Washington Appeals Court Finds No Child Support Obligation of "Intended" Lesbian Co-Parent

The Washington Court of Appeals has rebuffed the attempts of a state welfare agency and a lesbian biological mother to collect child support payments from her former partner, who had participated in the decision to conceive a child using artificial insemination while the women were still together. *State ex rel. D.R.M. v. Wood*, 2001 WL 1456352 (Nov. 19). While ultimately ruling that the mother's former partner did not owe any duty of child support, the court's decision rejecting the biological mother's claims appeared to have been influenced by the fact that she had actively prevented her former partner from adopting or even participating in any meaningful co-parenting relationship with the child. Although the appellate court made clear that a person seeking monetary support from a party who is not related to a child either by blood or by marriage would have a difficult legal burden, the opinion represents a partial victory to the extent that it rejects the traditional characterizations of a non-biological parent as a mere "stranger by law" to the child.

Kelly McDonald and Tracy Wood began dating in 1992, and moved in together shortly thereafter. Although they never attempted to marry and did not participate in any type of union or commitment ceremony, the women managed their financial affairs and their lives as a couple, and, according to the trial court, their conduct was "consistent with a marriage." In March 1995, they met with a family practice physician for counseling on artificial insemination and pre-pregnancy planning. As a result of these discussions, the couple agreed that McDonald would carry the baby to term, making her the child's natural and legal parent, and that Wood would have to adopt the child in order to become the child's legal parent. Although the parties intended at that point for Wood adopt the child, they also expressed their understanding that the adoption might not be approved by the state. After a year and a half of inseminations, McDonald conceived a child in September 1996.

In early October 1996, not yet aware that the September insemination had been a success, the women began a process, initiated by Wood, that ultimately led to a separation. Upon learning that McDonald was pregnant, the couple attended counseling to see if they could work out their differences, but it soon became apparent that reconciliation would not be possible, and the couple focused their efforts on achieving an amicable breakup. During these discussions, Wood offered in writing to pay McDonald $1,000 to $1,200 for monthly support, to be renegotiated after two and one-half years. She began making the payments in January 1997, six months before the child was born. After the child's birth, however, McDonald severely limited Wood's access to the child, and, according to the findings of the lower court, "did not go forward in a cooperative way to reach a co-equal parenting arrangement for the child or with efforts to adopt." In January 1998, Wood informed McDonald that she would make no further payments after April of that year. Shortly thereafter, McDonald applied for and began receiving public assistance benefits.

In accordance with Washington law, R.C.W. secs. 74.20.220(1), the state filed a petition on March 25, 1998, to establish parentage and impose a child support obligation on Wood. The following month, McDonald filed a separate action seeking an equitable distribution of property and enforcement of the parties' written agreement for financial support. These actions were consolidated before the lower court in a two-day bench trial, resulting in a decision from the trial judge that Wood was not a parent to the child and that the Uniform Parentage Act (UPA) did not provide a basis to establish a child support obligation for Wood. The trial court also determined that, while there may be an "estoppel or contract theory" sufficient to support a support obligation in some theoretical case, the facts of this case did not support enforcement of any of those theories against Wood. The State and McDonald appealed, with the National Center for Lesbian Rights, Youth Law Center, Children of Lesbians and Gays Everywhere and the Northwest Women's Law Center filing an amici brief in support of their position.

Before delving into its analysis, the court, in an opinion written by Justice Appelwick, noted that the three parties — Wood, the State/McDonald, and amici — had framed the issue before it somewhat differently. The State insisted that the sole question presented by this case concerned what, if any, circumstances would justify the imposition of a duty of financial support upon a person not biologically related to the child, and insisted that no issues regarding custody and visitation were implicated by this case. In a footnote, however, the court made clear from the outset that "[i]f we were to find Wood is a parent, she is a parent for all purposes not just support." McDonald framed her case in equal protection terms, arguing that children who are conceived by artificial insemination are entitled to the support of both parents, regardless of the marital status of those parents. Similarly, amici maintained that "[t]here is no reason to hold a lesbian who consents to the insemination of a female partner to a lower standard of parental responsibility than it applied to a man who consents to the insemination of a female partner," and argued that Wood should be found to be a parent to the child.

