9th CIRCUIT REVIVES GAY HARASSMENT CLAIM UNDER TITLE VII

A sharply-divided 11–judge en banc panel of the U.S. 9th Circuit Court of Appeals in San Francisco has ruled that a gay man may sue his employer for sexual harassment by fellow male employees under Title VII of the Civil Rights Act of 1964, a federal statute that bans sex discrimination but has been repeatedly held *not* to ban discrimination on the basis of sexual orientation. The September 24 decision in *Rene v. MGM Grand Hotel, Inc.*, 2002 WL 31108923, produced a slew of opinions by the judges, no one of which commanded a majority of the panel.

The plaintiff, Medina Rene, an openly gay man, was employed as a butler on the 29th floor of the MGM Grand Hotel in Las Vegas. All the other floor staff were male. Rene's evidence was that over a 2–year period he was subjected to constant harassment of a sexual nature by his co-workers, including "whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muneca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex." Rene was also frequently subjected to unwanted touching of a sexual nature, including caressing, hugging, crotch-grapping and having fingers poked in his anus while clothed.

During his pretrial depositions, when Rene was asked why he was subjected to this treatment, he stated it was because he was gay. At the close of pretrial discovery, MGM filed a motion to have the case dismissed, on the ground that discrimination against somebody because they are gay does not violate Title VII. The U.S. District Judge, Philip M. Pro, granted MGM's motion, finding himself bound by prior 9th Circuit decisions clearly holding that anti-gay discrimination, as such, is not prohibited by Title VII. On March 29, 2001, a three-judge panel of the 9th Circuit upheld Pro's decision, finding that the older 9th Circuit rulings were still valid and anti-gay discrimination, as such, is not covered by Title VII.

Rene asked for a rehearing by a larger panel of the court, which was granted and took place on September 25, 2001. After deliberating for a year, the en banc panel decided to reverse and remand the case for trial, with two groups of judges voting to do so on different rationales, and a third group dissenting against both grounds.

The rationale that attracted the support of four out of the eleven judges was articulated in an opinion by Judge William Fletcher. According to Fletcher, harassment of a sexual nature that is severe enough to affect terms and conditions of employment is clearly discrimination on the basis of sex, thus satisfying the motivation requirement of Title VII. Fletcher argued that an employee's actual or perceived sexual orientation is irrelevant to whether he has a claim of sex discrimination due to hostile environment harassment. To illustrate the point, Fletcher observed that sexual harassment cases involving women have never inquired into whether the victim was a lesbian or whether her actual or perceived sexual orientation had anything to do with the harassment. "We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women," he wrote. "In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim."

Fletcher found that "the premise of a sexual touching hostile work environment claim is that the conditions of the work environment have been made hostile 'because of sex.' The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of sex.' Whatever else those attacks may, or may not, have been 'because of' has no legal consequence. 'So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? Misogyny? personal vendetta? misguided humor? boredom?) is beside the point?'" (quoting from *Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997, *vacated and remanded*, 523 U.S. 1001 (1998), which involved an effeminate teenage boy who was harassed by fellow workers in a city parks crew in Belleville, Illinois).

But Fletcher's reasoning did not command a majority. Instead, Judge Harry Pregerson, joined by two other panel members, found that Rene's case should be allowed to go to trial on an alternative theory: that he was harassed for failing to conform to gender stereotypes held by his co-workers. This theory has been used by other gay plaintiffs in Title VII harassment cases with mixed success, including a recent decision by the 9th Circuit, *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001). The theory is that if an employee suffers discriminatory treatment because he is seen as failing to conform to gender stereotypes, then he is being discriminated because of his sex. It derives from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which a disappointed female candidate for partnership at Price Waterhouse was criticized by other partners for presenting an inadequately feminine demeanor for a "lady partner." In that case, the Supreme Court found that evidence of such motivation could support a finding of sex discrimination.

Pursuing this theory, Pregerson pointed to Rene's deposition testimony that "his co-workers teased him about the way he walked and whistled at him 'like a man does to a woman,'" and that their physical treatment of him was how they might treat a woman. Pregerson also noted that Rene was called feminine names, such as "sweetheart" and "muneca." He found that this testimony "constitutes ample evidence of gender stereotyping."

But Judge Proctor Hug, joined by three others, rejected both of these approaches. Hug insisted that the harassers' motivation is crucially relevant in a Title VII case, because the statute is not an anti-harassment statute, but rather an anti-discrimination statute, and only forbids discrimination that is due to the victim's race, religion, color, sex or national origin. Pointing to the consistent rulings by all federal appeals courts to have considered the question, Hug insisted that harassment motivated by the victim's sexual orientation does not come within the coverage of the statute, even when it is harassment of a sexual nature. Hug emphasized the Supreme Court's insistence in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), that same-sex harassment is covered by Title VII, but only if the victim can proved that he was harassed because of his gender. Hug noted that at deposition, Rene specifically stated that he was discriminated against due to his sexual orientation, not his gender.

Furthermore, Hug criticized Pregerson's characterization of Rene's deposition testimony, arguing that gender stereotyping had nothing to do with the case. According to Hug, it was not relevant that the co-workers treated Rene like one would treat a woman who is a target of aggressive sexual harassment, but rather whether Rene dressed or behaved in a gender-nonconforming way, and Hug found no evi-

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dence in the record that Rene was effeminate or in any way defied gender stereotypes, other than by his sexual orientation.

Hug also objected to this basis for decision, pointing out that Rene did not present a gender-stereotyping theory to the district court.

As usual in such negative opinions, Hug included the ritual disclaimer of any approval for the conduct to which Rene was subjected. "The degrading and humiliating treatment Rene describes is appalling and deeply disturbing," he wrote. But, "Rene's lawsuit was brought solely on the basis that he was harassed in the workplace because of his sexual orientation, which is not actionable under Title VII of the Civil Rights Act."

The Supreme Court has consistently evaded dealing with this issue, turning down numerous petitions to review circuit court rulings on hostile environment harassment claims brought by gay men. The only exception was *Oncale*, in which the issue was narrowly focused on whether any sex-related claim under Title VII can be brought by a man complaining about harassment by other men. If MGM Grand decides to petition for review in this case, it may well be the one that the Supreme Court agrees to take, especially as the court's ruling appears to conflict with rulings by several other circuit courts

Furthermore, it is arguable that Judge Hug's analysis of *Oncale* more accurately reflects the intent of Justice Scalia, who wrote that opinion, than does the analysis of Judge Fletcher. Fletcher's reasoning mirrors that of the 7th Circuit's *Belleville* case, but shortly after *Oncale* was decided, the Supreme Court vacated the 7th Circuit's decision in *Belleville* and sent the case back to the court of appeals for reconsideration on the question whether the harassment in that case was motivated by sex. In a subsequent case involving a male supervisor who sexually harassed both men and women, *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000), the 7th Circuit ruled that there was no Title VII claim because it was clear from the context that the harassment, although of a sexual nature, was not motivated by the sex of the victims. So reliance on *Belleville* as a precedent seems shaky at this time. A.S.L.

LESBIAN/GAY LEGAL NEWS

South Africa Constitutional Court Approves Joint Adoptions by Same-Sex Partners

The eleven members of the Constitutional Court of South Africa, that nations' highest court, ruled on September 10 that existing laws that fail to authorize joint adoptions of children by same-sex partners violate the South African Constitution. *Du Toit & De Vos v. Minister for Welfare and Population Development*, Case CCT 40/01. As a remedy for this violation, the court approved an order by the Pretoria High Court to "read in" to the adoption statutes treatment of same-sex partners equal to the treatment of legally married persons. The court's ruling is consistent with other recent South African decisions. The inclusion of sexual orientation as a prohibited ground of discrimination in the post-apartheid constitution has given the South African courts an express mandate lacking in the supreme law of any other western nation, and the court has be applying that mandate with vigor and without dissent.

This case arose from the desire of Suzanne Dutoit and Anna-Marie DeVos, partners in what Justice Skweyiya, writing for the court, called "a longstanding lesbian relationship," to adopt and raise children together. The women, who had participated in a commitment ceremony performed by a lay preacher in 1990, approached the authorities of the Cotlands Baby Centre in Johannesburg in 1994 to be screened as prospective adoptive parents. After a rigorous screening process, they were both approved. Throughout the process, they made clear to the Cotlands officials that any baby adopted by the them would be "moving into a family structured around a permanent lesbian life partnership," according to Justice Skweyiya's account.

After they were accepted as suitable adoptive parents, they chose a young sister and brother who needed adoptive parents, and these children were placed in their temporary care by the Cotlands authorities, and continue to live with them. In 1995, Dutoit and DeVos jointly applied to the children's court in Pretoria for a joint adoption. The children's court, looking to existing statutes on adoption, ruled that they could not adopt jointly, and granted the adoption petition only for DeVos. So since that time DeVos has been the legal mother of the children. Ironically, due to the demands of her profession, it is Dutoit who has become the primary caretaker, in terms of having more time to spend with the children and attend to their everyday needs, including medical appointments, school events and the like.

Feeling that this situation was not good for the children, since Dutoit had no legal authority with respect to them (and would have no legal relationship to them in the event of some emergency involving DeVos, the women filed suit in the Pretoria High Court seeking a declaration that the adoption law violated their constitutional rights to be free of discrimination on the basis of sexual orientation and marital status (another category specifically covered in the constitution). The Pretoria High Court responded favorably to their suit, but under the South African constitution, declarations by the lower courts about the unconstitutionality of legislation are not enforceable unless confirmed by the Constitutional Court, so it was necessary for Dutoit and DeVos to apply to the Constitutional Court for confirmation of their victory. The government, which had initially opposed their suit, ultimately came around to supporting them, so their petition to the Constitutional Court was not formally opposed. The Court itself appointed an attorney to serve as *curator ad litem* in order to make argument on the interests of these children and other who might be adopted in the future by same-sex partners. The Court made clear that its conclusion was not dictated by the lack of government opposition. Rather, the Court had to make its own independent determination as to whether the existing adoption laws violate the Constitution, and whether the remedy adopted by the Pretoria High Court was appropriate.

The chief flaw that the Court found in the existing adoption laws is an internal contradiction: on the one hand, the laws present no barrier to single gay people adopting children, and also do not prohibit adoptions by single gay people who are living in permanent partnerships with a person of the same sex. This means, as a practical matter, that children adopted into such circumstances will be raised in households headed by same-sex couples. And yet, the barriers imposed by the adoption law get in the way of applying the substantive standard of the law, which explicitly requires that all decisions involving children, including adoptions, be judged with respect to the best interests of the child. The Court described this as the "paramount" consideration in adoption cases.

According to the Court, the most pressing question in an adoption case is not the legal relationship of the parents to each other, but what will be in the child's best interest. In this case, nothing in the record before the Court suggested that being raised in a same-sex household would be adverse to the children's interests. What would be adverse would be to have one of the parents with no legal relationship to the child. Wrote Justice Skweyiya, "The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes

family life should change as social practices and traditions change."

