

SUPREME COURT AVOIDS SAME-SEX HARASSMENT CONTROVERSY; REJECTS EMPLOYER'S APPEAL IN MGM GRAND V. RENE

Even as it was preparing to hear oral arguments in *Lawrence v. Texas*, the pending sodomy law case on March 26 (see below), the U.S. Supreme Court announced on March 24 that it would avoid, for now, another important gay rights question: whether and under what circumstances Title VII of the Civil Rights Act of 1964, which bans sex discrimination in the workplace, can protect lesbian and gay employees from hostile environment sexual harassment. *MGM Grand Hotel v. Rene*, No. 02-970, cert. denied, 71 U.S.L.W. 3444 & 3452, 2003 WL 1446593.

This was the question posed by the case of Medina Rene, a gay man who had been employed as a butler by the MGM Grand Hotel in Las Vegas and who was subjected to severe hostile environment harassment by fellow employees before he was fired. U.S. District Court Judge Philip M. Pro (D. Nevada) dismissed the case before trial, ruling that based on Rene's own factual allegations it appeared that he was harassed because he is gay, and federal civil rights law does not forbid such harassment. After a three-judge panel of the U.S. Court of Appeals for the 9th Circuit affirmed that ruling by a 2-1 vote, 243 F.3d 1206 (2001), Rene petitioned the appeals court for reconsideration by a larger panel of judges. In a rare move, his petition was granted.

Last September 24, the expanded panel of eleven judges issued its decision, 305 F.3d 1061 (2002), reversing the three-judge panel and ruling that Rene was entitled to a trial of his sexual harassment claim. But the court split three ways, with no one rationale for the ruling capturing a majority.

Writing for four of the judges, Circuit Judge William Fletcher found that what Rene was alleging was harassment "of a sexual nature," and therefore could come under the jurisdiction of Title VII's ban on sex discrimination, regardless of whether Rene was gay or not. Three members of the court, in an opinion by Circuit Judge Harry Pregerson, ruled in Rene's favor under a different theory: that he had been harassed due to his failure to conform to gender stereotypes, an alternative theory that had recently been approved by the 9th Circuit in an-

other case. Finally, four members of the court dissented in an opinion by Circuit Judge Proctor Hug, who had written the opinion for the 3-judge panel, agreeing with the trial judge that Rene's factual allegations clearly indicated that he was harassed because of his sexual orientation. Judge Hug maintained that the majority had misconstrued some of Rene's deposition statements entered in the record, which did not really support the stereotyping theory, which he otherwise would accept in a proper case.

If the Supreme Court had taken this case, it would have had an excellent opportunity to clear up the wide-ranging confusion in the federal appeals courts over when an employee who is either openly gay or perceived by other employees as being gay is protected from harassment by Title VII. In an important 1998 ruling, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, the Court had ruled unanimously that Title VII does extend to claims of same-sex harassment, provided the victim can prove that he was harassed because of his sex. But the Court did not explain in any depth what it meant by "because of sex," leaving the issue to further development in the lower courts.

Since *Oncale*, there have been numerous lower court decisions, some involving gay employees, others involving non-gay employees who nonetheless encountered homophobic harassment, usually of a "sexual nature" and sometimes going beyond taunting to actual physical assaults. In those cases where the judges believed that the victim was attacked by homophobic co-workers because of the victim's sexual orientation, the judges ruled that Title VII had not been violated. In those cases where a persuasive argument was made that the victim's failure to conform to gender stereotypes had sparked the harassment, the case was allowed to go forward. The *Rene* case is the first since *Oncale* where a federal appeals court has arguably found that harassment of a "sexual nature" is by itself enough to bring the case within the ambit of Title VII.

Since passage of the Employment Non-Discrimination Act (ENDA) still seems far off, and only a minority of states have laws banning

sexual orientation discrimination (under which anti-gay workplace harassment would be unlawful), Title VII remains as the only hope for employees in many states that lack such laws when they seek redress for homophobic workplace harassment. The 9th Circuit's decision was particularly important not only because of its at least partial embrace of the "sexual nature" theory, and reiteration of support for the "gender stereotyping" theory, but also because it is by far the largest federal circuit in terms of the number of employees potentially protected by its decisions, although for residents of California and Hawaii the decision is not quite so important since state law protects them as well. In addition to Nevada, from which the *MGM Grand* case comes, the other states in the 9th Circuit are Arizona, Oregon, Washington, and Alaska. A.S.L.

SUPREME COURT HEARS ARGUMENT IN LAWRENCE V. TEXAS

Law Notes Contributing Writer Sharon McGowan attended the oral argument in *Lawrence v. Texas*, in which the Supreme Court will determine the fate of Section 21.06 of the Texas Penal Code, the so-called "Homosexual Conduct" law that makes it a misdemeanor for persons of the same sex to have anal or oral sex with each other. The Petitioners in this case were convicted of violating the law after police officers, responding to a false report, entered Mr. Lawrence's apartment and found the men sexually engaged. They were each fined \$200 for violating the law and appealed, at first winning a ruling from a three-judge panel of the Texas Court of Appeals that the law violated the Texas Constitution, then suffering a reversal from an en banc panel and a refusal by the Texas Court of Criminal Appeals, the highest appellate court for criminal cases, to take up the case on its merits. The Supreme Court granted certiorari on three questions: whether the statute violates Due Process; whether the statute violates Equal Protection; whether *Bowers v. Hardwick*, the Court's 1986 ruling rejecting a privacy challenge to Georgia's sodomy law, should be overruled. — Ms. McGowan is an associate in the Washington office of Jenner & Block, whose partner Paul Smith argued the case as a cooperating attorney for Lambda Legal Defense:

The long-anticipated argument in *Lawrence v. Texas* finally took place on March 26, and probably could not have gone any better. Paul Smith, who argued on behalf of the team of lawyers from Lambda Legal Defense & Education

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Fund and Washington, D.C.-based Jenner & Block, began his presentation by noting that a criminal prosecution for consensual sexual intimacy in the privacy of one's home runs counter to Americans' fundamental beliefs and values "implicit in our concept of ordered liberty." Furthermore, a law such as the one at issue in this case, which singles out same-sex sodomy for prohibition while leaving opposite-sex couples free to make the full range of choices regarding how they will conduct their most intimate relationships, violates the concept of equal protection of the laws.

Chief Justice William Rehnquist and Justice Antonin Scalia revealed their views early, both insisting at various points that moral judgments may be enough to sustain a law such as the one at issue in this case. Justices Ruth Bader Ginsburg, David Souter and Stephen Breyer, on the other hand, offered Smith numerous opportunities to explain fully why this law ran afoul of the Constitution.

Despite the predictions of some that the Court would ignore the due process argument in favor of the equal protection issue, the Court lingered on the privacy argument for over half of the argument. Justice Scalia, who at times appeared to have an air of resignation about him, asked Smith whether the fact that numerous states had repealed their laws against flag-pole sitting would somehow create a fundamental right to sit on flag-poles. Smith responded by noting that one must also look at the importance of the conduct to the lives and identities of citizens.

The Chief Justice asked Smith whether the state could prohibit homosexuals from becoming kindergarten teachers solely based on a moral judgment such as the one expressed by this law. Smith responded that the individual interests and state interests at stake in such a case would clearly be different from those presented in *Lawrence*, where the full weight of the criminal law was brought to bear on individuals for making choices that the state did not like. Justice Scalia followed up the Chief's question by indicating that the state might not want homosexuals interacting with children because it would lead them to become homosexual. In an unusual lapse in courtroom decorum, the audience — filled mostly with gay and lesbian attorneys and other supporters — groaned and/or booed Scalia's comment.

Smith moved with great skill back and forth between his due process and equal protection arguments. At one point, Justice Scalia suggested that Smith hold up one hand when he was discussing due process and the other when discussing equal protection, so as to avoid any

confusion. Justice Scalia asked Smith whether it was necessary for the Court to overrule *Bowers v. Hardwick* — specifically its statement that moral judgments alone are enough to sustain sodomy laws — and Smith explained that it would not be necessary for purposes of an equal protection ruling. Justice Ginsburg then jumped in, and "asked" whether Smith thought *Bowers* should be overruled as a due process ruling. In response to this softball question, Smith presented three reasons why *Bowers* should be overruled. First, Smith noted that *Bowers* had mischaracterized the right at issue as "homosexual sodomy" rather than the right to make a whole range of choices, including the decision to engage in sodomy, regarding sexuality. Second, Smith noted that *Bowers* had gotten the history completely wrong by suggesting that there was a long history of regulating same-sex conduct. In fact, a careful historical review revealed that most sodomy laws prohibited conduct without regard to the sex of the participants. [The ACLU and a group of gay historians both presented compelling arguments dealing with this history point in their amicus briefs.] Finally, in one of the most powerful moments of the entire argument, Smith challenged the notion that one's sexual choices have nothing to do with family relationships. Smith cited the recent census showing that there are hundreds of thousands of gay families living throughout the country. For these people, same-sex sexual intimacy performs essentially the same function as does sexual intimacy for married couples. Amazingly, until that point in the argument, not even Justice Scalia had suggested that gay relationships were not valuable.

Justices Anthony Kennedy and Sandra Day O'Connor were notably quiet throughout Smith's presentation. At one point, O'Connor asked whether the Petitioners were asking for heightened scrutiny, and Smith assured her that they were confident that this law failed rational basis review. Therefore they were not pressing (although had preserved) heightened scrutiny arguments. Finally, Smith urged the Court to recognize a right of privacy that protects people's choices about sexual intimacy, stating that while the Court had technically left the question open, the American people have already agreed upon the right answer and had "moved on."

The district attorney for Harris County, Charles Rosenthal, Jr., did not have quite as enjoyable a time before the Court. At times, even Justice Scalia, a natural ally, appeared frustrated at the weakness of the state's arguments. (For example, nobody was interested in Texas's argument that the record was insufficient because it

did not demonstrate that Petitioners were actually homosexuals.) Justice Breyer particularly grilled Rosenthal. At one point, Breyer served up Smith's three main due process arguments — *Bowers* is "harmful in consequence, wrong in theory, understat[es] the constitutional value" of the right at issue — and demanded that Rosenthal provide a "straight answer" to these claims. Chuckles broke out throughout the courtroom, and even Justice Clarence Thomas gave Breyer an elbow in the ribs for his witty double entendre. Breyer kept pressing — If this conduct is not hurting anyone, then what the heck is the government doing in people's bedrooms? Could Texas make it illegal for people to tell serious lies to family members around the dinner table simply because it is immoral to do so?

Perhaps having given up on Rosenthal, Justice Scalia took on the effort of defending Texas' position. The Chief Justice ultimately had to step in to the debate between Scalia and Breyer and encouraged them to at least try to direct their questions to the advocate before them.

Justice Ginsburg asked whether Texas prohibited homosexuals from adopting, but Rosenthal answered that he did not know. (Answer — no) She then remarked that such facts would seem to be important to Texas's case. Justice Souter challenged Texas on whether there was any tradition of regulating only same-sex conduct and asked how long this tradition had been in place (answer - only since 1973). Rosenthal insisted that even though Texas had decriminalized a whole range of conduct for heterosexuals back in 1973 — including adultery, fornication, sodomy and bestiality — these repeals did not necessarily suggest that the state condoned the conduct. He insisted that the state had the right to draw the line where it did. At that point, Justice Kennedy (in one of his only comments) stated that Rosenthal's argument did not speak to the due process question. Kennedy had also asked Smith to clarify the distinction between his equal protection and due process argument, but in a manner that did not necessarily provide any indication regarding his views.

Although supporters of the Petitioners left the argument with tremendous optimism, in some sense, the argument threw into question which of the two grounds offered the more narrow ruling. The privacy argument could arguably be cabined to the question of what consenting adults choose to do in their bedroom, whereas an equal protection ruling stating that discriminatory laws grounded solely in a moral judgment are unconstitutional clearly could have a broader reach. While most are predicting victory, it is still an open question how the Court will get there. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

California Appeals Court Rejects ERISA Preemption Defense Against Sexual Orientation Discrimination Claim

A California appellate court has ruled that federal law does not preempt state statutory and common law claims against a fertility clinic that allegedly refused to provide services to a female patient because of her sexual orientation. *Benitez v. North Coast Women's Care Medical Group, Inc.*, 131 Cal. Rptr. 2d 364, 106 Cal. App. 4th 978 (Cal. Ct. App., 4th Dist., March 4, 2003).

Pursuant to the health benefits plan provided by her employer, Guadalupe Benitez began receiving infertility treatment from the North Coast Women's Care Medical Group, Inc. (NCWC) in August 1999. At the time she began her treatment, Benitez told her ob-gyn, Dr. Christine Brody, that she was a lesbian, but asked Brody to keep that information confidential. Brody agreed not to include any reference to Benitez's sexual orientation in her chart. Early on, Brody expressed her religious-based objections to homosexual parenthood via artificial insemination, but nevertheless agreed to provide Benitez with fertility-related medical services. Brody also indicated that there would be no problem for another NCWC physician to perform any necessary procedures.

During the next eight months, Benitez took fertility drugs and attempted intravaginal insemination at home with donor sperm. These attempts, however, were unsuccessful. As a result, in April 2000, Brody performed laproscopic surgery on Benitez, in preparation for intrauterine artificial insemination (IUI). During the week of May 15–19, 2000, Benitez twice visited NCWC for monitoring and preparation for the IUI. On the second visit, Brody told Benitez that they were "ready to go," and left the room to make arrangements for another physician to perform the procedure. When Brody returned, however, she stated that she had "bad news;" according to Brody, California required a "tissue license" to inseminate known donor sperm, and NCWC did not have that license. Therefore, instead of receiving the IUI scheduled for the following day, Benitez was instructed to continue attempting intravaginal insemination.