The court reiterated that neither party disputed the fact that Wood was neither a biological nor an adoptive parent to the child. Furthermore, the court agreed with the trial judge's determination that neither the UPA presumptions regarding parenthood nor its surrogacy provisions clarifying paternity were implicated by this case. Although McDonald argued that Wood had acted like a parent in encouraging the conception of the child and should therefore be considered as such, the court emphasized that McDonald had not disputed the trial court's legal conclusions regarding the inapplicability of the UPA. The court was then called upon to examine whether the UPA statute itself was defective because its provisions had the legal effect of producing a child with only one parent. Noting that parental rights can be terminated by law, paternity suits can be blocked by the state based on the child's best interests, and that single people are permitted to adopt and conceive children using artificial insemination technology, the court rejected the notion that a child must have two parents. Any additional burden that might accrue to the state as a result of the fact that a child has only one parent on which it can rely for support offered an insufficient legal basis for imposing an independent obligation on someone who was not a parent to the child.

Addressing McDonald's and the amici's equal protection argument, the court insisted that Wood was not being treated any differently than a similarly situated heterosexual man involved in an unmarried relationship with McDonald would have been. First, under the adoption laws of Washington, which do not discriminate on the basis of sexual orientation, Wood could have adopted the child, but did not. Second, the law determines parentage regardless of the marital status of the parents, so the fact that these women were legally precluded from getting married was irrelevant to the ques-

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tion of paternity. Finally, the court noted that, even if Wood had been a man, none of the UPA's presumptive parentage provisions would have been applicable in this case, because Wood had never received the child into her home or held the child out as her own, and had not acknowledged her "paternity" of the child with the state registrar of vital statistics (although presumably the only way for Wood to have done so would have been by adopting the child). Therefore, neither the child nor McDonald suffered any denial of equal protection as a result of the outcome in this case.

The court then turned to the question of whether there were any independent bases for imposing a duty of support on Wood, even though she was not a legal parent of the child. Noting that the child support statute did not contain "any hint of a provision for application of this chapter to a non-parent,70 the court compared this case those involving the duty of support owed by a stepparent. The court emphasized that, although a stepparent is liable to third parties for the support of a stepchild while married to the child's biological parent, the obligation terminates upon the divorce or separation of that party from the legal parent. A stepparent's duty of support also terminates when there is no longer a custodial relationship with the child. In this case, Wood was no longer in a relationship with McDonald and did not have custody of the child. Therefore, according to the court, it would be inappropriate to impose upon Wood a burden greater than that imposed upon a stepparent who had actually cohabited with the child.

Perhaps recognizing that this situation, while presenting legal issues of first impression, was likely to recur, the State asked the court to craft a new test to recognize parenthood based on four factors: (1) the presence of an intimate relationship with the intended parent; (2) the intention of the party that a child be born and become part of the domestic household; (3) the overt actions of the party leading directly to the birth of the child; and (4) the party's support, financial or otherwise, of the conception. While expressing doubts over whether the court even had the authority to create a new cause of action, the court was also deeply troubled by the state's request that the court craft a new cause of action solely for the purpose of garnering financial support from this third party (the "intended parent"), while simultaneously denying this person, directly or indirectly, all of the other rights and responsibilities of parenthood (e.g., companionship, care and custody of his/her minor child) without due process of law. As a result, the court declared itself unwilling to rewrite the UPA to create a duty between an "intended parent" and "intended child," commenting that the UPA was sufficient to handle most disputes regarding parentage, and that any decisions about how to deal with specific problems not covered by the UPA, such as those presented by this case, were policy choices better left to the legislature.

The court then turned to the McDonald's contractual arguments. First, the court rejected the position that Wood should be estopped from denying her duty of support because she had promised to assist in the upbringing of the child when they jointly decided to pursue artificial insemination. Unlike equitable estoppel, which can be used by a party as a shield against claims, the court noted that promissory estoppel is used by a plaintiff as a sword in litigation, and should be only be invoked sparingly and with tremendous caution. In rejecting McDonald's contractual claims, the trial court had determined that she had not, in fact, relied on any promises made by Wood because she had apparently decided to have a child "one way or another, with or without Wood." Furthermore, even if McDonald had relied on Wood's representations, the court found her reliance to be unreasonable because both parties had understood that, unless Wood adopted the child, she would have no legal rights and, accordingly, no legal responsibilities under their arrangement. In addition, when McDonald challenged Wood's ability to parent the child or to adopt the child, McDonald breached their agreement and was no longer entitled to rely on Wood's promise of support. The court of appeals upheld both the trial court's factual and legal findings, and, after a brief review of estoppel cases involving stepparent adoptions from other jurisdictions, not only determined that there was insufficient reliance on the part of McDonald to support the imposition of an ongoing duty of support, but also found that there was no Washington authority justifying a child support order against a prospective parent who has failed to keep a promise to seek or finalize the adoption of a child. Finally, rejecting McDonald's breach of promise claim, the court found that even if the promises made by Wood would have otherwise been sufficient to sustain a contractual duty to support the child, McDonald's role in blocking Wood's parenting and adoption constituted a breach of contract, precluding enforcement of any obligations asserted against Wood.