In this light, the Court found that the exclusion of same-sex partners from being able jointly to adopt children "surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons." Thus, the Court approved the Pretoria High Court's remedy of "reading in" to the adoption provisions suitable language to make same-sex partners eligible to adopt. The Court stated that this does not take away from the requirement that the children's court make a case-by-case determination about the suitability of each applicant, whether single or a member of a same-sex partnership. The Court rejected a suggestion that it suspend the judgment for two years to allow the Parliament an opportunity to adjust the legislation, finding that the inequality imposed by existing law required an immediate remedy, and seeing no reason to delay the process of same-sex couples adopting children who need parents.

It is particularly interesting that the Court took the opportunity to telegraph its receptivity to further issues concerning same-sex partners. "It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease. It is significant that there have been a number of recent cases, statutes and government consultation documents in South Africa which broaden the scope of concepts such as 'family,' 'spouse' and 'domestic relationship,' to include same-sex partners. These legislative and jurisprudential developments indicate the growing recognition afforded to same-sex relationships." Can same-sex marriage really be far away in South Africa when its highest court is speaking in these terms? A.S.L.

Maine Supreme Court Rules on Property Issues in Break-Up of Gay Couple

The Supreme Judicial Court of Maine has ruled that the ex-domestic partner of a gay man was entitled to half of the value of the couple's former home, notwithstanding the fact that he did not contribute any money towards the purchase of the home. *Ackerman v. Hojnowski*, 2002 WL 2005442 (August 27).

Plaintiff Jeffrey Ackerman met defendant Theodore Hojnowski in 1976. According to the court, the two "began a domestic partnership" in 1981. For more than ten years, the couple lived in a house owned by Ackerman. Ackerman sold his house in 1992, and used the proceeds from the sale to buy another house for the couple to live in. Title to the new house was held by Ackerman and Hojnowski as joint tenants. The couple lived together and operated a pasta making business out of their home until approximately December of 1999, when Ackerman obtained a temporary protection from abuse order against Hojnowski, which granted Ackerman exclusive residence in the house.

In October of 2000, Ackerman filed a complaint seeking an equitable partition of the house and an accounting and division of personal and business assets. The court entered judgment directing that the house be sold and the proceeds divided equally. On appeal, Ackerman alleged that the house was intended to be an asset of the couple's pasta making business, and that the proceeds from the sale of the house therefore should be divided based on the relative contributions made by Ackerman and Hojnowski.

Writing on behalf of a unanimous court, Judge Levy rejected this argument, finding that there was ample evidence in the record to support the lower court's determination that the primary motivation for the purchase of the house was for residential purposes. Under such circumstances, joint tenants such as Ackerman and Hojnowski are entitled to "an equal, undivided share of the property" even if one of the two joint tenants did not contribute towards the property's purchase price. However, the court ruled that Ackerman was entitled to recover for the amount that he spent from his own, separate assets to improve the house after it was acquired.

The Supreme Judicial Court reversed the lower court's finding that Ackerman and Hojnowski had contributed equally towards post-purchase improvements, and remanded the case for further proceedings on that limited issue. The court also directed the lower court to consider whether Ackerman should be granted an unconditional opportunity to buy Hojnowski's share of the house. However, the court rejected Ackerman's request to apportion responsibility for personal debts the men had jointly acquired, unrelated to their business, on the ground that their relationship had no legal status in Maine.

Ackerman was represented by Sandra Hylander Collier. Hojnowski did not file a brief with the court. *Ian Chesir-Teran*

Federal Court Issues Thoughtful Opinion on Transgender Prison Treatment Rights

In a thoughtful and thorough opinion, a federal district judge told Massachusetts prison officials in no uncertain terms that they are required by the constitution to provide adequate medical treatment to their prisoners suffering from gender identity disorder. *Kosilek v. Maloney*, 2002 WL 1997932 (D. Mass.) (Aug. 28, 2002). Although U.S. District Judge Wolf technically denied the plaintiff's request for relief, his analysis will likely result in the transsexual prisoner receiving appropriate medical treatment in the future.

Michelle Kosilek, who is currently serving a life sentence, had been incarcerated in Massachusetts since 1990. Although numerous prison medical professionals have diagnosed Kosilek as suffering from gender identity disorder (GID), she has never received any of the forms of treatment described by the Harry Benjamin Standards of Care, the protocol used by qualified professionals in the United States to treat individuals with this disorder. In 1992, Kosilek filed a pro se lawsuit pursuant to 42 U.S.C. sec.1983, alleging that she was being denied adequate care for her serious medical need in violation of the 8th Amendment of the U.S. Constitution. She sought both damages and an injunction requiring that she be provided sex reassignment surgery.

In 1999, the court appointed counsel to represent Kosilek. Although some of Kosilek's claims were dismissed on the basis of immunity, the core claims ultimately were brought to trial in February 2002. In the amended complaint, counsel requested that the court issue an injunction requiring that Kosilek be provided with treatment in prison for gender identity disorder consistent with the Standards of Care. Specifically, Kosilek requested that the court order the Commissioner of the Department of Corrections (DOC), Michael Maloney, to retain a doctor who specializes in treating gender identity disorder to evaluate her, to authorize that doctor to prescribe any treatment deemed appropriate and actually to provide the treatment prescribed by that doctor.

Although Kosilek withdrew her specific request for the administration of female hormones and sex reassignment surgery, to the extent that a qualified medical professional determined that were appropriate pursuant to the Standards of Care, Kosilek continued to seek relief from the court.

In evaluating the merits of Kosilek's section 1983 claim, the district court emphasized that the DOC had operated in a most unconventional manner when determining the appropriate course of treatment for this particular prisoner. Although Maloney does not usually make decisions concerning medical care, in this case, he became directly involved due to widespread concern in the DOC over the political and pragmatic issues raised by the question of medical treatment for transsexual prisoners. After grappling with the issue for years, Maloney adopted a blanket policy concerning the treatment that the DOC would provide to the transsexual prisoners in its custody in 2000. The policy was designed to "freeze" a transsexual prisoner in the condition he was in when incarcerated. Furthermore, only those prisoners who were taking hormones under the supervision of a medical professional would be entitled to ongoing hormone treatment. Those inmates

who had been taking hormones procured on the black market would not be allowed to receive hormones in prison. As a result of this policy, the sexual traits of those prisoners would not in fact be frozen but rather would potentially revert to those of their old sex. The policy also categorically excludes sex reassignment surgery as a treatment option.

Because Maloney's directive basically dictated the terms of Kosilek's treatment, the court determined that, in this case, it was appropriate to look at Maloney's actions rather than the actions of the other medical professionals with whom Kosilek had interacted over the last decade.

Turning to the constitutional issues at stake, the court reiterated that the 8th Amendment proscribes the wanton infliction of pain on an inmate. In other words, the Constitution prohibits the state from allowing a prisoner's serious illness or injury to go untreated. The court commented that some might find it unusual that prisoners should be entitled to medical treatment for gender identity disorder (GID) even though many Americans do not have access to treatment for their serious medical needs. In fact, in an earlier case, the 7th Circuit Court of Appeals had remarked that, in its view, "[w]ithholding from a prisoner an esoteric medical treatment that only the wealthy can afford [i.e., sex reassignment surgery] does not strike us as a form of cruel and usual punishment." The district court chastised the 7th Circuit for "ignor[ing] a crucial constitutional consideration" — namely, that the Supreme Court has held that even though a law-abiding private citizen does not have a right to adequate medical care, an inmate committed to the custody of the state has such an entitlement.

The 8th Amendment inquiry incorporates both objective and subjective elements. As to the objective component, a petitioner must demonstrate that he has a serious medical need and that the state has not provided adequate care. "Adequate care" requires treatment by qualified personnel at the level deemed appropriate by prudent medical professionals in the community. Although the court must defer to the decisions of prison official regarding what type of care to offer, the court makes the final decision as to whether the care is constitutionally adequate. The subjective prong of the analysis asks whether the responsible official was aware of facts from which an inference could be drawn that a substantial risk of harm to the prisoner exists and must actually draw that inference when deciding on a course of treatment.

The court found without difficulty that Kosilek has satisfied the objective elements of the test. Kosilek did not, however, prove the subjective elements to the court's satisfaction. Specifically, Judge Wolf found that Kosilek failed to show that Maloney had treated his condition with deliberate indifference or that, once Maloney became aware of the substantial risks by this illness, he would continue to provide Kosilek with inadequate treatment. Based on the evidence adduced at trial, the court determined that Maloney did not adopt his inflexible policy regarding the treatment of transsexual prisoners in order to inflict pain or as a result of deliberate indifference to Kosilek's situation. Instead, the court concluded that Maloney had simply approached the situation as a legal problem rather than a medical one. The court believed that Maloney had failed to provide Kosilek with hormones or sex reassignment surgery not out of any malice toward the prisoner but rather because of his desire to provide no more treatment than the law required. His reluctance was based in part on his fears about the potential security risks that would result from a transsexual prisoner living as a woman in a male population. The court also noted, however, that his attitude stemmed from concerns regarding public and political criticism.

While Maloney was entitled to take security concerns into account, the court explicitly stated that concerns about criticism could not justify inadequate attention to a prisoner's medical needs. Likewise, the court insisted that concerns about the costs of a particular type of necessary medical treatment would never justify a constitutional violation.

In conclusion, even though the court dismissed Kosilek's section 1983 claim against Maloney, the court made clear that its decision "puts Maloney on notice that Kosilek has a serious medical need which is not being properly treated. Therefore, he has a duty to respond reasonably to it. The court expects he will." Specifically, any determination about Kosilek's treatment must be made as a result of an individualized assessment of her medical and psychological needs.

With regard to Maloney's security concerns, the court commented in passing that Kosilek is "already living largely as a woman in a medium security male prison. This has not presented a problem." Nonetheless, the court reserved the question of whether security considerations could provide an adequate justification for failing to meet a transsexual prisoner's medical needs according to currently accepted medical standards.

The district court's opinion presents a long and complicated tale of the difficulties faced by Kosilek in her quest to secure adequate medical treatment for her gender identity disorder. The opinion also provides an overview of the different policies that have been adopted to deal with these issues in both the federal corrections system and the Canadian penal system. Although the court did not order the specific relief sought by Kosilek, the opinion virtually guarantees that the DOC will finally start to provide her with adequate medical treatment for her GID. Furthermore, to the extent that the court invalidated the Commissioner's efforts to adopt a blanket policy of "freezing" prisoners at their current state of gender transition without any assessment of their individual needs, the case represents a positive development for the transgender community. *Sharon McGowan*

Cross-Dresser Loses Title VII Case

In an unusual case presenting a novel question of statutory interpretation, *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La., September 16, 2002), U.S. District Judge Lance M. Africk ruled that Title VII of the Civil Rights Act of 1964 does not apply to discrimination against cross-dressers. The American Civil Liberties Union represents plaintiff Peter Oiler.