In July 5, 2000, Benitez visited Brody and received another negative pregnancy test result. Brody encouraged Benitez to make arrangements for the IUI, and told her to call the clinic as soon as her menstrual cycle resumed so that she could resume taking clomid, a fertility drug. Two days later, Benitez called to inform Brody that her menstrual cycle had begun and to obtain a refill of her clomid prescription. The receptionist told Benitez that Brody was on va-

cation, and that her request would be referred to one of Brody's colleagues, Dr. Douglas Fenton. Later, however, Benitez received a phone call from someone named "Shirley" at NCWC, who apologetically informed Benitez that Dr. Fenton would not be able to help Benitez with the procedure or to authorize a refill for her prescription. Benitez demanded to speak to Fenton. When he called Benitez, Fenton allegedly stated that, because of the beliefs held by Brody and other members of the staff — namely, their discomfort with Benitez's sexual orientation — he would be unable to help Benitez.

On August 8, 2000, Benitez filed a complaint with the California Department of Fair Employment and Housing (DFEH). Brody apparently learned of the complaint and contacted Benitez. She tried to convince Benitez to drop the complaint by insisting that it was ruining her career, causing her stress and making it difficult for her to work. When Benitez challenged Brody with the fact that Fenton could have performed the procedure because he had no objections to treating homosexuals, Brody replied in essence that Fenton was a member of the same church as Brody and thus held the same moral objections. After this exchange, Benitez asked a DFEH investigator to inform Brody not to contact her further.

Benitez ultimately went to a provider outside of her benefits plan and received in vitro fertilization treatment, which was successful. However, the use of an off-plan physician caused Benitez to incur considerable extra expense. In addition, NCWC apparently refused to release certain records to Benitez's new physician. And the records that were released revealed that, contrary to Brody's promises of confidentiality, information about Benitez's sexual orientation had been included in her medical file.

In July 2001, Benitez filed a complaint containing various state statutory and common law claims against the clinic and the two doctors who had denied her treatment. The defendants, however, argued that Benitez's claims were preempted by federal ERISA law because the treatment at issue had been provided pursuant to an employee health benefit plan. Benitez amended her complaint to clarify that the defendants were not ERISA entities. Nevertheless, the trial court dismissed her complaint with prejudice on the basis of federal preemption, denying her the opportunity to amend her complaint further.

Relying on the U.S. Supreme Court's discussion of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 635 (1995), the California appellate court explained that "ERISA preempts only those state laws having a connection with or reference to employee benefit plans that

affect the nature of the plans and the objectives of ERISA." The primary objective of ERISA, the court emphasized, was "national uniformity of administration of employee benefit plans." As a result, ERISA preempts pure claims regarding eligibility, but "pure" or "mixed" claims regarding treatment decisions are not preempted, as ERISA was not intended to "federalize malpractice litigation."

The court then surveyed federal appellate cases, and determined that state law claims brought against medical practitioners based on acts or omissions unrelated to plan-based eligibility determinations or administrative decisions are not preempted by ERISA, even though the patient had been referred to the physician under an ERISA plan. Properly understood, ERISA is a program governing the administration of economic benefits rather than of medical care. Therefore, because Benitez was denied treatment for reasons wholly unrelated to her eligibility for benefits under an ERISA plan, the claims were not preempted by federal law. The court rejected the defendants' arguments that any decision based on non-medical reasons falls within the scope of ERISA preemption as "inverting the rationale" of federal ERISA cases and contrary to the general presumption against preemption.

The court agreed that Benitez has not brought claims against defendants as "ERISA entities," a category which includes only employers, beneficiaries under a plan, the plan itself and the plan fiduciaries. The complaint did not allege that the defendants were vested with authority to determine her eligibility under the plan, and therefore they were not acting as plan fiduciaries. Rather, her claims were brought against them as the provider of health care services. The defendants insisted that they qualified as plan fiduciaries because, as the sole providers of the specified medical benefit for plan participants, they controlled and determined whether or not plan participants would receive those medical benefits under the plan. The court rejected this view, insisting that, according to U.S. Supreme Court precedent, "a medical practitioner who makes treatment rather than eligibility decisions is not acting as an ERISA fiduciary even though the treatment decision has the incidental effect of granting or denying a patient benefits" under an ERISA plan.

The court refused to offer comment on any of Benitez's other claims in light of the lack of development of the record below. The court also avoided any discussion of "freedom of religion" arguments presented to the court by amici on behalf of the defendants. The court noted that the defendants in this case had not raised a First Amendment defense to Benitez's claims,

and therefore it was unclear whether the issue would even emerge in this case. Second, the record was insufficient to demonstrate whether the defendants' religious views caused them to decline to perform certain medical procedures for all persons or for only certain classes of people. For these reasons, any discussion of this issue would be based on hypothetical scenarios and therefore merely an advisory opinion.

Lambda Legal Defense and Education Fund, the California Women's Law Center and the National Health Law program weighed in as amici on behalf of Benitez, who was represented by Lisa Simonetti of Stroock & Stroock & Lavan. *Sharon McGowan*

Indiana Appeals Court Opens Up Some Adoptions for Same-Sex Couples

Making new law for the state of Indiana, a unanimous panel of the state's Court of Appeals ruled in *In re the Adoption of M.M.G.C., H.H.C., and K.E.A.C.*, 2003 WL 1228087 (March 18), that the lesbian domestic partner of an adoptive parent can petition to become the second adoptive parent of her partner's children. After finding that the state's adoption statutes neither explicitly prohibited nor permitted such an adoption, the court held that such adoptions should be allowed when they are in the best interests of the child.

Domestic partners Shannon and Amber Crawford-Taylor wanted to have children by adoption. Shannon adopted two Ethiopian children on April 30, 1999, and a Chinese child on June 8, 1999. According to the appellate court's opinion by Chief Judge Sanford M. Brook, Shannon "adopted all three children in their respective countries through the international adoption process as a single parent." Then, on April 28, 2000, Shannon and Amber filed joint adoption petitions with the Lake Superior County Court for each of the three children. The trial judge, Mary Beth Bonaventura, denied all three petitions, observing that foreign adoptions must be "domesticated without modification," so Shannon filed new petitions on March 29, 2001, seeking to domesticate her adoptions of the three children, and Amber filed new petitions on March 30, 2001, seeking to become their adoptive co-parent. Shannon also filed a consent form, indicating that she consented to Amber's adoptions without giving up any of her own parental rights.

The Lake County Division of Family and Children's Services performed a home study and found that things were just fine for an adoption. On June 12, 2001, Judge Bonaventura issued orders domesticating Shannon's adoptions of the children, and taking Amber's petitions "under advisement." A month later, however, she issued a new order denying Amber's petitions. According to Judge Bonaventura, Amber could only adopt Shannon's chil-

dren without terminating Shannon's own parental rights if she was a relative of Shannon, and since Indiana does not permit same-sex marriages, there was no way for Amber to become Shannon's relative or for Amber to adopt the children consistent with Shannon's consent form, which required that Shannon continue to be the children's legal mother after the adoption.

Amber appealed, and the appellate court found that Judge Bonaventura had misread the adoption statute. For one thing, Chief Judge Brook pointed out, the adoption statute "does not require that a petitioner for adoption be a legal relative of the child's adoptive parent." The only requirement of the statute is that the petitioner be an Indiana resident, which Amber is. Also, Brook observed that the adoption statute provides that an adoption divests all parental rights of a *biological* parent, but makes no mention of ending the parental rights of an adoptive parent. Consequently, the statute does not explicitly forbid this petition from being granted.

On the other hand, adoption is a process that is entirely the creation of statute in American law, so the court was faced with the lack of any specific legal authorization to grant Amber's petitions. However, the court concluded that it could make the necessary law as part of its common law authority to adapt the law to new circumstances. While carefully disavowing (in a footnote) any intent to rule on cases involving co-parent petitions for adoption of a domestic partner's biological children, or on cases involving joint adoption petitions by domestic partners, the court found that the public policies derived from Indiana's adoption statute would allow Amber's petition to be considered on the merits by the trial court.

"A two-parent adoption enables a child to be raised in a stable, supportive, and nurturing environment and precludes the possibility of state wardship in the event of one parent's death," wrote Judge Brook. "Such an adoption also legally entitles the child to both parents' employer-and/or government-sponsored health and disability insurance; education, housing, and nutrition assistance; and social security benefits. Undoubtedly, it would be in the best interest of the three children in the instant case to be entitled to the legal protections and advantages that a two-parent adoption provides." Noting that the common law provides room for courts to alter or amend existing legal doctrines in order to meet "the legal and social needs of our society," and finding that the statutory policy of "providing stable homes for children through adoption" would be advanced by such a ruling, the court held that "Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent." The court reversed Judge Bonaventura's ruling and sent the case back to the county

court "for further proceedings consistent with this opinion."

Attorneys Debra Lynch Dubovich and Reva J. Hill represented Amber on her appeal. A.S.L.

Lesbian Co-Parent Loses Texas Appeal

A Texas appeals court in Dallas has rejected a lesbian co-parent's appeal from the dismissal of her case seeking visitation with the child she was raising with her former partner. The decision in *Coons-Andersen v. Andersen*, 2003 WL 1090469 (March 13, 2003), also rejected her attempt to claim damages for breach of the oral agreement she had with her partner concerning her parental rights.

Lisa Coons and Juley Andersen began their relationship in 1988 when they were living in Florida. Coons adopted a hyphenated surname (Coons-Andersen) and Andersen became pregnant by donor insemination. According to Coons, they had an oral agreement under which Coons would support Andersen and their child and Andersen would accord parental rights to Coons. — The child was born in March 1997, but the relationship ended in October 1998 when the child was only 18 months old. Andersen and the child moved out, but Andersen allowed Coons to visit with the child occasionally, and Coons continued to pay half of the child's day care expenses for several months. — Late in 1999 Andersen moved herself and the child to Texas and refused any further contact with Coons, who filed this lawsuit in June 2000.

Coons claimed that she was entitled to seek visitation rights under a theory of "in loco parentis" that is recognized in Texas law (no such theory has been recognized by Florida courts), and alternatively that she was entitled to damages for the breach of her oral agreement with Andersen under which Coons paid for the costs of insemination and pregnancy and had contributed to the support of the child in return for acknowledgment of her parental rights. The trial court found that Coons did not have standing to seek visitation in a Texas court, and that her contract claim was invalid. The court of appeals agreed.

A Texas statute, Tex. Fam. Code sec. 102.003(9), provides that somebody who has exercised actual care, control and possession of a child for a period of at least 6 months may file a lawsuit seeking visitation rights, but not later than 90 days after such care, control and possession has ceased. In this case, Coons had filed her lawsuit more than 90 days after the last day when Andersen and the child were residing with her in Florida. She argued that the court should extend the time to include the period when she exercised visitation, and to make an exception in her case because she could not have filed such a suit in Florida, which lacks a similar statute, but the court was unwilling to do so. — Judge Morris pointed out that the pur-

pose of the 90 day rule was to avoid having somebody who no longer had a relationship with a child assert a stale claim for visitation.

The court also rejected Coons' rather ingenious argument that refusing her lawsuit on standing grounds would violate a provision of the Texas Constitution, art. I, sec. 13, that guarantees access to the courts for people with valid legal claims. The court pointed out that the only possible argument she could make under that provision would be that the statute had deprived her of a valid claim that would have been recognized under common law (that is, judge-made decisional law) before the statute was passed. Although Texas common law principles recognize that persons who stand "in loco parentis" to children to whom they were not legally related may assert various legal rights, including rights to continued contact, the court found that such a status is considered temporary, and ends once the child no longer lives with the person who is asserting the status.

The court also found that Coons' contract claim fell short. For one thing, the contract was not in writing and there was no written evidence of it. For another, Andersen claimed that the money Coons spent was not intended as payment for parental rights, but rather was a gift, and the court found this to be the more plausible interpretation of the circumstances. "The expenditures for which appellant sought reimbursement were made while she and appellee lived together as romantic partners," wrote Judge Morris. "Under Texas law, where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation."

In light of this requirement, the court found that Coons' bare assertion of an oral agreement was insufficient under the circumstances to raise an issue for trial. A.S.L.

Ohio Appeals Court Approves Custody Award to Lesbian Aunt Instead of Unstable Mother

A panel of the Ohio Appellate Court upheld Columbiana County Juvenile Court's decision to award custody of a boy to his lesbian aunt instead of his mother. Rhonda Lyons, the mother, objected, alleging that her sister, Tammy Spiya, tried to influence her son to "believe that heterosexuality is inferior to homosexuality." The panel found that Lyons was not prepared for custody, and made no reference to Spiya's sexual orientation in affirming the award of custody to her. *In the Matter of Zachary Exline*, 2003 WL 685520 (Ohio App., 7 Dist., Feb. 26, 2003).

On June 19, 2000, Lyons attempted suicide by taking pain pills and cutting her wrists. She wrote suicide notes to her son (age 7 at the

time), his father, and to Spiya, in which she stated that Spiya would take better care of her son. On August 29, 2000, Lyons gave Spiya temporary custody "until I get back on my feet and am capable of getting him back." Zachary, the son, lived with Spiya and her partner, Sandra Valentine, until approximately July, 2001, after which he stayed mostly with his mother and her boyfriend until he was returned to Spiya in October, 2001, after Lyons had allegedly become violent with him.

On December 11, 2001, Spiya sought and obtained a court decree of legal custody. Zachary's father did not object. — At a hearing on March 25, 2002, Lyons said she was bi-polar or manic-depressive and had been taking medication since November or December 2001. Lyons was semi-homeless for almost a year after her suicide attempt. According to the panel, Lyons had "initially accepted the fact that her sister is a lesbian and lived with her partner for over five years" before she agreed to have Zachary live with Spiya. Lyons later claimed that her son "is being influenced to believe that heterosexuality is inferior to homosexuality." According to the court decision, Lyons' boyfriend testified in her defense, but "seemed to refute this claim." Lyons, at the first hearing, said that her son was not in danger in Spiya's house, but later claimed that Valentine pulled the back of Zachary's shirt when she was mad at him, choking him. Spiya explained that the son had "refused to do his homework, and when Valentine was going to take his toys/privileges away," he spit in her face.