Wrapping up the few remaining issues in the litigation, the court determined that, although the question of property distribution had initially been incorporated in the lower court proceedings, the parties had agreed to address these matters at a later date. Although McDonald attempted to rely on the separation agreement as an alternative ground for imposing a duty of support on Wood, the appellate court refused to consider these arguments because McDonald had failed to present them to the trial court. Likewise, the court failed to reconsider the trial court's denial of Wood's request for sanctions and attorneys fees because she had failed to appeal from the trial court's ruling that the petitions for support were not frivolous. *Sharon McGowan*

[Editor's Note: Reinforcing the court's view that there is no equal protection problem with the treatment of Wood's possible support obligation, the Illinois Appellate Court ruled in *In re M.J. (Mitchell v. Banary)*, 28 Fam. L. Rep. (BNA) 1027 (2001), that a man who encouraged and funded his girlfriend's donor insemination process did not have any liability for support of the resulting twins. A.S.L.]

LESBIAN/GAY LEGAL NEWS

Minnesota Supreme Court Reverses Transgender Victory in Restroom Dispute

In a unanimous decision announced on Nov. 29, the Minnesota Supreme Court ruled that an employer did not violate the state's human rights law be barring a male-to-female transsexual employee from using restrooms designated for women, reversing a decision by the state's court of appeals. *Goins v. West Group*, 2001 WL 1512729.

Julienne Goins was born genitally male, but spent much of her childhood and adolescence confused about her sexual identity. Since 1994, she has been taking female hormones, and since 1995 she has presented herself as female, although she has not had sex-reassignment surgery. In October 1995, a Texas court granted her petition for a name-change and to have her birth certificate corrected to read "reassigned female." She identifies herself as transgendered. In May 1997 Goins began working for West Group in Rochester, New York, but she transferred to West's Eagan, Minnesota facility that October. The first time she used the women's restroom at Eagan, some female employees became concerned about having a person whom they considered to be a man using their restroom, and they complained to the director of human resources. After consulting legal counsel, the human resources director decided that an appropriate balance of the rights of other women employees and Goins' rights would be to bar Goins from using the women's restroom, since the building in which she worked had a single-occupancy undesignated restroom available (albeit on a different floor from that where Goins worked). Goins objected to this arrangement, and persisted in using the

women's room until she was threatened with discipline. She then struggled to avoid using the restroom during her workday, and finally resigned her job in January 1998, declining West's offer of a promotion and substantial salary increase based on her work performance, because she found the restroom situation intolerable. She also complained of staring, pointing and commenting by co-workers, alleging that it created a hostile environment.

Minnesota's human rights law forbids sexual orientation discrimination, broadly defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. Sec. 363.01 (41a). Goins filed suit, alleging that she was being unlawfully excluded from use of the restroom and subjected to harassment based on her gender self-image or identity. Although a trial court found no merit to her claim, the court of appeals reversed last year, finding that she had alleged a prima facie case of sexual orientation discrimination under the statute, and West appealed.

Writing for the court, Justice Russell A. Anderson observed that Goins had presented a disparate treatment discrimination claim, for which she had either to present direct evidence of discriminatory intent, or at least to satisfy the requirement, established by the U.S. Supreme Court in Title VII cases that have been followed by Minnesota courts in construing the state law, to allege a cluster of facts from which an inference of discriminatory intent could be drawn. Anderson found that Goins' complaint was deficient under either method of establishing a prima facie case.

The court of appeals had found that by barring Goins from using the women's rest room, West had adopted a policy that facially discriminates on the basis of sexual orientation, as that term is defined in the statute. Justice Anderson disagreed, asserting that West had clearly used biological gender rather than sexual orientation as the basis for deciding who could use which restroom. In the view of the supreme court, Goins was excluded not because she was transsexual but because she was not biologically female. "As the district court observed, where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature… While an employer may elect to offer education and training as proposed by Goins, it is not for us to condone or condemn the manner in which West enforced the disputed employment practice… To go beyond the parameters of a legislative enactment would amount to an intrusion upon the policy-making function of the legislature," wrote Anderson.