What made this case unusual was that the plaintiff is not a transsexual. That is, he does not deny his male identity and does not seek the permanent gender role of a woman. He also is not gay, identifying as a heterosexual who is married to a woman. Rather, he is a man who occasionally indulges in cross-dressing to relieve stress and express his feminine side. He never appeared at work dressed as a woman, either. But after many years as a delivery driver for Winn-Dixie grocery stores, mainly in Jefferson Parish, Louisiana, he told his supervisor that he goes out in public dressed as a woman a few times a month, appearing as "Donna."

After Oiler revealed this facet of his off-duty conduct to his supervisor, the supervisor reported the information to the president of Winn-Dixie's Louisiana operations. The president became concerned that if members of the public made the connection between the cross-dressing Donna and the Winn-Dixie delivery driver, Peter Oiler, they might decide not to patronize Winn-Dixie. After consulting the company's attorney, who evidently assured him that it was lawful to do so, the president directed that Oiler be asked to resign. When he refused, he was discharged.

Oiler sued under both Title VII and Louisiana's civil rights law. Because the federal court's jurisdiction is based on Title VII, Judge Africk's decision that Title VII does not apply removed the basis for federal jurisdiction, and the judge made no ruling on the potential application of state law.

The question Judge Africk faced may well be one of first impression. Although federal courts have been struggling since the 1970s with cases arguing that gay people or transsexuals should be protected from discrimination under Title VII, this may be the first case where a heterosexual, non-transsexual cross-dresser was seeking the protection of this law. In the circumstances, Africk fell back on the body of gay

and transsexual cases, in which most federal courts have refused to find any protection.

When Title VII was being debated in Congress in 1964, the main focus of attention was race discrimination. By the time the bill came up for floor consideration in the House of Representatives, early proposals to include sex discrimination had been abandoned. The proponents decided that their best chance for enactment would be to address directly the issue on which a national consensus had been forming — that race discrimination was wrong and should be illegal and not to muddy the waters with the controversial subject of sex discrimination. In an attempt to scuttle the bill, a conservative Representative from Virginia, Howard Smith, proposed a floor amendment to add sex to the list of prohibited grounds of discrimination. Like the bill's proponents, Smith believed that banning sex discrimination would be controversial enough to sink the bill. The sex amendment was successful, since enough liberals who supported banning sex discrimination voted for it together with those conservatives who thought its addition would sink the bill. But then the bill passed as amended, was sent directly to the Senate floor, and was passed without any modification of this language. The net result of this legislative history is that there are no committee reports from either house of Congress explaining what the inclusion of sex was intended to mean, and the floor debate did not make any mention of the scope to be given to that term.

In the absence of explanatory legislative history, a court interpreting a statute will try to give words the ordinary meaning that they would have had for the legislators. And this approach generally dooms any attempt to give an expansive meaning to sex in Title VII. Federal courts faced with this issue have uniformly ruled that sex in Title VII means "biological sex," and that it bans discrimination against women because they are women or against men because they are men.

As Judge Africk explained in his opinion, "In 1964, when Title VII was adopted, there was no debate on the meaning of the phrase 'sex.' In the social climate of the early sixties, sexual identity and sexual orientation-related issues remained shrouded in secrecy and individuals having such issues generally remained closeted. Thirty-eight years later, however, sexual identity and sexual orientation issues are no longer buried and they are discussed in the mainstream. Many individuals having such issues have opened wide the closet doors. Despite the fact that the number of persons publicly acknowledging sexual orientation or gender or sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word 'sex' in Title VII has never been clarified legislatively. From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed."

Africk also noted that as yet no bill has been introduced in either house seeking to amend Title VII or otherwise enact a federal law banning discrimination based on gender identity or cross-dressing. Oiler had placed much of his hope on "Price Waterhouse v. Hopkins", 490 U.S. 225 (1989), in which the Court held that an employer's reliance on sexual stereotypes in making a promotion decision was evidence of sex discrimination. In that case, a female candidate for partnership in an accounting firm was opposed by some partners because her behavior and appearance was deemed inadequately feminine and too brusque and masculine for a "lady partner." Following *Hopkins*, some lower federal courts have ruled that employees who suffer discrimination due to "gender non-conformity" may have a claim of sex discrimination under Title VII.

Africk did not find the analogy convincing for this case. "After much thought and consideration of the undisputed facts of this case," he wrote, "the Court finds that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity. The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna.'"

It would be easy to take offense at some of the wording in that paragraph, but it is clear from the context of the whole opinion that Judge Africk was adopting vocabulary presented to him by the expert witnesses who presented testimony in the case, and who did not agree among themselves about how to describe Oiler's situation. Some may particularly find offensive the word "disguise" used in this context. On the other hand, it is clear that Judge Africk found himself confronted by an unusual case of a type he had never seen before, and was struggling to produce an appropriate interpretation of the statute.

Indeed, Africk expressed discomfort with what the employer had done here. "In holding that defendant's actions are not proscribed by Title VII, the Court recognizes that many would disagree with the defendant's decision and its rationale. The plaintiff was a long-standing employee of the defendant. He never crossdressed at work and his crossdressing was not criminal or a threat to public safety. Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this Court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment."

In other words, the decision whether this kind of discrimination is wrong is a decision to be made in the first instance by the legislature, not the courts, and Judge Africk concluded that Congress had not made the decision when it approved the sex amendment to Title VII in 1964, at a time when most of the legislator would never have contemplated that they were voting to ban discrimination against cross-dressers. (At that time, appearing in public dressed as a member of the opposite sex was actually a crime in some parts of the United States.) Africk observed that the continuing legal battles over this issue have left Congress with an "open invitation" to do something about expanding the scope of federal law to protect sexual minorities from discrimination. He said that he "defers to Congress who, as the author of Title VII, has defined the scope of its protection."

Africk also rejected Oiler's alternative theory that the employer's policy against employing cross-dressers discriminates against men. Oiler contended that women who wore men's clothes were not dismissed. Africk acknowledged the evidence that women were allowed to work in Winn-Dixie's warehouse wearing flannel shirts and jeans, but disagreed with Oiler's contention that this was comparable. Africk pointed out that there was no contention that any of these women were transvestites who were attempting to present themselves as men, and thus they were not "similarly situated" to Oiler with regard to this issue.

For several years now, transgender rights supporters have been urging the proponents of the Employment Non-Discrimination Act, the bill that has been pending in Congress in one form or another since the mid–1990s, to add "gender identity" in order to make clear that passage of the bill would protect all sexual minorities, not just lesbians, gay men and bisexuals. But the legislative proponents of ENDA have so far refused to make such a change in the bill, expressing the same fears expressed by Title VII proponents in 1964 who sought to keep sex out of the proposed civil rights bill. It will be interesting to see whether a similar strategy might ensue if ENDA is ever brought to a vote in either house of Congress. Meanwhile, transgender activists have succeeded in getting a hand-

ful of states and many cities to amend their civil rights laws to include "gender identity" protection. In New York City, Oiler would have found protection under the municipal human rights law, recently amended to add this ground of protection. A.S.L.

Unregistered DP Could Not Qualify for Survivor's Benefits

In *Burke v. Kodak Retirement Income Plan*, the U.S. District Court for the Western District of New York denied Sally Burke pre-retirement survivor benefits she claimed were owed to her after her husband's death. The July 31 decision by Chief Judge Larimer discussed the necessary steps those in domestic partnership relationships need to take to qualify for benefits under the Kodak Retirement Plan. 2002 WL 31016419 (W.D.N.Y.)

Kenneth Burke worked for Eastman Kodak for 27 years. After Kenneth's death, Sally received a letter from a Kodak Benefits Administrator stating that she would be eligible for benefits if she was married to Kenneth for at least one year. Although the couple lived together for many years they were only married for about six months, so benefits were denied to her. On appeal of the decision, Sally's attorney claimed that she was eligible to receive the benefits as a domestic partner under the Kodak Plan Booklet, "You & Kodak." A Plan Administrator reviewed the appeal and denied it for not meeting the plan requirements of either a spouse or domestic partner, and Sally took the matter to federal court.

Under the Plan, two of the categories of survivors entitled to receive benefits are surviving spouse and domestic partner. However, Sally failed to meet the requirements of both. Kodak added domestic partners to the list of eligible beneficiaries on January 1, 1997. Under the Kodak Plan, eligible domestic partners are two people of the same or opposite sex in a spouse-like relationship who have met a list of requirements for at least one year prior to collecting benefits. Also, the Kodak Plan insists on an affidavit of domestic partnership being signed by both parties and filed with Kodak.

The court reasoned that Sally failed to meet the requirements of a surviving domestic partner under the Plan, because she and Kenneth had never filed an affidavit of partnership with Kodak. The court also noted that a Plan Administrator's decision may only be overturned if it is without reason, unsupported by substantial evidence or erroneous as a matter of law. Therefore, Sally's motion for summary judgment was denied and Kodak's cross-motion for summary judgment was granted. Kenneth and Sally Burke were aware that Kodak adopted a domestic partnership policy, but chose not to take steps to acknowledge their domestic partnership.

This case illustrates the importance of registering a domestic partnership with your employer. In order to qualify for benefits, Sally Burke and others needed to register their relationships or risk not being eligible for benefits. Kodak changed its policy in 1997 to promote equal treatment of employees regardless of sexual preference, however, one can not reap the benefits from that policy without registering the domestic partnership with Kodak first. *Tara Scavo*

California Appeals Court Upholds Peremptory Challenge of Gay Juror in Criminal Trial of Gay Defendant

In *People v. Zuniga*, 2002 WL 31054113 (Cal. App., 6th Dist., Sept. 16, 2002) (not officially published), the court upheld the second degree murder conviction of Richard Zuniga, a gay man, for the murder of Larry Stevenson, another gay man who was staying in Zuniga's apartment. Of particular interest is the court's upholding of a peremptory challenge against a potential juror who is gay, and the court's conclusion that various other errors did not prejudice the outcome of the case. Zuniga was sentenced to 16 years to life in prison.

Stevenson died of a deep stab wound. Zuniga at first claimed that Stevenson had fallen on a knife while preparing food in Zuniga's kitchen, after both men had been drinking. Forensic evidence suggested that the knife wound was not likely self-inflicted or the result of a falling accident. Although there was evidence of alcohol in both men, it was not so high as to suggest a drunken accident. At trial, a witness was allowed to testify without objection to a past domestic violence conviction of Zuniga with regard to a male partner, and the jury was given an instruction that appeared to rule out any possibility of juror nullification in this case.

Juror No. 17 from the jury pool spontaneously identified himself as gay during voir dire. The voir dire was extended, drawing in both the prosecutor and the judge. The gay juror exhibited significant sensitivity to the possibility of homophobia tainting a criminal trial of a gay man, and appeared perturbed about the responses of some of the other potential jurors to questioning by the prosecutor about their attitude toward a case where the defendant and victim were both gay. He reiterated that he would be particularly concerned about getting the "real truth" and the "absolute truth" and insisted that the "bar" had to be "set high" in terms of evidence against the defendant. The prosecutor exercised a peremptory challenge, and was in turn challenged by the defense. (Under California law, jurors may not be excused solely on the grounds of their sexual orientation.) In the ensuing proceeding to determine whether the peremptory challenge should be set aside, the prosecutor indicated his concern that the juror perceived the prosecutor as a bigot, that the juror seemed oriented toward the defense and would apply a standard of proof even more strict than the normal criminal standard of beyond reasonable doubt, in his quest for "absolute truth." The defense suggested that the prosecutor wanted to keep an articulate and aware gay man off the panel. The prosecutor asserted that the juror was very opinionated and outspoken, which would cut against his being able to work with the other jurors toward a unanimous verdict. In the end, the trial judge sustained the peremptory, and the court of appeals panel unanimously affirmed, finding that there were non-discriminatory reasons advanced by the prosecutor (and not directly contradicted by the defense) that would justify the challenge. A.S.L.