Lyons' mother testified for Lyons, claiming that Lyons never hit the son except for spanking, although she said that Lyons "was rowdy and upset all the time" and was unable to take care of her son. Valentine testified that Lyons lived with her and Spiya for a time and would hit her son "when she was mad," would "excessively swat [his] backside" and "backhand him across the face, grab him, and throw him." Valentine said she "saw scratches on the son's face and neck," which were allegedly caused by Lyons. Valentine claimed that Lyons called her at work and "told her that she slammed [her son] into a wall" and that she was fearful of hurting him. Spiya claimed to have seen Lyons kick her son's legs so he would fall, and hit him "multiple times in a row."

On March 28, 2002, the Juvenile Court granted custody to Spiya, finding that Lyons had more than once "harmed and/or threatened to harm" her son and "experienced unstable episodes in the recent past." Lyons was found to be "unsuitable" to have custody "at this time," but she was granted visitation rights.

Lyons appealed, citing the paramount custodial right of a parent over a non-parent. Judge Vukovich, writing for the appellate panel, found that the only issue for the panel to consider was whether the Juvenile Court had sufficient

grounds to find that Lyons was unsuitable to act as custodian of her child. The panel found that a "suitable parent" has a paramount right, but if a parent is found unsuitable, the issue is whether placement with somebody else is in the child's best interest. Here, Juvenile Court had more than sufficient grounds to find Lyons "unsuitable" to have custody. Thus, the lower court was justified in granting custody to Spiya in the best interest of the child. *Daniel R Schaffer*

9th Circuit Panel Rules Federal Child Porn Law Unenforceable Against "Home-Made" Pictures

A woman sentenced to 30 months in prison and 3 years of supervised release under a federal child pornography law, for production of an erotic picture of herself with her 10-year-old daughter, won a ruling from the U.S. Court of Appeals for the 9th Circuit in *U.S. v. McCoy*, No. 01-50495, that the federal criminal statute under which she was convicted, 18 U.S.C. sec. 2252(a)(4)(B), may not be used to prosecute her. — In the March 20 ruling, a majority of a 3-member panel found that Congress does not have authority to make it a federal crime for a person to make and possess "home-made" child pornography that was not intended to be placed into the stream of commerce.

Jonathan McCoy, a Naval Petty Officer, lived with his wife, Rhonda, and their two children in Naval housing in San Diego. Sometime in April 2000, they were spending an evening at home painting Easter eggs and taking family photographs. Rhonda, who had a problem with alcohol, was also drinking heavily that night. As described by Circuit Judge Stephen Reinhardt in his opinion for the court, "At some point during the evening, Rhonda and Kala [the 10-year-old daughter], partially unclothed, posed side by side for the camera with their genital areas exposed. This pose was captured in one photograph."

Several months later, Rhonda left five rolls of film at the Navy Fleet Exchange for processing. An employee of the Exchange informed the U.S. Naval Criminal Investigation Service that there were photographs "that appeared to present a child in sexually suggestive poses." Agents from the Investigation Service then conducted a search of the McCoy home, confiscating cameras, film, a computer, and numerous photographs. In January 2001, Jonathan and Rhonda were indicted on four counts of "manufacturing child pornography by a parent using materials transported in interstate commerce." The "materials" were presumably the confiscated camera and film.

The McCoy's argued that the statute was unconstitutional, but the trial judge rejected the argument. Jonathan decided to stand trial, while Rhonda decided to plead guilty and hope for the best. Jonathan turned out to have the better judgment, as he was acquitted by a fed-

eral jury, but Rhonda received a prison sentence and filed this appeal.

The court's opinion presents an interesting case of "what goes around comes around." In recent years, as part of the right-wing revolution on the Supreme Court, the Court has drastically cut down the ability of Congress to enact new laws by adopting a narrow view of Congress's power under the Commerce Clause of the Constitution. From the time of the New Deal (1930s) onward, the Court had been very deferential to Congress, upholding just about anything Congress might want to do under the guise of regulating interstate commerce. But in recent years, the Court has struck down several federal statutes as exceeding Congress's commerce power. In the first such case, *U.S. v. Lopez*, 514 U.S. 549 (1995), the Court held that Congress could not make it a federal crime for somebody to possess a firearm within 100 feet of a school. Although Congress sought to ground this in the commerce power based on the movement of firearms in interstate commerce, the Court found that this law had nothing to do with commercial regulation. Subsequently, the Court held in *U.S. v. Morrison*, 529 U.S. 598 (2000), that Congress did not have authority to confer upon women who were subjected to violent attacks the right to sue their attackers in federal court for damages. Congress had claimed that violence against women had a cumulative effect on the national economy, but the Court was unwilling to see this as any kind of commercial regulation, holding that Congress does not have general criminal law authority to address purely local non-commercial phenomena.

Now, a liberal panel majority in the 9th Circuit has taken this reasoning the next step. Relying on these two Supreme Court cases, Judge Reinhardt found that the federal child pornography law may not reach beyond the regulation of commerce. In this case, the McCoys took some photographs for their own use. There was no allegation that they were commercial pornography producers or distributors, or that they intended to sell the photograph to anybody. — The statute sought to provide a commercial link by requiring that the photograph have been taken with a camera or film that had moved in commerce, but the court was unpersuaded by this, pointing out that a similar argument had not saved the law about gun possession near schools.

This ruling does not mean that states may not pass laws making it a crime for somebody to possess home-made child pornography, but merely that the federal law may not be used for that purpose. The states may exercise the police power to criminalize any conduct that is not constitutionally protected (and the Supreme Court has held that manufacture, possession and sale of child pornography does not enjoy First Amendment protection), whereas the fed-

eral government's legislative authority is limited to the subject matter described in Article I of the Constitution. The federal government has no general power to pass criminal laws regulating purely local activity that has no direct relationship to national health, welfare or security.

The 9th Circuit panel's majority ruling, which drew a vehement dissent from Judge Trott, conflicts with rulings under this law from different federal circuit courts, so it is possible that a government appeal could bring this matter before the U.S. Supreme Court. A.S.L.

Mississippi Law Requires State to Acknowledge Vermont Adoption by Lesbian Couple

A Mississippi trial judge, Chancellor William Hale Singletary of the Fifth Chancery Court District in Jackson, Mississippi, has ruled that state officials may not refuse to issue a new birth certificate for a Mississippi-born boy who was adopted by a lesbian couple from Vermont. In *Perdue v. Mississippi State Board of Health*, No. G2001-1891 S/2 (March 18), Chancellor Singletary found that both state law and the Full Faith and Credit Clause of the U.S. Constitution require Mississippi to recognize a Vermont adoption decree, and that Mississippi law mandates that state officials issue new birth certificates showing the new surname of adoptees born in that state.

The plaintiff, bearing the grand name of Taliesin Phillip Charles Goldstein Perdue, was born in Jackson, Mississippi, in 1997, and was taken into their Vermont home a week later and subsequently adopted by Martha Holly Perdue and Cheri Lynn Goldstein in April 2000. Vermont, unlike Mississippi, specifically authorizes joint adoptions of children by same-sex couples. Shortly after the adoption was approved, Ms. Perdue and Ms. Goldstein submitted a request to the Mississippi Bureau of Public Health Statistics for a revised birth certificate for their son, reflecting his new name and the names of his adoptive parents. The Bureau refused the request, on the ground that Mississippi law would not allow issuance of such a birth certificate, because same-sex partners may not adopt children together in Mississippi. After repeated requests for reconsideration were denied, the mothers sought an order from the Chancery Court to compel issuance of the certificate.

Chancellor Singletary pointed out that the relevant Mississippi statute, Miss. Code Annotated sec. 93-17-21, mandates that when a Mississippi-born person is adopted, the Bureau issue a revised birth certificate listing the adopting parents' names. The statute specifically states the "the names of the adopting parents and the new name of the child" shall appear on the revised birth certificate. Furthermore, the statute provides that the Registrar, who issues birth certificates, "shall honor

orders of courts of other states having appropriate jurisdiction over Mississippi born persons in matters of adoption." As if the statutory authority were not strong enough, Singletary found that the Full Faith and Credit Clause of the U.S. Constitution (art. IV, sec. 1), which requires that binding effect of judicial acts of one state be recognized in other states, applies to this situation.

"Plaintiff was lawfully adopted in Vermont and that adoption is due the recognition of the courts and administrative agencies of Mississippi," wrote Singletary, who ordered that the Bureau prepare a revised birth certificate and deliver it to the plaintiffs' local attorney, J. Cliff Johnson, within ten days after the court's order was entered on March 18. Gregory R. Nevins, of Lambda Legal Defense Fund's Atlanta office, represented the plaintiffs together with Johnson.

In a press release hailing the ruling, Lambda Legal observed that just a week earlier a New Jersey court had ordered that state to issue a birth certificate listing both lesbian mothers of a child they are raising together. In that case, N.J. Superior Court Judge James Farber of Newton ruled prior to the birth of a child conceived through donor insemination that when the child is born, both lesbian mothers should be listed on the birth certificate. The case is a bit unusual, however, in that the anonymous donor's sperm was used to fertilize an egg donated by one of the women, and the embryo then was implanted in the other woman for gestation, so both women would be considered related to the child. The identity of both mothers was kept confidential by Judge Farber, who sealed all papers in the case. *Newark Star-Ledger*, March 13, 2003. Attorney Nevins commented, "All across the country — from the Northeast to the Deep South — courts are increasingly recognizing that children with gay parents are entitled to the same protections as every other child." A.S.L.

New York Trial Court Reduces Damage Award Against Helmsley In Discrimination Case

Imposing a massive reduction in damages in response to a post-trial defense motion, New York State Supreme Court Justice Walter Tolub found that the jury in *Bell v. Helmsley*, NYLJ, 3/10/2003, p. 21 (Supreme Ct., N.Y. County) had rendered an internally inconsistent verdict on Charles Bell's claim that he was discriminatorily discharged as manager of Helmsley's Park Lane Hotel because he was gay.

The trial of this case received major local newspaper coverage, mainly because of the notoriety of the defendant, the so-called "Queen of Mean" Leona Helmsley, and the spectacular nature of her defense. Helmsley claimed that Bell was a user of illegal drugs (on company property) who gave his friends in the gay

leather community the run of the hotel. Bell claimed that as soon as Helmsley found out he was gay, she found grounds to fire him. After a three-week trial, the jury found that Bell was fired because he was gay and that Helmsely had created a hostile environment for him, in violation of New York's Human Rights Law (which forbids sexual orientation discrimination). The jury awarded Bell \$321,000 for past lost wages, \$800,000 in front pay, \$30,000 for past pain and suffering, \$24,000 for future pain and suffering, and \$10,000,000 in punitive damages, which are allowed under the local law. The jury also found that Helmsely had made a bona fide offer to hire Bell back to manage another one of her hotels, and that had Helmsley discovered falsifications of his resume and evidence about his drug use before he was fired, he would have been fired for those infractions.

Justice Tolub ruled that in light of the jury's findings, the original damage award could not stand. Since Bell would have been fired in any event for drug use and resume falsification, and had turned down equivalent proffered employment, he could not receive damages for back-pay or front-pay, thus leaving his only compensatory damages as the pain and suffering occasioned by Helmsley's unlawful treatment of him, or \$54,000. In light of this sharp drop in compensatory damages, Tolub found the punitive damage award of \$10,000,000 to be excessive and, noting recent authority on proportionality of punitive to compensatory damages, cut the punitive damage award down to \$500,000.

While decrying the lack of specific authority in New York case law for calculating appropriate punitive damages, Tolub asserted: "At this juncture, it might be appropriate to consider what punitive damages are not intended to be. Punitive damages are not a game of Lotto and more particularly to the matter at hand, Mrs. Helmsley is not a 4 Billion Dollar pinata for every John, Patrick or Charlie to poke a stick at in the hopes of hitting the jackpot. Punitive damages are limited by standards of reasonableness and, more recently, by constitutional considerations." The reference to Patrick or Charlie was a not-so-subtle dig at this plaintiff and a predecessor, another gay management employee who had sued Helmsley over his discharge and won a considerable money settlement of his claim. —

Tolub also expressed the view that Helmsley's testimony in her own defense, and especially her combative nature on the witness stand, may have prejudiced the jury against her, resulting in a verdict inflated by passion.

Both parties are likely to appeal. Helmsley's lawyer vowed to the press that Bell would never see a penny of this money. A.S.L.

School Board Not Liable for Failing to Stop Malicious Actions of Jealous Lesbian Employee, but May Be Liable for Acts of Personnel Manager and School Principal

Beth Kavy worked for the New Britain, Ct., Board of Education. She had recently broken off an "intimate relationship" with another Board employee, Lynne Kowalczyk, but the two women remained friends. Ms. Kowalczyk's new girlfriend, Maria Garcia, was also employed by the New Britain Board of Education. Ms. Kavy alleged that Ms. Garcia was jealous of the continued friendship between Ms. Kavy and Ms. Kowalczyk, and acted against Ms. Kavy motivated by that jealousy. The reported decision is on a motion to quash 17 of the 28 counts of the complaint in *Kavy v. New Britain Board of Education*, 2003 WL 721565 (Conn. Super. Ct., New Britain, Jan 22, 2003).

Specific charges against Ms. Garcia included sending offensive and threatening material through the interschool mail and computer systems, making false allegations regarding the care Ms. Kavy gives to her daughter, and other similar behavior. Several counts of harassing phone calls are attributed to the Board's personnel manager, Scott Macdonald. Two counts alleged that the school principal, JoAnn Beekley, harassed the plaintiff in a public park, and menaced Ms. Kavy by driving in front of her house and taking off quickly, tires screeching. All of this conduct was also attributed to the Board of Education and certain supervisors through the doctrine of *respondeat superior*. These parties in addition were charged with knowledge of the harassment and failure to stop or investigate it, amounting to infliction of emotional distress.