Turning to the alternative method of alleging a disparate treatment claim, Anderson found that Goins fell down at the second step of the process; although she could credibly allege that she is a member of a group protected under the state law from discrimination, she could not allege that she was "qualified"to use the women's restroom, because she could not allege that she is biologically female. (Sounds a bit circular to us.) In an innocuous footnote, Anderson states: "The record is not clear whether Goins was ever denied access to the men's restroom." Does this court "get it?" Why would someone who identifies herself as female want to use the men's restroom? To provoke a sexual attack?

The court also rejected Goins' hostile environment claim, finding that co-worker "scrutiny, gossip, stares, glares, and restrictions on the use of the restroom near her workstation" did not amount to the kind of severe negative treatment that courts normally require to establish a claim of hostile environment harassment. In a confusing footnote, the court managed to discuss the issue of whether a hostile environment claim is actionable based on the sexual orientation coverage of the state law without stating a firm conclusion.

Since the case turns entirely on the construction and application of a state statute, there is no further appeal. A.S.L.

Military Police Nab Coast Guardsman For Smutty Home Tape

Although the government touts not having an interest in what people do in their bedrooms, the U.S. Coast Guard Court of Criminal Appeals still draws a sharp distinction between private and consensual acts of sexual intercourse, and private and consensual acts of sodomy (heterosexual or homosexual, oral or anal). *United States v. Allison*, 2001 WL 1453902 (Nov. 16, 2001). Defendant Terry L. Allison, a Food Service Specialist First Class in the Coast Guard, pled guilty to multiple acts of consensual sodomy with his fiance and one count of videotaping acts of sexual intercourse and sodomy, in violation of the Uniform Code of Military Justice, and then appealed aspects of the resulting sentence.

It is unclear from the decision by Chief Judge Baum why the police were in Allison's home and how they came to seize a certain videotape. However, the undisputed facts are that Allison videotaped certain acts of sexual intercourse and sodomy performed with his soon-to-be wife. Both the sexual acts and the videotaping were consensual. All of the activities took place in the privacy of Allison's home and, other than his fianc,, no one else was present. In addition, other than the police who seized the video tape, no one other than the participants ever viewed the tape. Although Allison entered guilty pleas to the court below, he challenged the conviction, claiming that the multiple charges of the video taping (indecent act) and sodomy were multiplicative, and that the act of privately video taping himself engaged in sodomy was a protected act under the Constitution.

The court agreed that videotaping consensual acts of sexual intercourse between unmarried participants is not indecent, but sodomy was another matter. Private consensual sodomy, whether heterosexual or homosexual, is a violation of the Uniform Code of Military Justice. Allison argued that if the sodomy on the videotape was the basis for declaring the videotape to be indecent, then the sodomy charge and the indecency charge must be multiplicious (a term used in the opinion but not known to spell-check!). However, the court found that the tape "might" have been viewed by others and in fact noted that the police viewed the tape after they seized it. Accordingly, the court found that the sodomy and indecency charges were not multiplicious.

The court next examined whether the making of the videotape was a constitutionally-protected act. The court found that the possession of the tape alone was protected, but, because the tape depicted Allison engaged in an illegal act, the making of the tape was not protected by the Constitution. Based on this, the court affirmed the convictions below. *Todd V. Lamb*

Anti-Gay Motivation Underlies Multiple Conviction

On June 3, 1996, William Delbart Russell approached Gildardo Avina in a gay cruising area of San Bernardino, California, to ask for a quarter. Avina said he had no money. Russell's friend, Emil Parrish Durant, came up behind Avina and started to argue with his friend. Russell hit Avina with a tree branch, and Durant grabbed Avina from behind while Russell kicked him. Both called Avina "faggot," and threatened to murder him. Avina escaped. Ten days later, Russell and Durant intercepted another gay man in the same cruising area, Dwight Harmon. This time, they murdered and robbed him after shouting, "Let's go … get the faggot." *People v. Durant*, 2001 WL 1452462 (Cal. App. 4th Dist. Nov. 15, 2001) (not officially published).