Nursing Home Had No Duty to Protect Lesbian Employee From Unfounded Charges of Sexual Assault by Patient

The question before the Tennessee Court of Appeals in *Lewis v. Life Care Centers of America Inc.*, 2002 WL 1489602 (July 12), was whether a nursing home supervising a nursing student owed a duty of care to the student if a female patient falsely accuses the trainee of rape and presses criminal charges after the patient learns that the student was a lesbian from a member of the staff of the nursing home.

The trial court had ruled that no duty of care had been breached because, even though the patient had made false accusations in the past, since the patient had not made accusations of this particular nature, such accusations were not foreseeable. The criminal charges were dropped before trial. It seems that the trial court in the instant action ruled that "all's well that ends well" and granted summary judgment to the nursing home. The Court of Appeals affirmed on the same grounds, in a rather cavalier decision.

Emily Lewis was a student at Nursetrainers, Inc., studying to be a Certified Nursing Assistant. As part of a longstanding program between Nursetrainers and Life Care Centers, Lewis was assigned to work under the supervision of other Certified Nursing Assistants to gain practical experience. On the date of the incident in question, Lewis was tending to a female patient, Lou Ann Harrelson, with advanced amyotrophic lateral sclerosis (ALS, also known as "Lou Gehrig's Disease"). Harrelson had a limited field of vision and a limited range of motion. Life Care's own records indicated that she was prone to make unfounded accusations about imagined grievances and about any changes in routine. Lewis was assigned to bathe Harrelson, and was left entirely alone to do so. After Harrelson was bathed and Lewis left, Harrelson appeared calm until another Life Care Center employee mentioned that Lewis was a lesbian.

Harrelson became upset, and accused Lewis of raping her in the shower. Criminal charges were filed but dropped before trial, on Lewis's motion.

The Court of Appeals decision states that at no time did Lewis do anything inappropriate to Harrelson. After this recitation of the facts, the Court of Appeals agreed with the trial court that since Harrelson had never made accusations of a sexual nature before, such complaints were not foreseeable. The Court of Appeals made clear that it was issuing a very fact-specific ruling. The relevant discussion took four lines of a three page decision and cites no prior authority at all on point. The only citations in this case referenced standards of review for summary judgment. One can hardly imagine a more perfunctory review of a trial decision. The court actually devoted more space in the decision to denying attorney's fees to Life Care with regard to oral argument which Lewis's attorney requested, but did not attend. (Could it be that Lewis was being punished for her counsel's failure to appear for an oral argument which they requested?) *Steven Kolodny*

HX Magazine Wins Distribution Victory in Federal Court

U.S. District Court Judge George Daniels granted HX magazine, a gay publication, and other co-plaintiffs a preliminary injunction against the City of New York, enjoining enforcement of a 1939 statute concerning street distribution. HX Magazine v. City of New York, 2002 WL 31040650 (S.D.N.Y. Aug. 13). Persons hired by plaintiffs were arrested after handing out free copies of the magazine on the street in front of gay clubs at night, charged with violating NYC Administrative Code sec.10–115(a), referred to as the "puller-in" statute. The law "prohibits public solicitation of passersby for commercial purposes." Plaintiffs challenge the law's constitutionality and seek relief for the deprivation of their First Amendment rights.

The court found that plaintiff must meet a two-prong test in order to be granted a preliminary injunction. First, plaintiff must prove that absent such relief, irreparable harm will be suffered; and second, either a likelihood of success on the merits or a serious question on the merits exists that requires litigation.

Judge Daniels wrote: "There is a presumption of irreparable harm where there is a governmental deprivation of First Amendment rights," including the right to distribute a publication. However, he added that "plaintiffs [in this case] cannot rely on past injury to meet their burden, but must prove a likelihood of future harm." The City contended that plaintiffs could not meet this burden because the police department has since implemented guidelines that restrict enforcement to conduct performed in an "aggressive manner." Under these guidelines, "prohibited behavior includes conduct intended to or likely to cause a reasonable person to… suffer unreasonable inconvenience, annoyance or alarm." Plaintiffs contended that distributing magazines and advertising flyers to people on the street does not constitute prohibited conduct under the statute. Finding the City's contention "unpersuasive," Judge Daniels stated, "these guidelines do not prohibit [enforcement], but merely attempt to restrict enforcement while still allowing subjective determinations of the type of conduct that constitutes aggressive behavior" and thus, can still penalize plaintiffs' constitutionally protected conduct.

Plaintiffs argued: "In 1976, the United States Supreme Court held that purely commercial speech, when not deceptive or misleading, is protected by the First Amendment." Here, Judge Daniels agreed with the plaintiffs, and holding that "the ordinance bans commercial speech which concerns lawful activity that is not misleading" and therefore, "the regulation is more extensive than is necessary to serve the asserted government interest [and thus] unconstitutional on its face."

Additionally, plaintiffs sought to certify a class action under Rule 23 of the Federal Rules of Civil Procedure, that consisting of all persons "(i) who have been or will be subjected by NYPD officers to defendants' policy, practice and/or custom of prohibiting the distribution of magazines and fliers on street corners and/or outside of bars and nightclubs in violation of the First Amendment; and/or (ii) against whom sec. 10–115 was enforced or will be enforced to prohibit such distribution." Plaintiffs, at this time, were only able to identify twenty-three persons who have received summons pursuant to the statute, and defendants have indicated that it would be difficult and burdensome to provide additional summons records. This was not a large enough group of plaintiffs to require class certification, according to Daniels, but, he wrote, "absence of such records may ultimately require inferences adverse to defendants' position in this lawsuit" but that "plaintiffs may renew their motion for class certification at a later date if the information they obtain or the records provided by defendants provide them with proper basis." Therefore, he denied plaintiffs' motion for class certification without prejudice. *Audrey E. Weinberger*

Civil Litigation Notes

Federal - 6th Circuit It may not be rocket science, but the procedural hurdles thrown in the path of pro se civil rights plaintiffs are quite daunting. In *Norris v. Diakin Drivetrain Components*, 2002 WL 31096744 (6th Cir., Sept. 18) (not recommended for full-text publication), a gay Tennessee man who suffered from same-sex harassment on the job was done in by the procedural complexities of Title VII and its interaction with state laws. Norris originally filed a sexual orientation discrimination claim with state and federal agencies, based on mistreatment by co-workers due to his sexual orientation. But neither Tennessee nor federal law bans sexual orientation discrimination. He did get the EEOC's right-to-sue letter, which is pro forma when they dismiss a claim, and he filed suit in federal court, alleging same-sex harassment in violation of Title VII. The problem, of course, was that his claim with the EEOC was for sexual orientation discrimination, a subject over which the EEOC has no jurisdiction. Therefore, his federal court claim had no administrative precursor, as required by the statute, and the magistrate to whom the case was referred recommended dismissal, was affirmed by the district court, and unanimously affirmed in this unofficially published decision by a unanimous 6th Circuit panel, which first voted to dispense with oral argument.

Federal — 6th Circuit Another chapter in the continuing legacy of *Bowers v. Hardwick*: In *Marcum v. McWhorter*, No. 98–00435, decided September 19, the 6th Circuit upheld the discharge of a deputy sheriff who was fired for engaging in an adulterous affair. As have several courts in recent years, the 6th Circuit relied on *Bowers v. Hardwick*, the Supreme Court's 1986 sodomy law decision, to find that engaging in adultery is not a constitutionally protected form of intimate association, and thus that the deputy sheriff has no valid constitutional claim against the sheriff for his discharge.

Federal - California On Sept. 12 a federal court jury in San Diego returned a verdict in favor of Karla Johnston, a lesbian, on her claim that she was subject to unlawful hostile environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964. From a brief description of the case in the BNA Daily Labor Report of Sept. 18 (No. 181, p. A–8), it appears that the harassment focused on her sexual orientation. The employer, Wal-Mart, had not yet announced whether it would appeal. The jury awarded $35,000 in economic damages and $500,000 in punitive damages, but ruled against Johnston on a wrongful termination claim. (The jury evidently believed the testimony that her discharge was for violating company rules unrelated to the harassment issue.) It would be interesting to see whether the 9th Circuit would uphold this verdict, in light of its decision in *Rene v. MGM Grand Hotel*, reported on page one of this issue of *Law Notes*.

Federal - Oklahoma Chief Judge Robin J. Cauthron of the U.S. District Court for the Western District of Oklahoma ruled on Sept. 17 that an Oklahoma City municipal ordinance giving city officials discretion to refuse permits for streetlamp banners "promoting any political, religious or social advocacy organization" or message was unconstitutional as applied to the

Cimarron Alliance Foundation, which had hung banners promoting gay and lesbian history month, after obtaining a permit, only to see them removed by city officials when the banners proved controversial. The city enacted the ordinance shortly after the banner incident, then rejected a permit application from another group seeking to promote a gay pride event. Cauthron found that the ordinance was vague enough to give the city room for content-based censorship, ordering nominal damages for the plaintiff and an injunction against enforcement of the ordinance. The decision had not been published as we went to press. *Daily Oklahoman*, Sept. 17.

California In the first case brought under the Los Angeles civil rights ordinance on gender identity, a settlement has been reached allowing a male transvestite to attend a beauty school, according to a Reuters report on September 26. The suit was brought by attorney Gloria Allred in Los Angeles Superior Court on behalf of a John Doe plaintiff otherwise identified in the story as "Sandy." Terms of the settlement, apart from Sandy's right to attend the school, were not disclosed.

Indiana The *Washington Blade* reported on Sept. 13 that a U.S. District Judge in Indiana, Larry McKinnery, issued a ruling early in September requiring officials at Franklin Central High School to allow students to form a gay-straight alliance. Unfortunately, it appears that students who wanted to start the club had all graduated since the matter went to a court ruling, and nobody has yet stepped forward to get the club started.