Since this decision is solely on motions to strike counts of the complaint, the Superior Court Judge Aurigemma merely ruled on the legal sufficiency of the counts. The court did not attempt to discern the truth or falsity of the allegations; it only ruled on whether each count alleged a cognizable cause of action.

This complaint contains allegations on three levels: (Level 1) Alleging that certain individuals committed torts; (Level 2) Alleging that the Board (or individual supervisors), via the doctrine of *respondeat superior*, is responsible for these torts; (Level 3) Alleging that the Board (or individual supervisors) directly (not via *respondeat superior*) committed certain torts by failing to investigate or stop the wrongful conduct.

Respondeat superior: The court stated that *respondeat superior* is based upon an agency relationship, and is only applicable when the affairs of the principal are advanced by the agent. Unless the agent is acting at least in part to advance the interests of the principal, the principal may not be found liable.

Intentional infliction of emotional distress: The court recited that liability for intentional

infliction of emotional distress requires four elements: (1) intent to inflict distress, or knowledge that one's actions are likely to cause such distress; (2) extreme or outrageous conduct; (3) such action was the cause of distress; (4) the emotional distress was severe. The court allowed the counts alleging that the principal, JoAnn Beekley, and the personnel manager, Scott Macdonald, harassed Ms. Kavy, stating that it is a question of fact whether the conduct, if it took place, was sufficiently extreme or outrageous. The Board denied that threatening phone calls made by the personnel director, Scott Macdonald, were in furtherance of Board business. The harassment was related to Ms. Kavy's threat to bring lawsuits against the Board. Mr. Macdonald allegedly threatened to "expose" Ms. Kavy and stated "you won't work anywhere when we get finished." The Board could be liable for such threats if proven and if found to be sufficiently outrageous. Therefore, this count was upheld. Likewise, the Board could be held liable for JoAnn Beekley's threatening behavior, and this count was upheld. The court rejected counts of intentional infliction against the Board and the supervisors for failure to stop Ms. Garcia from acting, or to investigate communications from Ms. Garcia and the personnel manager, Scott Macdonald. Failure to investigate or to stop threatening phone calls was not, as a matter of law, an intentional infliction of emotional distress for which the Board could be held liable. Therefore, this count was stricken.

Negligent infliction of emotional distress: Negligent infliction of emotional distress requires that the plaintiff plead and prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that this distress might result in illness or bodily injury. A judicially created rule in Connecticut prohibits an individual employee from being held liable for the negligent infliction of emotional distress for conduct that occurred during employment. The rule exists because of the possibility of a pervasive chilling effect on the workplace. Since no employee could be held liable, and all such counts were quashed, the Board and supervisors also could not be vicariously liable, so several counts based on *respondeat superior* were quashed as well.

Invasion of privacy: Intrusion upon the plaintiff's seclusion or private affairs is an aspect of the tort of invasion of privacy. Harassing phone calls can be an unwarranted invasion of privacy. Phone calls to Kavy's home may have constituted an intrusion upon her seclusion. When a personnel director calls an employee concerning a pending or threatened lawsuit, the conduct is within the scope of employment in furtherance of the business of the employer. Therefore, the Board is responsible via *respondeat superior* if the phone call is found to be actionable.

However, a separate count of invasion of privacy against the Board for its own failure to investigate and stop the harassing phone calls is not in itself an invasion of privacy, and the count alleging that is quashed. As for Ms. Garcia's actions, they had no connection to employment, but for the fact that the same employer employed all of the women and some of the incidents occurred during business hours. No business purpose motivated Ms. Garcia in her actions, and the Board was not responsible via *respondet superior*, as she was not acting as the Board's agent. *Alan J. Jacobs*

Same-Sex Harassment Case Rejected on Summary Judgment

The U.S. District Court for the Western District of Missouri ruled on summary judgment that plaintiff Terri Pedroza's evidence of harassment by co-worker Pam Straw was insufficient for a reasonable jury to conclude that the harassment was "because of sex." District Judge Dorr also found the harassment not severe enough to meet the 8th Circuit's baseline of conduct actionable under Title VII. *Pedroza v. Cintas Corporation*, 2003 WL 828237 (Jan. 9, 2003)

Judge Dorr believes that Pedroza found the working environment at Cintas hostile during her two years employment. According to Pedroza's uncontested allegations, Straw kissed Pedroza at least three times, put saliva on her cheek, grabbed her face and hands, frequently rubbed her buttocks at Pedroza, followed Pedroza into her work area, blew kisses at her almost daily, and frequently directed sexual comments and profanity at Pedroza. Straw told Pedroza, "I love ya, honey," "I want you," "you want me to kiss you," and invited Pedroza to kiss her ass, stating "you love it." At one point Pedroza responded, "Go home to your husband," to which Straw replied that she didn't have a husband and wanted Pedroza. Pedroza told Straw that her behavior amounted to sexual harassment. "Write me up," Straw countered.

Two psychologists report that Pedroza scores at the bottom percentiles of intelligence tests and has difficulty differentiating between sarcasm and concrete statements. Pedroza saw Straw's comments as sexual propositions, and believed that a jury would infer some attraction on Straw's part, but Judge Dorr, citing Straw's five children and "partner[ship] in a long-term heterosexual relationship," concludes that while Straw's words and actions had sexual content, the harassment was not "because of sex," as the Supreme Court's 1998 holding in *Oncale v. Sundowner Offshore Servs., Inc.*, requires to find a Title VII violation. The Judge concludes that Straw's treatment of Pedroza was "premised on a pre-existing dislike" and "conflicting personalities," as evidenced in the record by friction, bickering, "butting heads," and raised voices prior to Straw's earliest re-

corded use of sexual content. Noting that, at a meeting with supervisors, Pedroza referred to Straw's behavior as "little nips" and "nanny, nanny" comments, Dorr opines that only "earnest sexual solicitation" could rise to sex-based harassment in this case. In cases where the plaintiff and defendant are different genders, such earnestness is presumed. No evidence comparing Straw's treatment of male coworkers was presented. The opinion doesn't consider whether Pedroza, a heterosexual, could in some way have failed to conform to gender stereotypes in Straw's mind.

Further ensuring that Title VII doesn't devolve into a mere code of workplace civility, the 8th Circuit requires particularly severe and pervasive discrimination to establish a hostile work environment. Judge Dorr cited cases where various examples of egregious conduct were held to be insufficiently severe to establish a hostile environment as a matter of law, again finding no jury question on this point. *Mark Major*

Civil Litigation Notes

Federal — District of Columbia — U.S. Magistrate Robinson ruled on pending motions in *Black v. Kendig*, 2003 WL 1477018 (D.D.C., March 18, 2003), a case in which a transgendered prison inmate is suing prison officials about the failure to provide medical treatment for her gender dysphoria. At a previous point in the case, Magistrate Robinson had ruled that the medical director of the prison enjoyed qualified immunity from claims based on refusal to provide specific treatment that Black was demanding, but that under the constitution gender dysphoria is a serious condition for which an inmate is entitled to some appropriate treatment. Subsequently there were settlement negotiations under which the prison undertook to provide appropriate medical evaluation and treatment if warranted. Although numerous specialists have examined Black and recommended hormone treatment, the doctor relied upon by prison officials, Dr. Newton Kendig, appears to have recommended against any medical treatment, or so Black claims in having renewed the lawsuit. Magistrate Robinson granted the prison's motion to dismiss a breach of contract claim, finding that the settlement agreement did not create a contractually binding obligation to provide any specific treatment, but rejected the rest of the defendants' motions, although at the same time refusing to order any specific treatment by way of a preliminary injunction. Since Black had not been receiving hormone therapy prior to incarceration, the magistrate found that irreparable injury would not be caused by the delays incident to a trial of Black's claims, so preliminary injunctive relief was not warranted. However, the magistrate found that there are disputed material facts that

must be determined through trial before a ruling on the merits can be made on Black's claims of constitutional violations.

Federal - Nevada — After a faculty member at the University of Nevada sent out an email message stating that homosexuality is a "mental illness" and that the school-sponsored National Coming Out Day observance was "trash," Carol Harter, the university president, characterized this individual, one William Mason, Jr., as a "bigot." Mason sued Harter and the university in federal court, claiming a violation of his civil rights as well as defamation and intentional infliction of emotional distress. — U.S. District Judge Roger L. Hunt granted summary judgment for defendants, and was upheld in a terse opinion by a 3-judge panel of the U.S. Court of Appeals for the 9th Circuit in *Mason v. Harter*, 2003 WL 1508020 (March 24, 2003) (not officially published). The court found that Mason had not preserved his 42 U.S.C. sec. 1983 claim for appeal, and that Mason had not presented evidence of severe emotional distress sufficient to sustain that claim. As to the defamation count, the court found that Harter's statement that Mason is a "bigot" was not made with "actual malice" and thus enjoyed First Amendment protection.

Federal - New York — A federal district court jury in Nassau County, N.Y., found on March 13 that the Hicksville School District violated the constitutional rights of Robert Visconti, a gay teacher who was discharged after two years of teaching. The jury awarded \$59,527 for emotional distress and \$32,462 in back pay to Visconti, who is now employed as a training coordinator at the Massachusetts Eye and Ear Infirmary in Boston. The school district's lawyer disputed the verdict as internally inconsistent, according to the *New York Times*, since the jury failed to hold the individual defendants liable, just the school district. The defense was that Mr. Visconti had receive "less than satisfactory classroom observations over a two-year period," according to the lawyer, who told *Newsday* that he was "not a competent teacher." *Newsday*, March 15. The school district will move for judgment notwithstanding the verdict. —

Federal — Ohio — A federal district court jury in Cincinnati found that the city police department violated Title VII of the Civil Rights Act and the Equal Protection Clause of the 14th Amendment by demoting Phillip Barnes from the sergeant training program for failing to conform to gender stereotypes. The jury also found a violation of the state law banning sex discrimination in the workplace. Barnes was demoted while undergoing treatment for gender dysphoria to effect a change of sex. The jury awarded compensatory damages of \$150,000, front pay of \$140,000, and backpay of \$30,511. *Barnes v. Cincinnati*, U.S. Dist. Ct., S.D. Ohio, No. C-1-00-780, verdict an-

nounced Feb. 27. See BNA Daily Labor Report No. 49, March 13, 2003, p. A3.

Federal — Pennsylvania — Congressional obsession with stamping out child pornography keeps running up against the Constitution and getting battered, as happened again on March 6 in *American Civil Liberties Union v. Ashcroft*, 2003 WL 755083 (U.S.Ct.App., 3rd Cir.), in which a coalition of plaintiffs, including the gay-oriented Different Light Bookstores and the gay-themed Planetout Corporation, won a ruling that Congress had screwed things up again in the Child Online Protection Act, 42 U.S.C. sec. 231, a measure that essentially requires that any online material of a sexual nature that might be deemed “harmful to children” has to be shielded behind adult verification software. The court found the measure full of latent ambiguity calculated to chill access by adults to constitutionally protected material. This measure was already before the U.S. Supreme Court once, when the Court rejected the 3rd Circuit’s finding that Congress’s use of a national standard for determining whether material is harmful to minors was inappropriate. On remand, the 3rd Circuit found that just about every *other* constitutional objection that might be made to the measure was valid. An appeal seems likely.

Federal — Tennessee — Judge Donald of the U.S. District Court for the Western District of Tennessee, ruling on defendant’s motion for summary judgment in a Title VII and state law race discrimination case brought by a gay African-American male, ruled that incidents pertaining to the plaintiff’s sexual orientation were not probative with respect to his claim of race discrimination, and thus could not be taken into account in determining whether he was subjected to a hostile environment in violation of federal and state law. *Brack v. Shoney’s Inc.*, 2003 WL 1192043 (March 12, 2003).

Federal — Wisconsin — A unanimous 7th Circuit panel has found that a lesbian with multiple sclerosis was not entitled to a “reasonable accommodation” consisting of efforts by the employer to end an anti-gay atmosphere in the workplace that she blamed for a flare-up of her illness, rendering her disabled. *Vandevener v. Fort James Corp.*, 2003 WL 1466407 (March 11, 2003) (unpublished opinion). Tracey Rae Vandevener’s MS was under control when she started working at Fort James, but she quickly perceived an atmosphere of disapproval by co-workers that was quite stressful for her. Fearing that the stress would cause her MS to flare up, she discussed the matter with the Human Resources department, but the employer took no steps to alleviate the situations, her MS did flare up, and she became unable to work. U.S. District Judge J. Pl. Stadtmueller rejected her Americans With Disabilities Act claim, finding that while her MS was under control she did not qualify as a person with a disability, which she

would have to do to be entitled to an accommodation. More significantly, the 7th Circuit panel found, the ADA can’t be used as a “back door” to impose an obligation on an employer to end anti-gay discrimination in its workplace, under the guise of being an “accommodation.” Wrote the per curiam court, “To accept Vandevener’s reasoning would be to treat the ADA as a “back door” through which the disabled (and no one else) would be able to challenge any form of discrimination — or any kind of unpleasant circumstances — whatsoever. We decline to do so.”

California — Here’s an interesting development in sex discrimination law. In *Yanowitz v. L’Oreal U.S.A., Inc.*, 2003 WL 840970 (Cal. Ct. App., 1st Dist., March 7, 2003), the plaintiff, a female regional sales manager, lost her job after she stood up to a male executive who told her to replace a female subordinate who was insufficiently attractive. The executive asked Yanowitz to get him someone who was “hot” instead. After she questioned the action, she was subjected to heightened scrutiny and hostile evaluations, which drove her out on stress leave after four months, after which she was replaced. She sued under the Fair Employment and Housing Act for unlawful retaliation. The trial judge granted summary judgment for the employer, holding that she did not suffer retaliation for engaging in protected activity. The court of appeal reversed, stating, “A male executive’s order to fire a female employee because she fails to meet the executive’s standards for sexual attractiveness is an act of sex discrimination when no similar standards are applied to men. A lower-level manager’s refusal to carry out that order is protected activity.”

