pager, Susan, *Strictness v. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 Am. J. Comp. L. 553 (Summer 2003).

Roberts, Sharon, and Tim Outerbridge, Introduction to Forum on Same-Sex Unions and the Law, 41 Alberta L. Rev. 569 (Sept. 2003).

Strassberg, Maura, *The Crime of Polygamy*, 12 Temple Pol. & Civ. Rts. L. Rev. 353 (Spring 2003).

Sugarman, Stephen D., *"Lifestyle" Discrimination in Employment*, 24 Berkeley J. Emp. & Lab. L. 377 (2003).

Taylor, Greg, *The New Gay and Lesbian Partnerships Law in Germany*, 41 Alberta L. Rev. 573 (Sept. 2003).

Wardle, Lynn D., *Is Marriage Obsolete?*, 10 Mich. J. Gender & L. 189 (2003) (leading opponent of same-sex marriage speaks).

Student Articles:

Aulivola, Michelle, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 Fam. Ct. Rev. 162 (Jan. 2004).

Cooper, Molly, *What Makes A Family?: Addressing the Issue of Gay and Lesbian Adoption*, 42 Fam. Ct. Rev. 178 (Jan. 2004).

Cox, Alicia Y., *The Constitutionality of State Hate-Crime Legislation After* R.A.V. v. City of St. Paul *and* Wisconsin v. Mitchell, 33 U. Memphis L. Rev. 603 (Spring 2003).

Ginzburg, Rebecca M., *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in* Belle Terre, 83 Boston U. L. Rev. 875 (Oct. 2003).

Lloyd, Julie C., *Case Comment: Halpern v. Canada (A.G.)*, 41 Alberta L. Rev. 643 (Sept. 2003).

Moskow, Rebecca J., *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 U. Cincinnati L. Rev. 1421 (Summer 2003).

Specially Noted:

Vol. 41, No. 2 (Sept. 2003) of the Alberta Law Review includes a forum on same-sex unions and the law, focusing on legal developments in Germany and Canada. Individual articles are noted above. • • • The Dec. 22 issue of *The New Republic* contains a virtual mini-symposium on same-sex marriage and the law, with articles by three of America's most prominent legal commentators in journals of opinion: Prof. Jeffrey Rosen of Georgetown Law Center, Prof. Cass Sunstein of the University of Chicago Law School, and Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit. Each had a slightly different take on the decision, and particularly on the propriety of the court ruling as it did. Sunstein was the most supportive, and Rosen the least. Posner's essay was actually a review of a new book on same-sex marriage by Evan Gerstmann, who is a proponent of judicial recognition of the right for same-sex partners to marry. Although Posner was critical of Gerstmann's analysis, he concluded that the book is "careful, interesting, worthwhile, though ultimately unconvincing." • • • Vol. 10, No. 1, if the *Michigan Journal of Gender & the Law* contained a transcript of a symposium discussion on the topic: "Marriage Law: Obsolete or Cutting Edge?" The symposium was held on March 22, 2002.

AIDS & RELATED LEGAL ISSUES:

Attaran, Amir, *Assessing and Answering Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: The Case for Greater Flexibility and a Non-Justiciability Solution*, 17 Emory Int'l L. Rev. 743 (Summer 2003).

Bagley, Margo A., *Legal Movement in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS*, 17 Emory Int'l L. Rev. 781 (Summer 2003).

Befort, Stephen F., *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 Arizona L. Rev. 931 (2003).

Kutcher, Norman, *To Speak the Unspeakable: AIDS, Culture, and the Rule of Law in China*, 30 Syracuse J. Int'l L. & Commerce 271 (Summer 2003).

Pavento, Lisa C., Jamie L. Greene, and John K. McDonald, *International Patent Protection for HIV-Related Therapies: Patent Attorneys' Perspective*, 17 Emory Int'l L. Rev. 819 (Summer 2003).

Sell, Susan K., *Trade Issues and HIV/AIDS*, 17 Emory Int'l L. Rev. 933 (Summer 2003).

Zeitz, Paul S., and David Bryden, *Analysis of President George W. Bush's Emergency Plan for AIDS Relief in Sub-Saharan Africa and the Caribbean*, 17 Emory Int'l L. Rev. 955 (Summer 2003).

Specially Noted:

The Summer 2003 issue of the Emory International Law Review (vol. 17, no. 2) contains a symposium on the TRIPS agreement and availability of medical care in the Third World, with a particular focus on HIV medication issues. Some individual articles are noted above.

EDITOR'S NOTE:

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