New York In *Matter of Adoption of Krista*, an unpublished decision rendered on September 3, 2002, Westchester County Family Court Judge Joan O. Cooney had to decide whether a lesbian co-parent needs to go through the process of being individually certified as a prospective adoptive parent before the court will entertain her petition to adopt a child previously adopted by her partner. Under the New York adoption statute, if a parent remarries, the new step-parent can petition to adopt after a year of residing with the children and is not required to go through the certification process. "Since adoption in this state is regarded as being 'solely the creature of statute … the adoption statute must be strictly construed,'" wrote Cooney, quoting from *Matter of Eaton*, 305 N.Y. 162, 165, and finding that the partner could not be considered a "step-parent" since New York does not recognize same-sex marriage. She noted that in this case the adoptive parent, when going through the certification process, never mentioned her partner, and did not designate her as Krista's legal guardian, designating instead her sister and brother. "Therefore, since the agency did not know that petitioner lived in the household at that time and since petitioner was not designated as legal guardian, petitioner was never screened" during the initial adoption process. Cooney indicated that she would have considered waiving the certification process on the co-parent adoption had the co-parent been included in the initial certification process. "However, it is evident that the waiver of the certification process in this matter is not appropriate as petitioner's fitness as an adoptive parent was never reviewed." LeGaL Member Lisa Ayn Padilla represents the petitioner and brought the court's unpublished opinion to our attention. A.S.L.

Criminal Litigation Notes

California In *People v. Doktoreztk, 2002 WL 31009372 (Cal. Ct. App., 2nd Dist., Sept. 9, 2002) (not officially published), the court of appeals rejected the defendant's argument that trial evidence was insufficient to support the trial court's finding that he had violated the hate crimes law by beating up the victim because of her sexual orientation. Doktoreztk and a friend named "Gallo" picked up a woman on the street for sex and brought her to a motel room. It turned out that the woman, Dominique, was a male-to-female transsexual, age 17, who was undergoing hormone therapy and identified and dressed as female but had not had sex reassignment surgery. During the subsequent encounter, Gallo accused Dominique of being a "faggot," and when she denied being a man, a fight ensued, "during which appellant and Gallo forced Dominique to orally copulate them, beat her, and removed most of her closed." Then they kicked her out of the motel room, which the appellant warning her that he would beat her up if he saw her again on the street. Appellant claimed that his behavior was motivated by being lied to and deceived, but not due to any bias. The court of appeals found that the jury could, based on the facts presented at trial, conclude that the crimes were motivated by Dominique's sexually orientation, emphasizing the use of the epithet "faggot" and the specifically sexual mistreatment of Dominique by the men.*

Nebraska The *Omaha World-Herald* (Sept. 24) reports that Roger Van, convicted of several felonies in an SM case, has apparently fled the jurisdiction while out on $100,000 bail rather than face a sentencing date before Wayne County District Judge Robert Ensz, who was supposed to impose sentence on September 23. Van faced a maximum prison term of 85 years. *Law Notes* previously reported the details of his trial and conviction. Van, an SM master with a presence on the internet, was known to neighbors as a friendly florist and local real estate investor. His victim, who arranged to have an SM scene in Van's basement dungeon, changed his mind after two days and withdrew his consent, but Van prolonged the scene for an additional week before his friend/employee/cohort helped the victim to escape. A local businessman posted the bail bond on Van's behalf, and stood to lose it if Van did not turn himself in within 72 hours of the scheduled sentencing hearing. Nebraska state police have initiated a manhunt. ••• The Sept. 25 issue of the *World-Herald* reported that Van was still at large, considered dangerous, and that there were few clues for police, other than that he had taken credit cards with him. Police were hoping to track him down through credit card transaction records. A.S.L.

Legislative Notes

California Gov. Gray Davis signed S.B. 1661 on Sept. 23, for the first time extending a new benefit to domestic partners in the context of a broader effort to extend a benefit of general significance to California employees. S.B. 1661 creates a mechanism through which employees in California will, through a payroll tax, fund paid leave to workers who need to care for a seriously ill spouse, domestic partner or other family member (including children and parents). The program would provide employees with 55% of their regular salary for up to six weeks per year. ••• Earlier in the month, Davis signed a measure amending the intestate succession laws in California to allow equal treatment as between registered domestic partners and spouses, and another measure that will allow localities to extending survivor's benefits to domestic partners of government employees. Little by little, California-style domestic partnership is moving closer to the comprehensive civil union status in Vermont.

California — The Sacramento County Board of Supervisors voted on Sept. 11 to allow county employees to purchase insurance coverage for their domestic partners on the same basis as they now obtain insurance for their spouses. The policy costs the County nothing, since employees are required to pay the cost of ensuring their partners, the advantage to employees being eligibility and group rates, making the coverage both obtainable and more affordable than purchasing individual coverage. The vote was 3–2. In order to qualify, employees must register their partnership with the County. According to the *Los Angeles Times* (Sept. 12), the measure makes Sacramento County the 14th county in California to have a domestic partner benefits plan; 19 cities also offer such benefits to their employees.

Colorado In Glendale, Colorado, beginning Nov. 1 gay city employees can apply for health care coverage for their domestic partners. The City Council voted unanimously in favor of this move on September 10. *Denver Post*, Sept. 14.

Kansas The Topeka City Council considered a measure at its September 10 meeting that would increase penalties for bias-related crimes. As presented to the Council, the grounds of bias included "sexual orientation, gender identity or expression," but an amend-

ment was passed by an 8–1 vote to delete "gender identity or expression" from the measure. Then the measure as amended was passed by a vote of 7–2. After finishing up on this measure, the Council took up a proposal to amend the city's civil rights law to insert the terms "sexual orientation, gender identity or expression" into the list of prohibited grounds of discrimination in housing, employment and public accommodations, but that measure went down to defeat by a 5–4 vote. *Topeka Capital-Journal*, Sept. 11 & 12.

Florida The Miami-Dade County gay rights ordinance survived a referendum repeal vote on Sept. 10 by a clear but slender margin. According to final figures reported by the BNA Daily Labor Report on Sept. 19, the tally was 52% against repeal, 47% in favor, much less than the 20 percent margin measured in a pre-election poll. Proponent of repeal yelled foul, claiming that a majority of the voters supported repeal but that the confusion of new voting machines and inadequately trained workers at polling stations combined to disproportionately disenfranchise Hispanic voters, whom polls showed to be most supportive of the repeal. They vowed to begin petitioning to put the measure on the ballot again. The vote came 25 years after a similar referendum battle resulted in the repeal of an earlier gay rights ordinance, which had been one of the earliest such measures enacted in the U.S.

Maine Westbrook, Maine, may face a city-wide referendum to repeal a recently enacted gay rights ordinance, if the petition signatures submitted to the city clerk by the Christian Coalition of Maine hold up. *Portland Press Herald*, Sept. 10.

New Jersey A law that requires school districts to take steps against bullying, including on the basis of sexual orientation, has been enacted in New Jersey, according to a Sept. 13 report in the *Washington Blade*.

New York — Buffalo The Common Council of Buffalo, New York, voted 12–1 on Sept. 17 to amend the city's human rights code to ban discrimination on the basis of gender identity and expression. The measure was passed with the support of the mayor, and when finally enacted will be the third such ordinance in New York State. Rochester and New York City had previously added similar measures to their human rights laws.

Pennsylvania New Hope, Pennsylvania, a small town north of Philadelphia that has become know as a magnet for gay residents, became the smallest jurisdiction in the state to ban sexual orientation discrimination, by unanimous vote of the town council on Sept. 11. *Associated Press*, Sept. 12.

Washington State — Tacoma Proponents of repeal of a recently-enacted gay rights law have persuaded a judge to modify the wording of the ballot question in such a way as to lure people to vote for it in the belief that doing so is necessary to create an exemption from the law for religious organizations. The back story on this is a bit complicated. It seems that the city council reluctantly put together a ballot question, as it was required to do due to a successful petition drive. The petitioners argued that the question placed on the ballot by the Council was biased, and would lure voters into rejecting the repeal. They filed a lawsuit seeking changes that would amplify certain terms in the law and that would highlight that the proposition would expand the religious exemption. Although the judge, Pierce County Superior Court Judge Marywave Van Deren, agreed to add a "clarification" concerning the religious exemption, she rejected the need for amplification as to the meaning of "gender identity." At any rate, Judge Van Deren's ruling is non-appealable, and now proponents of the gay rights law fear the reworded ballot question provides an advantage to the repeal forces. *Tacoma News Tribune*, Sept. 26. A.S.L.

Law & Society Notes

A Museum of Sex has opened in New York City. Located at 5th Avenue and 27th Street, the Museum's first exhibit, "NYC Sex: How New York City Transformed Sex in America," includes extensive documentation of gay sexuality throughout the city's history. *Chicago Tribune*, Sept. 15.

Bowing to pressure from religious fundamentalists, the United Way of the Plains is modifying its fund-raising campaign to allow donors to exclude particular recipients. The pressure came from publicity to the policy of Big Brothers Big Sisters to require local chapters to adopt non-discrimination policies that would allow gay people to volunteer to be mentors to children. The charity announced that it wanted to accommodate the religious views of donors who don't want their money going to a gay-supportive cause. Of course, this policy also means that donors who disapprove of the Boy Scouts' anti-gay policy could restrict their donations as well. *Wichita Eagle*, Sept. 5.

The YMCA in Louisville, Kentucky, has decided to extend family membership rates to same-sex couples and other unmarried cohabiting adult couples, beginning in 2003. Without any specific mention of homosexuality, the new policy merely provides that family rates are available to "up to two adults with or without dependent children residing at the same address." Family rates have previously been available only to traditionally-married couples or single parents with their children. *Louisville Courier-Journal*, Sept. 3.

Belo Publishing Company, owner of the *Dallas Morning News*, will offer domestic partner health benefits to employees, according to a Sept. 17 report in *Editor and Publisher*. A.S.L.

Quebec Court Rules for Same-Sex Marriage, But Delays Remedy

Confirming predictions that were made during the summer when the Ontario Superior Court ruled in favor of same-sex marriage, Justice Louise Lemelin of the Quebec Superior Court issued a similar decision on September 6 in the case of *Hendricks and LeBoeuf v. Attorney General of Quebec*, Case No. 500–05–059656–007. In common with the Ontario opinion, Justice Lemelin was unwilling to issue an order requiring immediate compliance by the government, instead adopting the same 2–year window in which Parliament is to devise a remedy that respects the equality rights of same-sex partners as guaranteed by the Charter of Rights.

The ruling comes amid revolutionary change in family law in Quebec respecting same-sex partners. On June 7 of this year, the Quebec legislature unanimously passed a civil union bill, which was described by Egale Canada, the nation's lesbian and gay rights organization, as "the most far reaching piece of registered domestic partnership legislation in Canada." From Egale's description, the Quebec law sounds very similar to Vermont's Civil Union Act of a few years ago, essentially extending to same-sex couples who formalize their relationship all the rights available to married opposite-sex couples under the laws of Quebec. Of course, this necessarily excludes rights that they would have solely under federal law, but in Canada, the federal government has also enacted a series of measures extending rights to same-sex couples, so registered partners in Quebec would come closer to the full panoply of marriage rights than would civil-union couples in Vermont.

On the other hand, even this combination of local and federal law does not equal full marriage rights, and Justice Lemelin was sensitive to this point when the government tried to argue that Hendricks and LeBoeuf should be satisfied with the current situation. According to a translation of portions of the decision (which was issued in French) distributed by Egale, she quoted from a dissent in an earlier Canadian decision, "One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada four decades after its much heralded death in the United States."