California — Responding to the first discrimination complaint it has ever received, the California Department of Social Services’ Community Care Licensing Division issued a ruling giving a private, non-profit adoption agency, Olive Crest Foster Family and Adoption Agency, a March 31 deadline to adopt a new recruitment policy that eliminates the agency’s discrimination against gay families. According to a March 4 report in the *Orange County Register*, the adoption agency was taking the position that only a traditional nuclear family with an opposite-sex couple at its head was a suitable environment to place a foster or adoptive child. State officials had substantiated the complaint that Olive Crest pushed its staff members to refer to other agencies or require more evaluation of applicants who didn’t fit the definition of a “nuclear” family based on their sexual orientation.

California — The California Supreme Court has agreed to review the decision of the state’s first district court of appeal in *Evans v. City of Berkeley*, 2002 WL 31648768 (Nov. 25, 2002) (unpublished opinion), which upheld a city

policy denying free berthing at the city marina to the Sea Scouts, a unit of the Boy Scouts of America, because of the Scouts’ anti-gay membership and employment policies. The city generally provides free berthing to non-profit groups with boating activities. The Scouts claimed that the denial violated their constitutional and contractual rights. A grant of review automatically vacates the court of appeal decision. *Los Angeles Times*, March 27, 2003.

Maine — Catholic Charities of Maine has filed a lawsuit against the city of Portland in U.S. District Court alleging that its constitutional rights are violated by the city’s refusal to renew public funding for some CCM programs on the ground that CCM does not provide domestic partner benefits. Portland is one of a handful of cities nationwide that has enacted an equal benefits law requiring that organizations that receive city funding for their programs provide equality of benefits regardless of the marital status of their employees. CCM claims it should be exempt from the requirement as a matter of free exercise of religion and equal protection of the laws, pointing out that the city has not extended this requirement to vendors of goods. *Portland Press Herald*, March 1.

Texas — A Gay Divorce? Russell Smith and John Anthony had a civil union ceremony in Vermont in February 2002 and then moved back to Texas. Subsequently, Smith decided that he needed a legal divorce for financial reasons, and Anthony agreed not to contest it. Smith filed an action in the Texas Circuit Court in Beaumont, seeking a divorce decree. On Monday, March 3, Judge Tom Mulvaney signed the decree in *Smith v. Anthony*, although nobody is quite sure what it means. Since the men were never legally married in Texas (where, in common with all other U.S. states at present, same-sex partners may not contract legal marriages), it is uncertain what the decree accomplishes. In order to obtain legal dissolution of the civil union under Vermont law, one of the men would have to move to Vermont and establish residence for a year, which neither was interested in doing. Does this Texas decree have any legal effect on the Vermont civil union, outside of Texas? And did the Vermont civil union have any legal effect, inside of Texas? We’re basing this account on a brief report by the Association Press distributed on March 7, which is rather short on details, such as why Smith thought he needed the divorce for financial reasons. — But the media attention the case attracted prompted Texas Attorney General Greg Abbott to get into the act. The *Beaumont Enterprise* reported on March 27 that the Attorney General filed a petition with the court on March 26, arguing that the divorce decree should be rescinded. “As a matter of law, a court cannot grant a divorce where no marriage existed,” argued Abbott. According to state law, Judge Mulvaney had until April 3 to reverse his de-

creed. Abbott's office announced that if the decree is not reversed, an appeal will be considered.

Texas — Reacting quickly to legal advice that they were in an indefensible position due to the federal Equal Access Act, Klein Independent School District officials quickly settled a lawsuit brought by the ACLU on behalf of some students who wanted to form a gay-straight alliance at their local high school but encountered stalling tactics from administrators. The settlement, announced on March 5, allows the school to continue enforcing its policy that all students who wish to participate in extra-curricular clubs must have a signed permission slip from a parent. The policy also prohibits any club that “promotes, encourages, or condones, directly or indirectly, participation in any conduct by students that is classified as a criminal offense under Texas law, or that poses a risk to their health, safety, or welfare (including, but not limited to, sexual activity by minors).” Displaying the usual hick sensitivity of small town school administrators, Superintendent Jim Surratt, commenting on the Equal Access Act in an interview with the *Houston Chronicle* (March 6), stated: “Until that law is changed, there will be groups entering campuses that people locally do not favor. Our business is academics... Putting on carnivals related to sexual preference is not what the purpose of the school system is.” School administrators also belittled statements by gay students that they had been the subject of intimidation and assaults at school, calling them “unfounded” and “fantasy.” (In other circumstances, of course, administrators engaging in such wilful ignorance have found themselves on the losing end of million-dollar verdicts in favor of physically assaulted students.) A group of conservative parents who opposed allowing the formation of the student group announced that they would ask the school district to install separate bathrooms and locker rooms for gay students. “I don't want my son hopping in the shower with [a gay] person,” said one parent. “We wouldn't allow a heterosexual boy and a heterosexual girl to shower together.” Anyone care to speculate about whether the gay students would object to having their own shower rooms.....? Next thing you know, the school would be seeking out gay gym coaches to teach separate classes!! Where would this all lead to? A.S.L.

Criminal Litigation Notes

California — A cautionary note about bringing guys home... In *People v. Lydon*, 2003 WL 550318 (Cal. App., 2nd Dist., Feb. 27, 2003) (not officially published), John Joseph Lydon was appealing his conviction of attempted murder, residential robbery, criminal threats, and unlawfully taking or driving a vehicle. Lydon

and a companion, Paul F. Devlin, were hitchhiking in Hollywood on Aug. 7, 2000, when they struck up a conversation with Jeffrey Harstedt, described as an entertainment industry account executive, who offered them a ride. They ended up back at Harstedt's house, after he told them he was bisexual and Devlin had responded in kind. A social time turned into a criminal act when the two hitch-hikers hog-tied Harstedt on his bed, stole his ATM card, stabbed him numerous times, and stole his car. Unlike all too many of these cases, in this case Harstedt survived the incident and lived to testify against the two men, who were convicted on numerous counts. The court upheld the convictions, but finding at least one procedural error, modified their sentences downward. As a result, Lydon is sentenced to 54 years to life, and Devlin to 50 years to life.

California — In *People v. Rios & Reyes*, 2003 WL 1558197 (Cal. Ct. App., 4th Dist. March 26, 2003) (unpublished opinion), the court upheld criminal assault convictions and sentences for two young men who brutally beat some gay men in a diner as a verbal altercation escalated. According to the opinion by Presiding Justice Ramirez, defendants Rios and Reyes were sitting in an adjoining booth to a party of two gay men and three lesbians; when Rios and Reyes expressed antagonism when the women did not respond affirmatively to their “come-ons,” the two men sprang to the verbal defense of the women, provoking homophobic remarks and things escalated from there. As the court said, “food, dishes and fists began flying. The aggravated assault victim eventually managed to get away from the ruckus and was standing by himself when Reyes sneaked up behind him and hit him on the back of his head with some object, knocking him out. As the aggravated assault victim lay on the floor, Rios raised a chair over his head and was about to bring it down on the former when an object thrown by one of the females who accompanied the victims hit Rios, preventing him from landing his blow. The aggravated assault victim suffered a skull fracture.” On appeal, the defendants challenged the disqualification of a Hispanic juror and questioned evidentiary rulings by the trial court concerning a waitress's testimony about the sexual orientation of the victims and evidence concerning a past gay-bashing suffered by one of the victims.

California — After a preliminary hearing, Alameda County Judge Kenneth Mark Burr has ordered that Jason Michael Cazares, Jose Antonio Merel and Michael William Magidson be held for trial in the slaying of Eddie “Gwen” Araujo, a 17-year-old transgendered person. Based on preliminary hearing testimony, Burr found that the defendants should stand trial for a hate crime because the motivation of the defendants was “inextricably caught up with the gender of the victim.” Jaron Chase Nabors pled guilty to

voluntary manslaughter in the case and turned state's evidence against the other defendants. The murder took place on October 4, when the four men, who encountered Araujo (who was living as a girl) at a party, discovered that she was biologically male and brutally beat and killed her, even as she begged for her life. Judge Burr rejected defense arguments that this was a crime of passion for which lesser charges should be made. *Los Angeles Times, Contra Costa Times*, March 19.

California — A Ventura County Superior Court jury found Jamie Cid, characterized in news reports as a “transgender prostitute,” guilty of voluntary manslaughter in the death of Jack Jamar. According to trial testimony, Jamar, age 78, had “picked up” Cid and brought her to his home to have sex. Cid badly beat up Jamar, leading to his death. Cid claimed to have acted in self-defense after Jamar tried to rape her. The jury did not believe the self-defense claim to the extent of acquittal, but evidently did believe that the crime was not premeditated. Three jurors told reporters that the prosecution failed to prove either premeditation or malice beyond a reasonable doubt, and that the evidence that this was a robbery-connected murder was also not convincing. Cid will be sentenced on April 24, and faces a potential sentence of between 4 and 12 years. Cid has already served almost 4 years in jail awaiting trial. *Los Angeles Times*, March 28.

Colorado — When local law enforcement authorities refuse to take action after a gay-bashing incident, the victim sometimes just has to take matters into his own hands — legally speaking. That is what Kyle Skyock, who was 16 years old at the time, did. The Garfield County District Attorney's Office refused to prosecute his assailants, Brian and Bill June, also teenagers, claiming a lack of evidence. But Skyock filed suit in federal court, claiming a violation of his civil rights, and won an award of \$1.2 million in damages on March 13 in a ruling by Judge John Kane, which runs against the boys and their mother, Jane Jennings. Judge Kane stated, in announcing the ruling, “There's no doubt that this is a hate crime. There was no doubt that it was vicious.” Some other co-defendants settled out of court. *Denver Post*, March 14.

Texas — A thought experiment... Imagine a man is on trial for having oral sex with a sixteen year old boy in Texas. During voir dire, a potential juror raises his hand in response to the following question: “Is there anybody here [for whom the allegation of homosexual conduct] is gonna [sic] make it difficult for you to sit impartially, favorably, unfavorably, for either side, it doesn't matter?” The potential juror again raises his hand when the court asks the jury panel if those who had raised their hand to the previous question felt that they could be fair and impartial under these circumstances.

Upon individual questioning, he stated: "Well, I can be fair to both sides. I could be an enemy to both sides, too. I'll state point blankly that I am quite homophobic, so I'm not a nice kind of guy, so — so I can be your worst enemy or your worst friend, but I can be fair." The defendant's trial counsel did not object to this person being seated as a juror, and he was selected as foreman of the jury. The defendant was convicted. Was defendant deprived of effective assistance of counsel? This being Texas, the courts said no. *Almendarez v. State of Texas*, 2003 WL 1387208 (Tex. Ct. App., Corpus Christi-Edenburg, March 20, 2003) (of course, not official published). After all, defense lawyers for gay defendants are allowed to sleep during the trial in Texas, in order to rest up for more important tasks. The court of appeals, in an opinion by Justice Hinojosa, asserted that because the juror had repeatedly stated he could be fair, he was not challengeable for cause, and since there was nothing in the record about the trial lawyer's reason for not using one of his strikes to remove this juror, the appellant had "failed to meet his burden of rebutting the presumption that trial counsel's decision was reasonable." Well, that's just the nature of criminal justice in Texas, we suppose...

Virginia — The Virginia Court of Appeals in Richmond upheld the second degree murder conviction of Timothy James Tratzinski, an HIV+ gay man, in the death of Jermaray Johnson. *Tratzinski v. Commonwealth of Virginia*, 2003 WL 1477660 (March 25, 2003). Police found Johnson's naked body in a trash can behind an automobile repair shop that was on the other side of a wooded area from a house in which Tratzinski rented an apartment. The police were alerted by a neighbor who had heard suspicious late-night noises and then reported blood stains on the property. Search dogs followed the trail of the blood, and later that day a police officer saw Tratzinski at a nearby convenience store with blood on his clothing and hands and made the connection. Tratzinski did not deny killing Johnson. He testified that Johnson had come home with him to have sex. Johnson undressed in Tratzinski's bedroom. "Tratzinski fondled Johnson, kissed his body, and then informed Johnson he needed a condom because he was HIV positive. Tratzinski testified that Johnson became upset and loudly accused Tratzinski of wanting to infect him. He testified Johnson obtained a hammer that was among other tools in basement, swung at him, and threatened to kill him." Tratzinski testified that he tried to escape from Johnson, ended up "tussling" with him, won possession of the hammer, and beat Johnson to death with it. Tratzinski testified that he could not remember what happened after the struggle, but awoke the next morning in the woods not knowing why he was there, or why he was bruised and covered in blood. This was a bench trial. Richmond Cir-

cuit Judge Learned D. Barry did not believe key elements of Tratzinski's testimony and convicted him of second-degree murder. The court of appeals found no grounds to reject this conviction. The court of appeals opinion does not state what sentence was imposed. A.S.L.

Legislative Notes

Federal — U.S. Representative Jim McDermott (D-WA) has introduced H.R. 935, a bill intended to extend tax benefits on health insurance for domestic partners. Called the Tax Equity for Health Plan Beneficiaries Act, the measure would end federal tax code discrimination against employees who use employer-provided health insurance benefits to cover persons other than legal spouses. McDermott characterized his proposal as an "equal pay for equal work" measure. According to a press release from McDermott's office, almost 6,000 public and private employers now offer domestic-partner benefits.

Federal — U.S. Senator Dianne Feinstein (D-Calif.) has introduced a resolution to amend Rule XLII of the Senate's standing rules to add "sexual orientation" to the list of forbidden grounds for discrimination during the hiring process for Senate staffers. A similar measure was introduced in the prior Senate and picked up 43 co-sponsors, but never emerged from the Rules and Administration Committee for a vote. The chair of the Rules Committee is Sen. Trent Lott, no friend of gay rights, so it seems unlikely the measure will go anywhere. As of March 10, it had picked up 31 co-sponsors. *Roll Call*, March 10.