Rejecting the government's argument that gays should not be able to marry because their sexual relations do not result in children, she exclaimed, "We don't deny marriage to elderly women!" She asserted that marriage "confers a social status," and that no amount of domestic partnership rights could confer the same status.

Thus, she concluded that "the definition of marriage creates a discriminatory distinction by excluding same-sex couples. Bearing in mind all the contextual factors, this distinction undermines human dignity and denies the applicants' equality rights under Section 15 of the Charter."

Justice Lemelin also rejected the argument that recognizing same-sex marriage would detract in any way from the existing institution of heterosexual marriage, and also rejected the argument that the religious aspects of marriage preclude granting it to same-sex couples. "No one would deny that religions have played an important role in marriage," she wrote, "indeed, their beliefs and their rites have framed the institution. Secularization of marriage, however, requires government to recognize that the institution is a civil one, and cannot be defined exclusively by religion. We are no longer living in the homogeneous society of a century ago. Multiculturalism, diverse religious beliefs, and the secularization of many societal institutions all testify to the openness of Canadian society. The state must ensure respect for each citizen, but no group has the right to impose its values on others or define a civil institution."

She also found that many of the government's arguments against same-sex marriage were fatally undermined by its own actions in passing the civil union bill, since it clearly recognized that same-sex partners could and did form lasting relationships of a family nature that were entitled to state recognition and support. However, she drew back from ordering the state to grant marriage licenses immediately, writing, "The Court concludes that it is for the Legislature and not the Court to choose the appropriate means of correcting the discriminatory nature of Sec. 5 of the Marriage Act. The Legislature has already been put on notice that there is no consensus about the criterion of heterosexuality. Such reforms take time, and one cannot strike down the only definition of marriage, leaving an indefinite legal vacuum while we wait for Parliament to choose its approach. Taking into account the nature of the right being denied and the whole of the context, the Court grants Parliament a 24–month delay, and therefore suspends its declaration of invalidity for this period."

The government's announcement on September 9 that it would appeal brought an announcement as well from Justice Minister Cauchon that the government had to show "leadership" on this issue, as to which Canadians are sharply divided. Recent polls show the public almost evenly split over whether the government should open full marriage rights to same-sex couples, with younger respondents being more favorable than their elders. Cauchon called for hearings by a parliamentary subcommittee to begin in October and expressed hope to have a recommendation for legislation before the House of Commons by the end of this year. But the government will appeal the court rulings because it believes this is not a matter that should be left solely in the hands of the courts. A spokeperson for Minister Cauchon told the *Canadian Press*, "Fundamentals are at stake and we believe it is important to clarify the reach of the judgments." An appeal is also on file of an early decision from the British Columbia courts that rejected a same-sex marriage suit.

The government's appeal papers came in for some press ridicule, however, when they were filed a few weeks later. The best argument the Attorney General's Office could come up with was that marriage needed to be reserved for the purpose of procreation and not extended to same-sex couples who are unable to procreate. The absurdity of this argument was brought home by letters to the editor and editorials about gay parents and childless straight married couples. A.S.L.

Other International Notes

Canada - Quebec A Human Rights Tribunal in Quebec awarded $6,000 in damages to a former waitress who proved that she had been subject to harassment because she was a lesbian. The fine against a Dunkin' Donuts franchise restaurant was divided as half for damages and half for lost wages. *Hamilton Spectator*, Sept. 25, 2002.

China Canada's *National Post* reported on Sept. 27 that a Chinese court rejected a compensation claim from a woman whose husband turned out to be gay and left her. Under Chinese law, if the husband had run off with another woman, his wife would have been entitled to compensation from the government, but the court decided that as the Chinese law on the subject makes no provision for cases of homosexuality, it was powerless to award compensation.

England The announcement of the newly-designated gay-friendly Archbishop of Canterbury, Rev. Rowan Williams, has caused consternation among religious conservatives in England. A conservative group within the Anglican Church, calling itself "Reform," urged that Williams withdraw from the position (which he is set to assume at the end of the year) if he is not willing to reaffirm the Church's traditional teaching that all non-marital sex, including gay sex, is sinful. Williams' reaction was to assert that the issue of sexual ethics was not so central or prominent to the job as his critics contended. *Daily Telegraph*, Sept. 26.

Switzerland Citizens of the Swiss canton of Zurich voted by an overwhelming margin on September 22 in favor of a proposal to establish a civil registration system for same-sex couples. Registration will give them the same tax, inheritance and social security benefits as other married couples have, according to news reports. Zurich is the first Swiss canton to extend legal recognition to same-sex partners, and one of the few jurisdictions in the world to do so as a result of an affirmative vote of the populace. It was reported that 63 percent of the voters supported the measure. *Miami Herald*, Sept. 23.

International Law Delegates from Australia, Canada, Croatia, Denmark, Finland, the Netherlands, Norway, Spain and Sweden to the Hague Conference on Private International Law have proposed that the upcoming 20th Session of the Conference engage in "an exploratory examination of private international law issues related to registered partnerships and non-marital cohabitation," and that "a working group be set up for interested member States within the Hague Conference, whose task it would be to study the possibility of establishing common principles of private international law in this field, or even the feasibility of drawing up a multilateral instrument, and make relevant recommendations to the 21st Session." The proposal refers back to a recommendation that this be done emanating from the 5th European Conference on Family Law which was held in March 1999 at the Peace Palace at The Hague.

Brazil According to a report posted to the internet by Rex Wockner, an appellate court in Brazil has decreed that the government must recognize a lesbian couple, united under a French "pact civile," for immigration purposes. The matter involves a French woman and a Brazilian woman who met in France and formed a legally-recognized partnership under French law, after which the Brazilian woman was granted French residency rights. Then the couple decided to move to Brazil, but encountered opposition from the government to recognizing the French woman as entitled to family status for immigration purposes. The court reportedly based its decision on the principle of international reciprocity for family status determinations.

Egypt The International Gay and Lesbian Human Rights Commission reports that the Boulak Appeals Court of Misdemeanors has reversed the conviction of four men, who had been sentenced to three years in prison for consensual homosexual behavior. The appeals court said evidence was lacking to support the convictions, noting that the prosecutor had never really investigated the charges and that forensic examinations did not show that two of the defendants ever engaged in anal intercourse. IGLHRC notes that it condemns forensic examinations of this type on humanitarian grounds. A.S.L.

Professional Notes

LeGaL Member Daniel O'Donnell won a hotly contested primary election for the Democratic nomination to the New York State Assembly representing a district on the Upper West Side of Manhattan on September 10. In this area, the Democratic nomination is tantamount to election, barring an unprecedented upset. If elected, O'Donnell would become the first openly-gay man to serve in the New York State Assembly, where Deborah Glick now serves as the only openly-lesbian member. Tom Duane, a candidate for re-election, is the only openly-gay person serving in the New York State Senate.

LeGaL Member Rosalyn H. Richter, a New York City Criminal Court Judge who has recently been sitting as an Acting Justice of the New York Supreme Court in New York County, was nominated by the Democratic Party for one of six open seats on the Supreme Court. Justice Richter was one of two openly-gay candidates who were recommended by this year's Democratic Supreme Court screening panel, and was nominated at a Judicial Nominating Convention held on September 19. (There was reportedly a large contingent of openly lesbian, gay, transgender, delegates who were elected to the Nominating Convention during the Sept. 10 primary election, mostly in uncontested races in which they were nominated by local political clubs.) When elected, Justice Richter would become the fourth openly lesbian or gay person elected to the New York Supreme Court in New York County.

Another openly gay lawyer, David N. Cicilline, won a contested primary in Providence, Rhode Island, to become the Democratic party's candidate for mayor. According to the *Providence Journal* (Sept. 11), Cicilline, 41, is a criminal defense attorney who has been an ardent gay rights advocate as a state legislator representing an East Side district in Providence. His primary campaign did not, however, center on gay issues. In a field of 4 candidates, he earned 53% of the vote. A.S.L.

AIDS & RELATED LEGAL NOTES

California Appeals Court Appears to Contradict Itself In Determining Standards for Mandatory AIDS Testing of Criminal Defendants

In Court of Appeal, Fifth District, California, sweat transmitted from a criminal defendant to the peace officers attempting to restrain him is found to be a "bodily fluid capable of transmitting HIV" and is sufficient evidence to compel a defendant to submit to AIDS testing. *People v. Hall*, 124 Cal. Rptr. 2d 806 (Sept, 5, 2002). However, just nine days earlier, the same court (with two of the three judges from the *Hall* case sitting), found that there was no probable cause to order a defendant to submit to AIDS testing where he had been found guilty of lewd and lascivious behavior by touching the genitals of a 5 year old girl. *People v. Slack*, 2002 WL 198714 (Aug. 27, 2002).

In *Slack*, Justices Levy, Ardaiz and Detjen unanimously found that the trial court erred in ordering Slack to submit to AIDS testing. In 1997, Slack was living with his sister, her boyfriend and their three children. One morning, Slack was playing with his 5 year old niece. Slack was tickling the niece. At one point, Slack's nephew noticed that Slack had pulled a blanket over himself and the niece. The nephew thought this was strange and reported the behavior to his mother. The mother investigated and, after talking to her daughter (Slack's niece), the mother determined that while under the blanket, Slack had put his hand underneath the niece's pajamas and underwear and rubbed her "private."

In *Hall*, Justices Detjen, Ardaiz and Buckley unanimously upheld the order compelling Hall to submit to AIDS testing. Hall was on trial for unrelated crimes. At the conclusion of the trial, the jury found Hall guilty. Upon hearing the verdict, Hall went ballistic. Despite the restraints he was already wearing, two peace officers and at least one of the jurors, who had just convicted him, undertook to try to restrain Hall. In the process, the peace officers received abrasions about their faces and knees. The peace officers claim that during the struggle, Hall spat on them and Hall's sweat came into contract with the peace officers.

In California, a court may not order mandatory AIDS testing except where specifically authorized by statute. In *Slack*, mandatory AIDS testing was ordered by the trial court pursuant to California Penal Code section 1202.1. This section provides as follows:

"(6) Lewd or lascivious acts with a child in violation of Section 288, if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. For the purposes of this paragraph, the court shall note its finding on the court docket and minute order if one is prepared."

The trial court did not make a finding of probable cause and simply ordered Slack to submit to AIDS testing. Slack did not raise an objection at the time the order was issued. On appeal, Slack argued that there was no finding of probable cause made on the record to support the court's order directing him to submit to AIDS testing. The People argued that, by failing to object to the order when issued, Slack waived his right to raise the issue on appeal. The Court of Appeal disagreed with the People, stating that Slack would not be able to raise the issue on appeal if he was now, for the first time, objecting to the sufficiency of the evidence upon which the finding of probable cause was made. However, in this instance, Slack's challenge to the order was purely legal. Because Penal Code section 1202.1 specifically requires the court to note the basis upon which probable cause is found in the court docket and minute order, which was not done by the court below, there is nothing in the record to support the order compelling Slack to submit to AIDS testing. Accordingly, the court vacated the order requiring Slack to submit to mandatory AIDS testing.

In *Hall*, the mandatory AIDS testing was ordered pursuant to Health and Safety Code section 121060 which provides, in pertinent part, as follows:

"Any person charged in any criminal complaint filed with a ... court ... in which it is alleged in whole or in part that the defendant ... interfered with the official duties of a peace officer ... by biting, scratching, spitting, or transferring blood or other bodily fluids on, upon, or though the skin or membranes of a peace officer ... shall in addition to any penalties provided by law be subject to an order of a court having jurisdiction of the complaint or petition requiring testing as provided in this chapter."

Under Health and Safety Code section 121060, a finding of probable cause is also necessary prior to ordering the defendant to submit to AIDS testing. At trial, one of the peace officers testified that during the struggle he put his arm around Hall's neck and head. Hall actively resisted and did not stop until he was brought to the floor and had his hands restrained with handcuffs. The peace officer testified that Hall's hands were "very sweaty." Because the peace officer had suffered an abrasion n his head and a scrape on his knee during the altercation, the court found that it was reasonable to infer that Hall's sweat may have had contact with the peace officer's wounds.

Without making any findings with respect to whether AIDS could be transmitted through sweat, the Court of Appeal instead concentrated on whether sweat was a bodily fluid within the meaning of Health and Safety Code section 121060. This was a question of first impression in California. While noting that other statutes authorizing AIDS testing limited the definition of "bodily fluids" to include only

those fluids identified by the federal Centers for Disease Control of State Department of Health Services as being capable of transmitting HIV, section 121060 had no such limiting language. As a result, the court turned to the dictionary to determine whether sweat was a bodily fluid. Based upon the dictionary definition of sweat, the Court determined that there was probable cause under section 121060 to order Hall to submit to AIDS testing.

Two different California statutes, both of which set standards for finding probable cause to order AIDS testing, with two drastically different results. Arguably, Slack, in touching his niece, was likely to transmit his sweat to her. However, this question is not even raised because for victims of lewd and lascivious behavior, the bodily fluid exchanged, if any, must be capable of transmitting HIV before a finding of probable cause to order AIDS testing can be made. However, for a peace officer, who in the course of his duties is exposed to the sweat of another, the defendant may be ordered to submit to mandatory AIDS testing without any evidence that HIV can be transmitted through sweat. It is important to note that in *Hall*, the AIDS testing was done before the appeal was perfected thus rendering the issue moot. The court nevertheless heard the appeal and issued its decision because the case raised "questions of statewide interest."

This is really an outrageous result. It is amazing that within ten days of each other, two decisions can come out of the same court (with two of the three Justices being common to both decisions) with such diametrically different rulings with respect to AIDS testing. As a result of the *Hall* decision, any time a peace officer gets into a struggle with a defendant, there would seem to be probable cause to conduct mandatory testing for AIDS. It makes absolutely no sense to order a defendant to submit to AIDS testing where the only bodily fluids exchanged are incapable of transmitting HIV. Essentially, the *Hall* decision opens the door to mandatory AIDS testing for any defendant whose sweat comes into contact with a peace officer. *Todd V. Lamb*

Punitive Damages Not Available for Violation of Illinois HIV Confidentiality Law

The town of Fairview Heights, Illinois, 10 miles east of St. Louis, was abuzz in 2000 with the news that Jane Doe's husband had infected Jane Doe with HIV. The town received the news from Dr. Santosh Chand, a local practitioner who, in violation of ethical rules and the Illinois AIDS Confidentiality Act, had spread the word. Dr. Chand had even advised her patients to avoid Jane Doe so as to contain the contagion. A trial court convicted Dr. Chand of violating the Act, but the Fifth District Appellate Court threw out all punitive damages, and ordered a new trial to specify violations of the act and to prove actual damages resulting from Dr. Chand's disclosure. *Doe v. Chand*, 2002 WL 31009312 (Ill. App. 5th Dist. Sept. 4, 2002).

After finding out that her husband had HIV, Jane Doe went to Dr. Chand to get an HIV test for herself. After being tested, she called the doctor several times to find out the results, but was told that they were "not in." She finally learned got the news from her sister, also a patient of Dr. Chand, with whom the doctor had shared the results. Doe had HIV.

The doctor's excuse for informing Doe's sister was that she thought it better that Doe get the news from a family member. However, Chand also spread the news to a variety of other patients, and to her staff. In one case, Chand recommended that an acquaintance of Doe's stay away from her because she had AIDS. In another situation, a woman tested positive for a sexually transmitted disease; when the woman refused to believe the test results, the doctor said she "was just like Doe, who did not want to believe that she had AIDS." After learning of Chand's disclosures, Doe was treated for emotional problems by an art therapist, and for HIV by another doctor, who described Doe as suffering from anxiety and depression largely caused by Chand's disclosures.

The trial court, in a non-jury trial, found numerous violations of the AIDS Confidentiality Act, some negligent, some intentional, some reckless. The court awarded $600,000 in actual damages and $300,000 in punitive damages.

The AIDS Confidentiality Act addresses damages. It allows (1) the greater of $1,000 or actual damages against anyone who negligently violates the Act; (2) the greater of $5,000 or actual damages against anyone who intentionally or recklessly violates the Act; (3) reasonable attorney fees; and (4) "such other relief, including an injunction, as the court may deem appropriate." 410 Ill. Comp. Stat. 305/13. Punitive damages are not specifically allowed, and the appellate court concluded that "such other relief" did not include punitive damages. Because the Act specifically allows greater liquidated damages for intentional conduct than for negligent conduct, the legislature already provided punishment for greater levels of misconduct. Therefore, punitive amounts beyond liquidated damages or actual damages are not authorized.

As for actual damages, the trial court did not say what they were for. It did not specify what the violations were, how many there were, or which ones were negligent and which intentional or reckless. Doe did not submit any evidence or seek compensation for any medical bills, lost wages, or other out-of-pocket expenses. Therefore, the record does not support a finding that Doe's actual damages were $600,000, and a new trial on damages is required.

One judge dissented on the issue of actual damages, feeling that the amount is proper in relation to the seriousness of the charges, which "speak plainly to a physician run amok.... This case is all about betrayal — the betrayal of a patient and the betrayal of professional duty and trust.... [H]ow [could] a person ... ever inflict a deeper wound than the one inflicted in this case.... Dr. Chand ... told family, friends, and fellow patients that Jane Doe was dying from a deadly disease. She also warned that being in her presence was a dangerous act. She suggested that Jane Doe should be completely avoided, as though AIDS could be contracted by airborne vapors. Dr. Chand actually pursued a course to effect isolation, labeling Jane Doe a social outcast. She had just as well condemned her patient to a leper colony." Alan J. Jacobs

HIV Exposure Defendant Not Prejudiced By Admission

The Missouri Court of Appeals, in an unpublished opinion, held that a trial court's error, allowing testimony about how the defendant first contracted HIV before the jury, did not prejudice the outcome of his trial for recklessly exposing another to HIV. *State v. Yonts*, 2002 WL 31007957 (Mo.App. S.D., Sept. 6).

After getting an HIV+ diagnosis and a doctor's counsel on safe sex practices, David L.Yonts ejaculated into and had repeated unprotected sexual intercourse with J.H. Yonts first told J.H. that he was HIV-negative, later admitting that he was positive but "could have safe sex because of the medication" he was taking. J.H. only learned that no medications prevent HIV transmission when she got tested (negative). On cross-examination, the prosecutor asked Yonts how he contracted HIV. Defense counsel's objection on the basis of relevance was overruled. Yonts replied that while he didn't know, he "wasn't a very good boy," but "wasn't very promiscuous sexually either."

The sole issue on Yonts' appeal of the conviction was whether the court's admission of the question and answer, which the Court of Appeals concedes was both irrelevant to the issue at trial and beyond the scope of the prosecutor's examination-in-chief, led the jury to infer that Yonts contracted HIV through "some bad behavior on his part," and was therefore so prejudicial as to deprive Yonts of a fair trial. Noting that there is no reversible error where other evidence establishes "essentially the same facts" as improperly admitted evidence, the Court of Appeals focused on Yonts' prior admission to a conviction for distribution of a controlled substance, and his undisputed extra-marital affair with J.H. The court reasoned that such evidence was more likely to lead a jury to conclude that Yonts contracted HIV by needle or "pro-

miscuous" sex than was his answer to the prosecutor, particularly since the prosecutor didn't refer to the question again. The court also noted that there was ample evidence to convict Yonts, and the jury selected a one year prison sentence. The sentencing available ranged from a fine to five years' imprisonment. *Mark Major*

Georgia Appeals Court Holds Risk Trumps Confidentiality

In a case of first impression under Georgia's HIV confidentiality statute, the Court of Appeals of Georgia ruled that a doctor who performed an HIV test for a dental hygienist who was his patient had a right to notify the hygienist's employer of the positive test result, over the objections of the hygienist. *Waddell v. Bhat*, 2002 WL 31109005 (Sept. 24).

Spencer Waddell has a college degree in dental hygienics. He worked in a variety of non-health care jobs for several years. In 1988 he learned he was HIV+ after donating blood and being notified of his test result. In 1993, he began to work as a dental hygienist for the first time. Although he knew he was HIV+, he did not notify his employer or any of his patients. One of the perks of his job was getting free dental care at the clinic where he worked. He did not disclose his HIV+ status in the capacity of a patient, checking the "no" box on the patient intake form asking that question. He was also a surgical patient several times, but never disclosed his HIV+ status to any of the surgeons or other healthcare workers who were treating him. In 1997, he visit Dr. Bhat seeking treatment for a sore throat. Bhat asked him to consent to an HIV test, and Waddell agreed. When the test came back positive, Dr. Bhat, who knew Waddell worked as a dental hygienist, asked for the name and phone number of his employer, so that Bhat could tell the dental clinic about Waddell's HIV+ status. At first Waddell refused to give Bhat the information, stating that there was no problem with HIV exposure at the clinic. Ultimately, Waddell gave in and provided the information, later testifying that he felt like he was "in a corner" and he "wanted to get out of there." Bhat notified the employer, who suspended Waddell with pay while considering what to do. Although the employer could have terminated him for failing to disclose his status, instead Waddell was offered employment as a receptionist, but he declined such employment.

Waddell then filed a discrimination charge under the ADA, which he lost spectacularly. *See Waddell v. Valley Forge Dental Associates*, 276 F.3d 1275 (11th Cir. 2001). In its ruling, the 11th Circuit found that an HIV+ dental hygienist posed a significant risk to patients and co-workers, and thus the dental clinic was justified in removing him from providing dental services to its patients. Dr. Bhat's concern had been as much about Waddell as a patient of the clinic, and this is the greater concern, really, because transmission from patients to dental workers is more of a risk than transmission in the other direction.

Having failed at his discrimination suit, Waddell sued Dr. Bhat under OCGA sec. 24–9–47, Georgia's HIV confidentiality law. Waddell claims that Dr. Bhat was prohibited from communicating information about Waddell's HIV test result to Waddell's employer without Waddell's consent. The court of appeals, affirming the trial court, disagreed with this claim.