Arkansas — The state Senate has approved and sent to the House a proposed hate crimes bill that takes a different approach from the bills enacted in many other states. The measure, which includes "sexual orientation" in its enumeration of the types of bias to be reached by the law, eschews penalty enhancement in favor of what its proponents call "restorative measures." That is, instead of requiring that persons convicted of bias violence receive longer prison sentences or other greater penalties than they otherwise would have received for the same crimes that were not bias-motivated, the bill would authorize prosecutors to request as part of sentencing the imposition of the restorative measures, specified as community service, counseling, educational classes, restitution to victims, and placement on a state Registry of Violent Hate Crime Offenders. The bill's sponsor, Sen. Tracy Steele, a North Little Rock Democrat, pointed out that Arkansas was one of only five states that lack hate crimes laws. He told the Senate, which approved the measure on a 24-5 vote, "We need to send a message that does not mean there is an opportunity to hate."

Colorado — Why do we feel so warm and fuzzy about politicians? The recent activity of Colorado State Representative Don Lee, a Republican from Jefferson County, provides an example of the sort of concern for humanity that inspires such feelings. While the House was considering what a local newspaper described as a "run-of-the-mill measure dealing with agency regulations," Lee proposed an amendment that would repeal a regulation that had been adopted by the Medical Services Board requiring that health care providers not discriminate in providing services on the basis of a patient's sexual orientation. Lee's rationale? There is no state law forbidding anti-gay discrimination, so it is inappropriate for the Board to have adopted such a ban administratively. (And, of course, we must keep the world safe for emergency medical staff who may want to refrain from rendering assistance to a gay-bashing victim when they respond to a 911 call, mustn't we? Does anybody remember when this hypothetical was posed before the U.S. Supreme Court during the oral argument about Colorado Amendment 2?) The bill, as amended, then passed on a virtual party-line vote, with only one Republican siding with the Democratic minority in opposition. The measure still has to be considered by the state Senate. *Rocky Mountain News*, March 28.

Connecticut — A committee of city aldermen in New Haven, Ct., bowed to the protests of religious spokespersons and voted 10-6 to reject a proposed ordinance that would have extended recognition to the "relationship status" of domestic partnerships. Although the city already provides some partner benefits to its employees, the proposed measure would have extended to the population at large to obtain municipal recognition for their relationships. The alderman endured four hours of religious diatribe at a public hearing before voting. The measure had been expected to pass the committee, but several supporters, cowed by the vehement opposition, changed their votes at the March 24 meeting. *Yale Daily News*, March 25. Evidently, the separation of church and state doesn't apply in New Haven. However, it was reported that an attempt will be made to pass the measure in the full council, despite the committee defeat. *Yale Daily News*, March 27.

Florida - Broward County — Transgender activists have asked the county commission to consider extending its recently adopted gay rights law to include protection for transgendered individuals. — The commission's human rights advisory board is drafting a proposal, and based on comments to the press, it appears that the county commission will be receptive, having been advised by the county attorney that the existing civil rights law does not provide such protection. *South Florida Sun-Sentinel*, March 25.

Florida - Palm Beach County — The Palm Beach County School Board voted 5–2 on March 24 to ban discrimination and harassment in the county's schools based on sexual orientation. This was the third time the proposal had come before the board since 1991. *Orlando Sentinel*, March 25.

Maryland — The House of Delegates voted 90–44 on March 19 to approve a proposal to add “sexual orientation” to the state's hate crimes law. At present, the law only authorizes penalties for crimes motivated by the victim's race, color, religious beliefs or national origin. The measure would need to be passed by the Senate and approved by the governor to be enacted into law. *Baltimore Sun*, March 20.

Minnesota — Claiming that the state's law banning sexual orientation discrimination has made it possible for schools to promote homosexuality in their sex education classes, Republican Representative Arlon Lindner has introduced a bill to repeal the measure, which received a hearing on March 20. The bill also received a hearing in the state Senate, where its sponsor is Republican Senator Michael Jungbauer, on March 21, but Jungbauer subsequently withdrew the measure from consideration. According to Linda Marquardt, a grandmother from Maple Grove who testified for the bill, “Johnny is no longer thinking about the short ‘a’ and long ‘e’.” His mind has gone to butts.” Marquardt and another witness insisted that an epidemic of sexually transmitted disease among young teenagers can be attributed to the description of homosexual sex in public school health classes, which the students then perform during slumber parties. The bill is not expected to be enacted, or even receive committee approval, but has stirred up enormous political controversy. When Lindner, in discussing the bill, questioned whether the Nazis persecuted gays along with Jews during the Holocaust, some other members of the House filed ethics charges against him. A hearing on the ethics charges is scheduled for April 7. *Duluth News-Tribune*, March 21 & 25.

New Jersey — Governor McGreevey has signed into law a bill inspired by the controversy over racial profiling by the state police. The bill, which passed both houses of the legislature with overwhelming majorities, applies to all public servants, stating that officials who are acting in their official capacities are guilty of a crime if, knowing their actions are unlawful, they set out to intimidate or discriminate against an individual or group on the basis of race, color, religion, gender, handicap, sexual orientation or ethnicity. *Bergen Record*, March 14. Although anti-gay police bias did not inspire the enactment of this bill, it may prove useful in attacking recurrent police practices on highway rest stops in New Jersey to entrap gay men.

New Mexico — The New Mexico “gay rights” bill continues to wend its way back and forth between the legislative chambers. A version passed by the state Senate, SB 28, was approved on March 21 by the state's House of Representatives, but only after being amended on the floor to exempt businesses with fewer than 14 employees from the employment non-discrimination requirement. So the bill must go back to the Senate again for further consideration. Gov. Bill Richardson has pledged to sign the measure if it is finally passed in the same form by both houses. The vote in the House of Representatives was 32–26. — A similar measure, HB 314, already approved by the House, is pending in the Senate. On March 20, the House approved a pending hate crimes bill that had previously been approved by the Senate, and Gov. Richardson had pledged to sign this measure as well. When it takes effect, New Mexico will be the 46th state to have adopted a law providing penalty enhancement for bias-related crimes. The measure includes “sexual orientation or gender identity” in the category of hate crimes covered. *Albuquerque Journal*, March 21 & 22. The *Albuquerque Tribune* reported on March 14 that a measure to that would have required insurance companies doing business in the state to offer same-sex domestic partnership coverage in certain circumstances was defeated in a tie vote in the state House.

New York — State Assemblyman Richard Gottfried (D - Manhattan) has introduced a bill, A. 7392, to open up marriage in New York to same-sex partners. Eleven other members were listed as co-sponsors, all representing districts in the New York City metropolitan area and all Democrats. Co-sponsors include the Assembly's only openly lesbian or gay members, Deborah Glick and Daniel O'Donnell, both of whom represent Manhattan districts.

North Carolina — Countering the argument by county officials that Durham County should not offer employee benefits covering domestic partners of county employees because of a state law dating back to 1805 making unmarried “cohabitation” a crime, State Representative Paul Luebke introduced a bill that, if enacted, would put the General Assembly on record as declaring that neither the ancient cohabitation law nor the state's “crimes against nature” sodomy law makes it a crime “to live with another adult of the same or opposite sex.” The measure was introduced with co-sponsorship of Rep. Mickey Michaux and Rep. Paul Miller. *Durham Herald Sun*, March 26.

Washington State — The State House of Representatives voted 59–39 in favor of House Bill 1809, which would add “sexual orientation” to the forbidden grounds of discrimination in the state's civil rights law, on March 17. The measure has been pending in the legislature off and on since 1976, and was actually passed by

the House in 1994, but defeated in the Senate by one vote. Although the Senate presently is divided 25–24 in favor of the Republicans, there is hope that some Republicans will vote yes and help pass the bill in the Senate. In the House, seven Republicans voted for the bill. *Columbian*, March 18. A.S.L.

Law & Society Notes

National — As further analysis of 2000 Census information is published, more interesting data about same-sex families comes to light. According to a study released in mid-March, San Francisco has the highest percentage of same-sex households in which census respondents indicated that they were more than just roommates, 2.7% of all households. Next highest was Ft. Lauderdale, Florida, at 2.1%, followed by Seattle, 1.9%, Oakland, 1.8%, Berkeley, 1.8%, and Atlanta, 1.7%. Ft. Lauderdale's Mayor, Jim Naugle, told the *South Florida Sun-Sentinel* (March 13) that he thought it “amazing we're ranked that high,” but then said he thought the count of same-sex households reported by the Census Bureau was low. “Only 1,400? I would have thought we had that many in one neighborhood alone.” ••• The validity of the Census numbers is open to challenge, of course, and such a challenge has emerged from the Institute for Gay & Lesbian Strategic Studies. Based on two surveys of large groups of gay people, the Institute concludes that a substantial number of same-sex partners checked the “housemate/roommate” category rather than the “unmarried partner” category, leading to a significant undercount of same-sex partner households. Furthermore, the surveys found that the couples who checked the unmarried partner option on the form tended to be higher income and have higher educational levels, so resulting data about the educational and income attainments of same-sex partner households will also be distorted upwards in the official Census figures. (The Census counted 594,691 unmarried same-sex partner households in the U.S. as of May 1, 2000.) *Washington Blade*, March 14. ••• Perhaps reflecting the “density” of gay population in Ft. Lauderdale, elections on March 11 resulted in the election of the first openly gay city commissioner, lawyer Dean Trantalis. *Miami Herald*, March 12.

National — The old “stop loss” policy followed by the military in times of war seems to have been silently activated again, despite any denials by the Defense Department. According to a report issued by the Servicemembers Legal Defense Network, once the military started mobilizing last year in anticipation of action in Iraq, the discharges of lesbian and gay service members dropped dramatically. The March 25 report found that there were 906 discharges on grounds of “homosexuality” in 2002, down

from 1,273 in 2001. Indeed, the number of such discharges in 2002 was the lowest since 1996.

National — The Presbyterian Church (USA) continues sharply divided over the issue of gay clergy. In mid-March, the denomination's Permanent Judicial Commission overruled protests against the ordination of Rev. Kathleen Morrison, an open lesbian, but in a second case ordered a trial on whether the denomination's top officials had acted improperly by refusing to hold a national assembly that was demanded by church conservatives to discipline those who are defying the church's official ban on ordination of openly gay clergy. *Chicago Tribune*, March 14. Although the commission trying the case subsequently concluded that the official who had moved to block the assembly consideration of the issue had acted "improperly," it upheld his decision not to call the meeting. *Atlanta Journal-Constitution*, March 22. ••• A report issued by a policy committee of the Episcopal Church urged that the denomination not take on the issue of commitment ceremonies for same-sex couples at its national convention this summer, on the ground that "we are nowhere near consensus." *Chicago Tribune*, March 28.

Florida — As media attention was aroused by the oral argument before the U.S. Court of Appeals for the 11th Circuit in the pending ACLU challenge to Florida's statutory ban on adoptions of children by "homosexuals" (the only such explicit statutory ban in the nation), the Unity Coalition of Miami-Dade County has organized a petition drive intended to spur the legislature into making the lawsuit superfluous by repealing the ban. Among the organizers of the petition drive is Luis Penelas, an AIDS activist and Unity Coalition board member who is the brother of Miami-Dade County Mayor Alex Penelas, who is reportedly planning to run for the U.S. Senate. No word yet on Mayor Penelas's position on the issue. *South Florida Sun-Sentinel*, March 6, 2003.

Florida — The *Dayton New Journal* (March 6) reported that two Florida institutions of higher education, Embry-Riddle Aeronautical University and Stetson University, are now offering health insurance to domestic partners of their gay employees.

Georgia — As the state government debates a proposal by Gov. Sonny Perdue to hold a referendum on reviving the old Confederate battle flag or another segregation-era state flag to fly over the state capitol, the Association of American Law Schools is rethinking its commitment to hold its January 2004 annual convention in Atlanta. The meeting was last held in Atlanta in 1977, but subsequently the Association decided to join in a boycott of Georgia after the Supreme Court upheld the state's felony sodomy law in 1986 and the Association added a sexual orientation non-discrimination provision to its

by-laws in 1990. After the Georgia Supreme Court struck down the sodomy law several years ago, Atlanta went back on the annual meeting list. But in a letter to Atlanta Mayor Shirley Franklin, AALS Executive Director Carl Monk warned that the Association was rethinking in light of the possibility of a divisive, racially charged referendum campaign going on during the time of the meeting. *Atlanta Journal-Constitution*, March 22.

Louisiana — The Louisiana sodomy law, the subject of numerous court battles over the past two decades, should be repealed, according to Eddie Jordan, the new district attorney of New Orleans. His predecessor, Harry Connick, Sr., was a staunch defender of the law. In a Feb. 26 press release, he stated: "If the legislature is willing to reconsider, I will testify that private, non-commercial acts of sodomy between consenting adults are not a public matter and therefore should not be a violation of the law."

Maryland — The faculty senate at the University of Maryland has voted to amend the school's non-discrimination policy to prohibit discrimination on the basis of gender identity or gender expression. The policy needs to be considered by the school's legal counsel, Board of Regents, and chancellor, before it can go to the president for approval. *Washington Blade*, March 14.

New York — It was reported on March 14 that the Law Committee of the Rabbinical Assembly, the lawmaking body for the Jewish Conservative Movement in the U.S., has agreed to reopen discussion of the issue of same-sex unions and ordination of openly gay rabbis. *Chicago Tribune*, March 14. When these issues were last considered during the early 1990's, the Committee voted against letting rabbis undertake such ceremonies and against ordaining openly gay rabbis. Since then, several Conservative rabbis have "come out," and a non-gay woman rabbi caused significant consternation by accepting the position of assistant rabbi at Congregation Beth Simchat Torah in New York. (CBST is the world's largest synagogue composed primarily of lesbian, gay and transgendered members, and is not formally affiliated with any of the organized movements of mainstream American Judaism. — The Rabbinical Assembly could be as concerned with one of its new graduates going to an unaffiliated congregation as with the fact that the congregation is "gay," given a shortage of pulpit rabbis at present.)

Ohio — The Hebrew Union College-Jewish Institute of Religion in Cincinnati appears to have made history by accepting a transgendered person into its rabbinical training program. The College is affiliated with the Reform movement of American Judaism, which is the largest of the four major "movements" of American Judaism. Reuben Zellman, who labels himself "transgender and queer," may be-

come the first openly transgendered rabbi. The school's national Director of Admissions, Rabbi Roxanne Schneider Shapiro, told the Jewish Telegraphic Agency that "Reuben was an outstanding candidate" and that his transgender status was not a factor in the admissions decision.

Texas — A library committee in Montgomery County, Texas, rejected an attempt by a conservative citizens group to have two books dealing with gay issues removed from the public library shelves in the county. The books are *Weetzie Bat* by F. L. Block, and *Desire Lines* by J. Gantos. — The library director accepted the library committee's recommendation, which, she stated, was "based on the entirety of the work, not sections of it." *Houston Chronicle*, March 13.

Virginia — On March 10, Virginia Technical University's governing board approved a resolution banning affirmative action in admissions based on race, gender, disability or other personal factors, although the policy still allows Tech to consider athletic ability and family history with the university. At the same time, the resolution deleted "sexual orientation" from the University's non-discrimination policy. Student leaders called upon the governing board to reconsider these actions, especially protesting that the actions were taken in a closed session without any prior notice. *Roanoke Times & World News*, March 18. However, and perhaps inconsistent with these actions, the University moved to defuse a continuing controversy by offering a position with the university's Faculty Development Institute to Shelli Fowler, the lesbian partner of Virginia Tech Graduate Dean Karen DePauw. When DePauw was hired to come to Tech as dean, her partner was offered a tenure-track position in the University's English department, but the offer was withdrawn at the behest of University administrators, who stated opposition to treating Fowler the way they would treat a faculty spouse. *Roanoke Times & World News*, March 11. A.S.L.

International Notes

Argentina — Same-sex partners in the Buenos Aires metropolitan area and in Rio Negro will make history in April when civil unions will begin to be legally recognized in both regions as a result of recent legislation, according to a March 18 report on-line by latinamericanpress.org. The laws were approved in December at the local level. They do not authorize same-sex marriages, joint adoptions, or inheritance rights, since those are aspects of national law. However, the couples will be able to share social security services, claim leave when a partner is sick, and enter into various kinds of agreements that are at present only legally enforceable between marital partners, such as agreements for acquisition of real property.

Canada — The *National Post* reported on March 14 that some Canadian military chaplains are considering performing commitment ceremonies for same-sex couples among military personnel. Now that Canadian federal law has provided for significant legal recognition for same-sex couples, the only potential barrier would be the tenets of the churches by which the chaplains are ordained as ministers. A Defense Department official said there was nothing in military policy to stop a chaplain from performing such a ceremony. (How different things look south of the border. Under U.S. military regulations, attempting to engage in a same-sex marriage is grounds for discharge under the “don’t ask, don’t tell” policy.)

Canada — The Canadian Broadcasting Corporation reported on March 25 that thirteen same-sex couples had reached a settlement with the province of Alberta on their claims that they had suffered wrongful denial of compensation for health care costs under circumstances where unmarried opposite-sex couples would have received such compensation. Although the province’s human rights commission had ruled in favor of the plaintiffs and ordered compensatory damages for the cost of insurance premiums, it failed to order any damages for discrimination as such, and the couples went to court. Under the settlement, each claimant will receive \$1,000 (Canadian) as compensation for the discrimination.

Egypt — Although President Hosni Mubarak had ordered new trials to be held in the cases of 50 men who were arrested in a gay gathering place, the subsequent retrials did not all result in acquittals. International news sources reported on March 17 that 21 of the men have now been sentenced to three years in jail on debauchery charges, although no sexual activity was actually taking place at the time they were arrested. *Birmingham Post*, March 17.

Israel — A rabbinical court in Beersheba, ruling in a child custody dispute between a gay man and his ex-wife, has decreed that the two teenage boys of the marriage should be granted their preference to live with their father. This is the first time that a rabbinical court has awarded custody of minors to an openly gay father. The mother has appealed the ruling to the Supreme Rabbinical Court in Jerusalem. In Israel, where Judaism is the state religion, Rabbinical Courts rather than the civil courts have jurisdiction over all family law matters. The Director-General of the Rabbinical Courts, Rabbi Eliahu Ben-Dahan, told the *Jerusalem Post* (March 24) that rabbinical judges tend to favor custody for fathers when children are above the age of nine, since the halacha (ritual law) imposes obligations on the father and not the mother with respect to the child’s religious education.

Japan — Transgendered individuals in Japan have begun to organize, having formed a lobbying group in January. So far, Japanese courts have not been receptive to the claims that somebody who has changed their sex is entitled to a change of gender designation on official documents. As a way around the numerous problems that a person can encounter when their official documents do not accord with their apparent gender, four municipal governments have now agreed to begin eliminating gender from a variety of forms. For example, in Koganei, the mayor has decided that gender should not be printed on notices that are sent to inform eligible voters about an upcoming election. Mayor Inaba stated that he had ordered this removal after learning that some transsexuals had refrained from voting out of fear that they would face embarrassing questions from election officials. Instead, the gender will be contained in a bar code on the form, which will be scanned to maintain statistical records, but will not be readable by the election officials. *Asahi Shimbun*, March 24.

Russia — Despite a certain degree of liberalization in the life of gay people in Russia, it is reported that a new regulation will go into effect on July 1 specifically banning gay people from serving in the military, except in time of war. This regulation is seen as ironic, since the Russian defense establishment is struggling to fill the ranks, as thousands avoid call-ups due to the miserable conditions they expect to encounter in Chechnya, the main current assignment of the Russian army. *Straits Times*, March 15.

South Africa — The South African Press Association reported on March 28 that the Constitutional Court of South Africa had ruled that twins born to a lesbian couple by means of donor insemination were the “legitimate” children of that couple, and that the Children’s Status Act, to the extent it would be construed to label those children as “illegitimate” because born out of wedlock, would be unconstitutional. The lesbian couple had applied to the Durban High Court after the Department of Home Affairs refused to allow both of the women to be registered as legal parents of the children. The Department took the position that only the birth mother could be registered as a parent. The Durban High Court ruled in their favor on constitutional grounds, but the opinion had to be confirmed by the Constitutional Court before it could become effective. Judge Richard Goldstone read the unanimous judgment of the court on March 28. The court made clear that this did not mean that children born to unmarried heterosexual couples must also be treated as “legitimate” under the law. Clearly, the South African Parliament has some repair work to do on this statute.

Sweden — Now that Sweden authorizes registered partnerships for same-sex couples, so

long as one member of the couple is Swedish, the government has instructed its foreign embassies that they are expected to perform partnership ceremonies, even if they are in countries where such unions are not recognized — so long, of course, that at least one member of the couple holds Swedish citizenship. *Reuters*, March 7. A.S.L.

Professional Notes

The Lesbian and Gay Law Association of Greater New York held its annual dinner on March 27, celebrating the Association’s 25th Anniversary. Recipients of the Association’s Community Service Awards were Sharen I. Duke, MPH, of the AIDS Service Center NYC, and Jack Schlegel, a long-time community activist who has been a prominent fund-raiser for numerous causes, including Lambda Legal Defense.

The Massachusetts Lesbian and Gay Bar Association will hold its dinner on April 25, at which time the honorees will include Jennifer Levi, staff attorney at Gay & Lesbian Advocates & Defenders, lawyer Vincent McCarthy, and the Freedom to Marry Coalition of Massachusetts. The event will be at the Royal Sonesta Hotel in Cambridge. For last-minute information on reservations, call 617-984-7256 and speak with Maureen Brodoff, or email her at mbrodoff@nfpa.org.

The March 5 issue of the *Chicago Daily Law Bulletin* included a feature article about Cook County Circuit Judge Colleen F. Sheehan, an openly-lesbian judge who came out during 2001 during the effort to get the Illinois Supreme Court to amend its ethics rules to bar discrimination within the court system on the basis of sexual orientation, disability, age and socioeconomic status. Commenting about going public about being a lesbian as part of that effort, she told the newspaper: “It really just made me look at the issue of fully being myself, of being free. It was an internal shift I made for myself.”

Paula Ettelbrick has been designated the new executive director of the International Gay and Lesbian Human Rights Commission, a San Francisco-based organization with a New York office that focuses on violations of human rights involving members of sexual minorities worldwide. Ettelbrick has previously held leadership positions with several organizations, including Lambda Legal Defense Fund, National Center for Lesbian Rights, the National Gay and Lesbian Task Force, and the Empire State Pride Agenda. She has also taught courses on sexuality law at several law schools, including N.Y.U., New York Law School, and the University of Michigan.

On March 24, New York City Criminal Court Judge Michael R. Sonberg, who has served as president of the International Association of

Lesbian & Gay Judges and is an active member of the Lesbian & Gay Law Association of Great New York, delivered the keynote address at a conference on openly lesbian and gay judges sponsored by American University's Washington College of Law. His address, titled "Visible Equality: Examining the Role and Impact of Gay and Lesbian Members of the Judiciary," will be published in a forthcoming issue of the school's law review. Other openly-gay judges participating in the conference as panelists included U.S. District Judge Deborah Batts (S.D.N.Y.), Illinois Circuit Court Judge Thomas Chiola, and NLRB Administrative Law Judge William Kocol.

Openly-gay U.S. Rep. Barney Frank is the subject of new political speculation as a result of Massachusetts Senator John Kerry's campaign for the 2004 Democratic Presidential nomination. If Kerry is actually elected president in 2004, Gov. Mitt Romney, a Republican,

would appoint somebody to serve out the last two years of his term, and then in 2006 there would be an open contest for the Democratic nomination. Would Frank seek to become the nation's first openly-gay elected Senator? Frank told *Bay Windows*, a Boston gay newspaper, that he would. Asked to comment, Sen. Kerry stated of Frank: "He's a remarkable public servant and he's done so much for Massachusetts and the nation. He's smart as hell; he's tenacious; he's witty; and he's a fighter. Barney speaks his mind and argues his case better than just about anyone." *American Political Network Hotline*, March 20, 2003.

What goes around comes around. George W. Bush has nominated U.S. Attorney Michael Mosman of Oregon to a seat on the Federal District Court there. Mosman clerked for Justice Lewis Powell in 1986 when the Supreme Court decided *Bowers v. Hardwick*, and is generally "credited" with having persuaded Powell to

vote to uphold the Georgia sodomy law in that case. (According to several accounts, Powell was deeply undecided on the case, and actually voted to strike the sodomy law at the court's first conference after oral argument, but then yielded to the opposing views of Mosman and Chief Justice Warren Burger and ended up providing the fifth vote for upholding the law. Powell later repudiated his vote.) Basic Rights Oregon, the state's gay rights political group, has protested the nomination, and demanded that Mosman go on record as to his beliefs on whether the constitutional right of privacy extends to gay people. In a March 17 editorial, the *Portland Oregonian* (March 17) said that this was a "valid question" that Mosman should have to answer as part of the confirmation process. Said the newspaper, "A judicial candidate's views on privacy rights are of more than academic interest, not only to Basic Rights Oregon, but also to everyone else in our state." A.S.L.

AIDS & RELATED LEGAL NOTES

6th Circuit Rejects Damage Claim for Insurer's Failure to Disclose Positive HIV Test Result

In *Eaton v. Continental General Insurance Company*, 2003 WL 857330 (U.S. Ct. App., 6th Cir. March 4) (not officially published), the 6th Circuit ruled that an insurer was not liable under a theory of negligence per se for failing to inform an applicant for disability insurance of a positive result of an HIV test, despite the applicant's specific request to be informed of any such positive result. The holding of the case has to be stated in this manner because, it seems, insufficient lawyering and an indifferent or hostile court prevented the issue from being considered on any possible contract theory.

David Eaton, an Ohio resident, applied for disability insurance from Continental General in May 1997. He agreed to take the required HIV test, and completed an "Informed Consent Form" that specifically stated he would be notified of any positive HIV result if he so desired. He indicated that he wanted such results, and provided the required address for notification.

Before Continental was advised of the positive result by its independent lab, it was discovered that Eaton had disability insurance through his employer, rendering him ineligible for coverage under Continental's underwriting guidelines. A form rejection letter was generated, and "as a result Continental did not follow its customary practice of notifying applicants of a positive test result."

Eaton tested for HIV again and learned of his positive status in August 1998. He learned of the positive result of the prior test in October 1998 as a result of a demand letter by his attorney. He sued the insurance company, the agent, the lab and everyone else involved in federal

court in August 1999, on theories of negligence, contract, and negligent or intentional infliction of emotional distress. The district court granted defense motions for summary judgment, and Eaton appealed. The Court of Appeals ruled that, because the negligence theory was the only one briefed on appeal, all other theories of relief were deemed abandoned.

Eaton argued that there was a statutory basis for his claim of negligence under Ohio Rev. Code sec. 3901.46, which requires notification of applicants for insurance of a positive HIV result if the results are requested. The court rejected this claim, ruling that the language of the statute ran only against an insurer (thus eliminating liability on the part of any other parties to this suit) and that the language actually stated that the insurer *may* advise the applicant of a positive HIV result. Such language simply did not create a sufficient level of duty to Eaton that he could complain of Continental's negligence in compliance. Though Continental's failure to advise Eaton of the positive results may have run afoul of Ohio administrative regulations, violation of Ohio administrative regulations does not rise to negligence per se.