Writing for the court, Chief Judge Blackburn observed that the legislature sought to achieve a balance between confidentiality rights for the HIV+ individual and the need for information by health care providers rendering services. Waddell was not just an employee of the clinic, he was also a patient. (He had received dental services from a clinic dentist just days before going to Bhat.) Furthermore, when Waddell was tested, he signed a consent form authorizing Bhat to disclose his HIV+ status to other health care workers who were providing services to Waddell, so Bhat was covered in terms of having written consent. That Waddell's dentist was also his employer did not change the equation, as far as the court was concerned. Quoting extensively from the 11th Circuit's analysis of Waddell's ADA claim, the court concluded that the dental clinic had a right to know about Waddell's HIV status, and that the Georgia statute not only allowed but actually mandated the release of this information. A.S.L.

Michigan Appeals Court Orders Resentencing of HIV+ Man Convicted of Having Unprotected Sex with Uninformed Partner

In *People v. Clayton*, 2002 WL 31058331 (Mich. App., Sept. 13) (not officially published), the Michigan Court of Appeals affirmed a jury verdict of sexual penetration by an HIV-infected person with an uninformed partner, a felony, against David Clayton. According to the scoring system used in Michigan, Clayton was sentenced as a fourth habitual offender to a term of 58 months to 15 years imprisonment. In a decision which turned on procedural matters, the matter was remanded for resentencing.

The issue mandating resentencing was that one element of the scoring provided for additional points when the accused inflicted a life threatening or permanent incapacitating injury on the victim. Because the victim was not infected with HIV as a result of his contact with the defendant, there was no showing that a life threatening or permanent incapacitating injury was inflicted on the victim. The court of appeals specifically refused to speculate as to whether such an injury will occur in the future. Remand was required because the points added when this factor was included affected the final determination of the sentence.

In June 1999, the victim rented a room in a house where three other men lived. According to the victim, he did not know the others, but took the room in response to an advertisement. The victim admitted being attracted to Clayton, and that first night, the two of them went to his bedroom where he performed oral sex on Clayton. Later that night and again that morning, Clayton "engaged in unprotected anal sex with the victim." The victim said that Clayton refused to use a condom because it "didn't feel right." The victim said that Clayton first told him that he was HIV-positive during a walk they took later that morning. The victim went to the hospital immediately and reported the incident to the police. The victim spent the next 2–« weeks living in a domestic violence shelter, and never returned to Clayton's house. He said that he had been tested "about forty times" for HIV since then, testing negative each time. It is unclear from the opinion when trial took place.

Clayton testified at trial that he told the victim of his HIV status before they engaged in any sexual acts, but told him that his HIV was undetectable. Clayton said he was not attracted to the victim, but had engaged in sex with him only after four hours of drinking and smoking marijuana with him and the others in the house.

A police officer testified that during an interview in April 2000, Clayton admitted having oral and anal sex with the victim, but said that he did not tell him that he had HIV because he assumed that the victim already knew.

Clearly, the jury did not believe Clayton's version of the facts. Clayton's claim that he had advised the victim of his HIV status would have been a defense to the charge.

In addition to the error as to sentencing, Clayton's appeal raised issues relating to prosecutorial misconduct, the fact that he was required to testify under the influence of seven prescription drugs, and on account of faulty jury instructions. The court of appeals reviewed and rejected each of these claims. *Steven Kolodny*

AIDS Law Litigation Notes

Federal Alabama - Although several federal appeals courts have found that a state's receipt of federal funds is sufficient to waive sovereign immunity defenses to disability discrimination claims by state employees under sec. 504 of the Rehabilitation Act, U.S. District Judge William A. Acker, Jr., disagrees, ruling on remand in *Garrett v. University of Alabama*, No. 97–AR–0092–S (N.D.Ala. Sept. 4, 2002) that "the spending clause cannot operate as a device for circumventing the state's eleventh amendment immunity at the whim of Congress."

Florida The Florida 5th District Court of Appeal upheld an award of $39,270.00 in legal fees for the plaintiffs in *Sterling Casino Lines LP v. Chestnut*, 2002 WL 1990671 (Aug. 30, 2002). The plaintiffs, Chestnut and Lyautey, were discharged as foodhandlers by Sterling Casino Lines after revealing that they were HIV+. They sued Sterling for disability discrimination and infliction of emotional distress, seeking damages in excess of $50,000, with their principal claim being for damages for emotional distress. At the end of plaintiffs' case, the trial court directed a verdict in favor of the employer on the emotional distress claim, leaving only a claim for lost wages, which the jury resolved in their favor in the total amount of $3,042.00. The plaintiff's trial counsel, Thomas Yardley, sought fees of $110,000, which came out to almost $1,000 an hour for his work on the case. The trial judge discounted hours and adopted a significantly lower hourly rate in making the fee award, but Sterling appealed, suggesting the fee was outrageous in light of the small recovery and the loss of the emotional distress claim. A majority of the court of appeal affirmed the fee award without issuing an explanation, but dissenting judge Cobb issued a detailed opinion, arguing strenuously that the fee award was not supported by the record. In particular, Cobb ridiculed the expert testimony upon which the trial court appeared to rely on awarding a reasonable attorneys fee in the case.

New York In *People of New York v. Anonymous*, 721 N.Y.S.2d 437 (N.Y.Sup.Ct., Crim. Term 2000), Justice Marcy Kahn ruled that the N.Y. Department of Correctional Services was in general providing adequate treatment for prisoners with AIDS to meet constitutional and statutory requirements. In a subsequent order in the same case, she "directed non-party Department of Correctional Services (DOCS) to implement certain measures concerning the medical care of defendant during his incarceration," and the state appealed, arguing that the trial judge does not have authority to make such an order; that once a prisoner is sentenced to the state system, the system decides where to house him and what services to provide. In *People of New York v. Purley*, 2002 WL 31030625 (N.Y. App. Div., 1st Dept., September 12, 2002), a unanimous panel of the Appellate Division reversed Justice Kahn's order, agreeing with the state that decisions about how to deal with prisoners, broadly speaking, are within the discretion of DOCS, not trial judges, and vacated the order. In a per curiam opinion, the panel commented, "Indeed, the court itself acknowledged that the specific conditions set forth in its order 'may very well be redundant to policies and procedures that DOCS would undertake without any prompting from me,' and went on to praise DOCS AIDS-related services as 'state of the art' and observe that 'DOCS has received national recognition for its leadership in the treatment of AIDS, and has implemented a comprehensive range of policies and procedures' for its treatment."

New York City Firing an important shot in a long-running lawsuit, Justice Eileen Bransten of New York County Supreme Court ruled Sept. 13 in *Winds v. Turner*, NYLJ, 9/18/2002, p. 19, that the city had violated its own regulations in providing substandard housing to persons with AIDS. Bransten recited a litany of testimony from several clients of the City's Division of AIDS Services about the inadequacy of the housing they were provided. Bransten ordered the defendants, the two principal officials with responsibility for providing such housing, to provide housing in conformance with regulatory standards quickly. A.S.L.

AIDS Law & Society Notes

California California has passed a bill introducing changes in the state's medicaid system (known as MediCal) intended to provide expanded access to health insurance for persons with HIV who do not have a diagnosis of full-blown AIDS. Prior to this legislation, only those with full-blown AIDS were eligible for the MediCal program, although HIV+ folks with incomes below a certain level could qualify on the basis of need. The new program would recognize that middle-class people with HIV infection who lack insurance also need assistance. A federal waiver will be needed to put the program into effect. The intended funding mechanism is to shift MediCal participants with full-blown AIDS into a managed care program and use the savings realized thereby to fund the expanded coverage for those with HIV. *Los Angeles Times*, Sept. 19.

New York New York City health officials reported an ominous rise in syphilis cases among gay men in the city, similar to increases that have been noted in some other large cities during the first six months of 2002. According to new figures reported in the *New York Times* on Sept. 27, syphilis cases reported in NYC increased more than 50% comparing the first six months of 2002 with the corresponding period in 2001, that most of the recent cases involved men who report having sex with men, and that nearly half in that group report that they are HIV+. This suggests there is plenty of unsafe sex going on involving HIV+ men in New York City. A.S.L.

AIDS International Note: India

The Maharashtra state government has "categorically ruled out mandatory HIV tests before marriage" on the ground that it "would only add to the social and ethical problems associated with AIDS." The statement by a government spokesperson was made in contrast to an announcement by the Andhra Pradesh state government that it would seek legislation to make such tests mandatory for all persons of marriageable age. Maharashtra's health minister stated that such a requirement would violate the National AIDS Control Organization guidelines for dealing with the epidemic. *Times of India*, Sept. 26. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Lambda Legal has two senior attorney positions available: Director of the national AIDS Project, based in the New York Headquarters Office; and Deputy Legal Director, based in the New York Headquarters Office. Join a talented team to press for high-impact legal, policy and cultural change on behalf of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS. See www.lambdalegal.org for more information on Lambda and on each job opening. Send cover letter, resume & writing sample as soon as possible to: Ruth Harlow, Legal Director, Lambda Legal, 120 Wall St., Suite 1500, New York, NY 10005. People of color and people with disabilities especially encouraged to apply.

MOVEMENT EVENT ANNOUNCEMENT

On Monday, October 7, 2002, the West-Village Trans-Legal Clinic will proudly host a Ribbon Cutting Ceremony and Reception celebrating its grand opening. The event will begin at 6:00 p.m., and will be held at the Lesbian, Gay, Bisexual and Transgender Community Center, which is located at 208 West 13th Street (between Seventh and Eighth Avenues) in Manhattan. The West-Village Trans-Legal Clinic is a not-for-profit organization serving the legal needs of the Transgender communities, and is the first of its kind in the New York City area. The clinic is a collaborative effort among a group of volunteers from legal, transgender, social service and community groups, including the Lesbian and Gay Law Association Foundation, the Gender Identity Project of the Lesbian, Gay, Bisexual and Transgender Community Center, the LGBT Committees of the New York County Lawyers' Association and the Association of the Bar of the City of New York, Housing Works, the New York Association for Gender Rights Advocacy and the LGBT Committee of Community Board Two. The clinic currently operates the Name Change Project, a monthly free legal clinic which provides information and assistance to transgender clients interested in ob-

taining legal name changes. They are presently working on expanding their focus by implementing projects addressing employment discrimination, criminal justice and other legal needs of transgender individuals.

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Anderson, Scott A., *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 Ethics 748 (July 2002).

Athanassoulis, Nafsika, *The Role of Consent in Sadomasochistic Practices*, 8 Res Publica 141 (2002).

Australian Institute of Criminology, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales, 1980–2000 (Research and Public Policy Paper No.43 -http://www.aic.gov.au/publications/whatsnew.html.*

Backer, Larry Cata, *Religion as the Language of Discourse of Same-Sex Marriage*, 30 Cap. U. L. Rev. 221 (2002).

Bell, Jeannine, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime* (NYU Press 2002).

Berrigan, Judge Helen Ginger, *"Speaking Out" About Hate Speech*, 48 Loyola L. Rev. 1 (Spring 2002).

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