Finally, the Court of Appeals ruled that the purpose of the statute was not to require insurers to provide notice to applicants who want to know such results, but to prevent testing on a discriminatory basis, to prevent discrimination against those with HIV and to preserve the confidentiality of HIV test results.

That Continental agreed to provide results of a test, if positive, that Eaton may have relied on such an agreement and may have suffered damages as a result of such reliance, is clearly of no concern to the court. *Steven Kolodny*

Georgia Appeals Court Rules HIV-Disclosure Plaintiff May Be Able to Sue Anonymously

A unanimous Georgia Court of Appeals panel ruled in *Doe v. Hall*, 2003 WL 1251289 (March 19) that a man who is suing his health care provider and insurance company on a claim that they improperly failed to protect the confidentiality of his HIV status is not required to file suit using his own name as plaintiff. Reversing a trial judge's decision that state law precluded the plaintiff from using a pseudonym, the court of appeals directed that the trial court reconsider the issue. The plaintiff was allowed to appeal the trial court's initial ruling as "John Doe."

Doe alleges that his doctor, David L. Hall, drew blood to determine his HIV status. Doe complains that Hall failed to submit the blood anonymously, and that Hall, the laboratory, and the insurance company were negligent in allowing his positive test result to become known to his employer, as a result of which he lost his job. Doe is also suing Dr. Hall and his group practice for medical malpractice. After filing suit, Doe filed a motion for a protective order, asking the trial court to rule that he could proceed with the litigation as John Doe, that all court papers refer to him as such, and that his actual name and the names of his family members not be used during the trial.

The trial court found that a provision of Georgia's HIV-Confidentiality Statute, OCGA sec. 24-9-47(y)(2), requires that somebody suing his doctor use his real name in the lawsuit, and denied the motion.

The statute generally requires that HIV-related information "disclosed or discovered within the patient-physician relationship⁷⁰ be

kept confidential, but creates several exceptions. One exception provides that if the HIV+ person files insurance claims or is involved in a dispute over coverage, they must file claims or coverage-related lawsuits in their own name. — Another provides that any lawsuit that “places such person’s care and treatment, the nature and extent of his injuries, the extent of his damages, his medical condition, or the reasons for his death at issue in any civil or criminal proceeding” must be brought in the plaintiff’s own name. The trial judge thought that this exception would naturally extend to any suit claiming that the doctor or health care organization did something wrong, but the appellate court unanimously disagreed.

Writing for the court, Presiding Judge Blackburn pointed out that Doe was not actually complaining about the quality of his health care, and was not claiming that he was infected through the doctor’s negligence. “As such, appellant has not placed his care and treatment at issue in these proceedings,” wrote Blackburn, who pointed out the circularity of the trial judge’s reasoning: “Under the trial court’s ruling, one would be required to disclose their identity in suing for improper disclosure of that identity, which would defeat the purpose of the statute.”

However, this does not necessarily mean that all plaintiffs in HIV-disclosure suits may automatically sue anonymously. “A trial court must employ its sound discretion in determining whether or not a pseudonym may be used in each case, considering the effects of such decision on the rights of the individual parties and considering the right of the public to open judicial proceedings,” said the court, sending the case back to the trial judge for reconsideration of how best to protect Doe’s confidentiality while allowing the lawsuit to go forward.

The court emphasized that the trial court’s approach must not interfere with the defendants’ ability to obtain information necessary to mount a defense to the lawsuit during pre-trial discovery proceedings. “The trial court should permit the use of plaintiff’s real name where such use is required in order to ensure adequate discovery by the defendant. The trial court is free to use other devices, such as sealing certain records and order of non-disclosure in conjunction with plaintiff’s use of a pseudonym, in order to balance lawful discovery requirements, while providing all reasonable confidentiality.” A.S.L.

AIDS Litigation Notes

Federal — Maine — U.S. Magistrate David Cohen ruled on numerous motions in *Stokes v. Barnhart*, 2003 WL 1145464 (March 13), a case pending in the U.S. District Court in Maine. The case arises out of the visit of Regina Brooks, the regional Social Security Admin-

istration liaison, to Alan Stokes, at the time a hospital patient suffering from a variety of conditions, some associated with his HIV status. Stokes alleges that he had tried to keep his HIV status confidential, but that Brooks mentioned it in the presence of another person who was visiting him in the hospital. This person subsequently spread the information around, to the mortification of Stokes. Stokes filed a variety of claims against the Social Security administrator and Brooks. As a result of the ruling on motions, the U.S. was substituted as defendant and the claims were essentially reduced to intentional infliction of emotional distress, as to which Magistrate Cohen found that there was a sufficient theoretical legal basis for the claim and sufficient disputed facts to reject the government’s motion for summary judgment. However, a variety of other claims, including negligent infliction of emotional distress and constitutional violations, were thrown out, but Cohen allowed Stokes to amend his complaint to add a violation of the federal Privacy Act. Cohen rejected a Rehabilitation Act sec. 504 claim, however.

Federal — New York — U.S. District Judge Hellerstein (S.D.N.Y.) found that there was substantial evidence to support the Social Security Administration’s determination that an HIV+ man was not entitled to disability benefits, on the ground that he was capable of working. The case shows, yet again, that an HIV diagnosis in the absence of opportunistic infections that substantially limit a person’s ability to work cannot be the basis of a disability determination under federal benefits law. It turns out that at a later date, Acevedo was found to be qualified for benefits, due to subsequent complications from his HIV infection and other ailments. *Acevedo v. Barnhart*, 2003 WL 841089 (March 6, 2003).

Federal — New York — Rejecting a claim by an HIV+ state prisoner at Sing Sing that his housing conditions amounted to an 8th Amendment violation, U.S. District Judge Preska (S.D.N.Y.) granted a motion for summary judgment sought by defendants in *Laureano v. Pataki*, 2003 WL 841067 (March 2, 2003). The prisoner, who was confined for some time in the Special Needs Unit at Sing Sing where HIV+ inmates with medical complications are housed, complained that exposure to pigeon droppings, leaks, and asbestos had placed his life in danger. The prison produced various medical experts to attest to the lack of any health consequences to Laureano from these exposures, and specifically opined that various skin lesions, which he contended were due to asbestos exposure, were actually routine symptoms experienced by HIV+ people who were following the medication regimen prescribed for Laureano, and had not relation to asbestos exposure. Judge Preska also denied Laureano’s

motion to have counsel appointed for him. This matter was brought pro se.

Michigan — The first thing you need if you are a medical malpractice plaintiff is a competent expert witness, as Betty J. Christy has discovered to her dismay. Christy, as personal representative of the estate of her late husband, Ralph Christy, sued Detroit Osteopathic Hospital Corporation for malpractice in connection with her husband’s death. Ralph allegedly contracted HIV while being treated at the defendant hospital in April 1984, about a year prior to the release of the HIV antibody test that has been used ever since to screen donated blood. The hospital obtained the blood used for Ralph from the Red Cross. In support of her complaint, Christy presented affidavits and deposition by Dr. Barry Singer, a board-certified internist, oncologist and hematologist, who professed ignorance about the standard of care in effect for blood collection and donation at the relevant time. The trial court found (and the Michigan Court of Appeals agreed, in an unpublished opinion) that Christy’s complaint was fatally defective for failing to present evidence of the relevant standard of care. *Christy v. Detroit Osteopathic Hospital Corp.*, 2003 WL 1343070 (March 11, 2003). A.S.L.

AIDS Law and Society Notes

United States Government — During his state of the union message in January, George W. Bush announced to great applause a new \$15 billion initiative to fight the AIDS epidemic in third world countries. As usual with this administration, however, the announcement was mainly public relations, and, in light of subsequent actions, may actually be seen as a way to attempt to impose conservative restrictions on the international effort to prevent transmission of HIV. It appears that the administration is taking the position that any organization receiving U.S. governmental funding in connection with this initiative must totally forswear anything to do with abortion. That means that family planning clinics and women’s health clinics, which would logically be at the front-lines of the efforts to combat HIV transmission in Africa and Asia and South America, will be subject to the same ideological restrictions now imposed on such organizations within the U.S. if they are to receive any of the federal money. This goal helps to explain why the Bush Administration is proposing to dispense most of the money directly rather than through the United Nations’ Emergency AIDS Fund. In addition, of course, the \$15 billion figure will likely prove to be mythical as well. Some of it will be money diverted from other programs, and much of it will be delayed if it is ever appropriated, following the pattern of other Bush “initiatives” in areas such as education and public health. Meanwhile, Bush can bask in the approval of media

commentators for having made a “commitment” to a “compassionate” agenda on the AIDS issue. Why are we depressed?

South Dakota — The state legislature has passed a bill that would allow state health officials to release confidential HIV-related data to prosecutors when it involves people who are being investigated for the crime of intentionally exposing somebody to HIV without their knowl-

edge. Such intentional exposure can result in a prison sentence of up to 15 years under South Dakota criminal laws. Prior to this new bill, state health officials were not required to turn over such information. At the time of writing, the governor had not yet signed the bill.

Spain — Condemning an existing ban on blood donations by gay and bisexual individuals as “antiquated,” the Spanish Ministry of

Defense announced on Feb. 4 that the Gomez Ulla Military Hospital in Madrid would abandon that policy. Instead, individual donors will be asked to exclude themselves if they have engaged in behavior that might place them at risk for sexually-transmitted diseases, and all donated blood will be subject to repeated HIV screening. (This story was reported on-line by Rex Wockner’s International News Service.) A.S.L.

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LESBIAN & GAY & RELATED LEGAL ISSUES:

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ticle I, Secs. 1, 6, and 9, 6 J. Gender Race & Justice 451 (Fall 2002).

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Specially Noted:

Although the lengthy trial court opinion in *Kantaras v. Kantaras* is not officially published, it is summarized in the BNA Family Law Reporter, 29 Fam. L. Rep. 1195 (March 4, 2003). In *Kantaras*, a federal trial judge held that a transsexual father was entitled to custody of two children he had been raising with his ex-wife, and that their marriage had been a valid one, even though he lacked a penis to consummate their marriage through heterosexual intercourse. Mrs. Kantaras had been pregnant by another man when Michael Kantaras proposed to marry her, and conceived her second child through donor insemination while they were married.

Cambridge University Press has announced the publication of *Gay Rights and American Law* by Daniel R. Pinello, an Associate Professor of Government at John Jay College of Criminal Justice of the City University of New York. — Pinello’s book, portions of which we have seen in manuscript, is a fascinating look at how

American courts deal with gay rights cases, based on an extensive survey of reported cases. The book, which will become available in June, is receiving simultaneous hardcover and paperback publication. Advanced orders can be placed through the CUP website: us.cambridge.org/politicalscience/. Prof. Pinello was an active legal practitioner in New York City for many years, and was well-known for having helped to establish and staff the first major effort to provide inexpensive legal consultation for the gay community in a law clinic type of setting.

Vol. 23, No. 6 (Aug. 2002) of the *Cardozo Law Review* is devoted to a symposium titled "The Fate of the Child Pornography Act of 1996."

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Shaw, Sarah, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 *Cal. L. Rev.* 1981 (Dec. 2002).

LETTER TO THE EDITOR

To the Editor: Thank you for your objective analysis of the Oregon Court of Appeals' January decision in the *Strome* case. I think it is important for your readership to understand that, consistent with Oregon statutory and case law, the father's sexual orientation and his relationship with his partner played no role whatsoever in the briefing or in the deciding of the case. That is the full extent of the good news for gay family law litigants, however, in this shocking decision.

Oregon has been served for many years by one of the best third-party parenting statutes in the nation. In the wake of *Troxel v. Granville*, the Oregon Court of Appeals appears determined to undo the statute completely. In *Strome* and its post-*Troxel* progenitors, the court extended the constitutional test far beyond anything suggested by the *Troxel* plurality and rendered the statute essentially unusable by separating co-parents. That means that children raised by gay or lesbian (or straight, for that matter) co-parents will have no access whatsoever to those parental figures following separation except as the biological parent may allow.

The court's reasons for taking such a hard line remain obscure. We in Oregon are left to hope that the court will approach our recently revised statute differently, but the initial indications are not encouraging. It remains a possibility, of course, that the Supreme Court will clean up the mess. In the meantime, *Troxel* should stand as a reminder to our community that constitutional protections in this area of family law are a double-edged sword.

The Constitution simply was not conceived or written with the needs of our community in

mind. As a practitioner litigating these cases, it would have been better in my mind if *Troxel* had never been decided. The irrelevance of homosexuality in custody decisions is well-established in Oregon law. What we need are laws that foster and support our family structures. The loss of that statute and the body of case law interpreting it are a truly tragic outcome that cannot be ignored.

Thanks for your great work!

Mark Johnson, Attorney at Law <http://www.legalzenith.com> Bennett, Hartman, Morris & Kaplan, LLP, 851 SW Sixth Avenue, Suite 1600, Portland, Oregon 97204

[Editor's Comment: We reported on *Strome* because it appeared from the court's opinion that in a custody dispute between an apparently gay father in a relationship and his ex-wife, the court found that custody for the father was mandated by law. As Mark Johnson correctly observes, this result is reached through a reading of that statute that, on balance, would be most disadvantageous to same-sex co-parents who are neither biological nor adoptive parents of the children whose custody is in dispute, inasmuch as it precludes reaching an objective "best interests of the child" analysis while giving overwhelming preference to the biological or adoptive parent over the other co-parent. (In effect, only a biological or adoptive parent who is shown to be unfit to have custody would be denied custody in a contest with an "unrelated" co-parent.) As such, the opinion is part of an alarming trend in Oregon family law as far as lesbian and gay families are concerned. Another point to note: Mr. Strome contacted us after reading our account in the internet-posted version of *Law Notes* to point out that pending further disposition in his case, he still does not have actual custody, pending further appeal in the case. A.S.L.]

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 Le-GaL 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.