Both perpetrators were tried and found guilty of second degree murder and a variety of other charges. Durant received a sentence of 18 years to life; Russell was sentenced to 22 years to life. The defendants appealed on many technical grounds. The only one concerning the subject

matter of *Law Notes* is contained in Part IX of the opinion. Russell contended that the imposition of separate sentences for the murder of Harmon and for the robbery of Harmon violated a section of California law, which states that "even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act." California Penal Code secs. 654. The appellate court found that the robbery and the murder were separate crimes. Part of the court's reasoning was that there was clearly a motive, apart from robbery, to murder Harmon: his homosexuality. The fact that the defendants were out to "get the faggot" was adequate for the jury to decide that there was a separate motive for the murder distinguishable from the motive for robbery. Substantially more force was used on the victim than would have been required to simply rob him. One crime was not incidental to the other. The appellate court unanimously upheld all aspects of the conviction, despite some harmless errors by the court below. *Alan J. Jacobs*

Alleged Homosexual's Selective Enforcement Claim Fails Against IRS

Unquestionably, Walter Borland incurred tax liabilities from his actions as president of Enduroglas Corp. Did the IRS violate due process by enforcing the tax code against Borland, in preference to other responsible parties, because of his alleged homosexuality? The U.S. Court of Appeals for the 6th Circuit, in an unpublished Nov. 7 opinion, decided that Borland did not make out a prima facie case of selective enforcement. *Borland v. United States*, 2001 WL 1450721.

In 1996, Borland, using the Freedom of Information Act, obtained an investigation history completed by IRS officer Alan Belkonen. The entry for September 18, 1992, was redacted or "whited-out." In 1999, Borland obtained the same report in response to a request for documents in conjunction with Belkonen's deposition. The 1999 copy contained the entry for September 18, 1992, which reads: "PAUL DATTANI CID Detroit — has an informant — looking for a reward who claims that Borland is living in California — with some people, is a homosexual, is employed using his father's SSN (a possible 5 year felony) and he bled, embezzled, STOLE funds — trust funds from the corporation — causing the bankruptcy. Borland is supposedly in San Francisco."

Borland contended that the redaction of this entry in the copy that he received pursuant to his FOIA request was an "apparent and deliberate attempt to conceal this information." He argued that the fact that the Government would not allow a deposition witness to testify as to whether the IRS had contemplated other responsible parties, and his allegation that other responsible persons could have been found more easily, indicate selective enforcement. The court countered that the redaction of the investigation history and the alleged failure to hold other responsible persons liable, when viewed in conjunction, would not support a finding that the IRS intentionally singled Borland out because of his alleged homosexuality. Reasoning that Borland also failed to demonstrate that the IRS was motivated by a discriminatory purpose or had a discriminatory effect in enforcing the tax laws against him, the court affirmed summary judgement for the government. *Mark Major*

Son's Discomfort With Mother's Same-Sex Relationship Makes It An Appropriate Consideration in Custody Determination

In a notably brief decision, the Ohio Court of Appeals, 12th Dist., affirmed a decision by the Domestic Relations Division of the Brown County Court of Common Pleas awarding custody of the minor son to the father, over the protest of the lesbian mother. *Layne v. Layne*, 2001 WL 1359784 (Nov. 4). Unfortunately, the opinion for the court by Judge Valen says little about the facts of the case, while emphasizing the deferential abuse of discretion standard used by the appellate court in considering an appeal from a custody decision. In this case, the trial judge had carefully listed the statutory factors and found that they weighed in favor of designating the husband as the legal custodian and residential parent for the child (whose age is not specified in the opinion).

Responding to the mother's argument on appeal that the trial court "improperly considered her sexual orientation when determining who should be the residential parent and legal custodian," Judge Valen commented, "In a lengthy list of concerns that it had regarding appellant's stability, the trial court cited appellant's relationship with another woman. A trial court determining the allocation of parental rights and responsibilities may consider a parent's sexual orientation only if the sexual orientation has 'a direct adverse impact' on the child. However, there is evidence in the record that Brandon was upset by appellant's relationship with another woman. Therefore, it was not error for the trial court to consider this factor as one of many in its custody determination." It is difficult to evaluate the court's treatment of this issue in light of the skimpy written opinion, which says nothing about Brandon's age, the reasons for his being "upset," or the nature of his mother's relationship. Certainly, Judge Valen says nothing about how this has "a direct adverse impact" on the child.

The mother, Robin K. Layne, was represented on the appeal by Scott T. Gusweiler of Georgetown, Ohio. A.S.L.

Civil Litigation Notes

Alaska — Domestic Partnership Benefits — The *Columbian* reported on Nov. 19 that Alaska Superior Court Judge Stephanie Joannides had ruled on Nov. 16 that neither the city of Anchorage nor the state of Alaska was obligated to extend employee benefits to same-sex partners of employees and retirees. The court found that such individuals are similarly situated to unmarried heterosexual couples, and thus have no equal protection claim. The suit was filed by the ACLU, which presumably will appeal.

California — Sexual Orientation Discrimination — Dawn Goodman won a $945,000 jury verdict in her sexual orientation discrimination dispute with the San Jose Police Department, but on Nov. 9, Santa Clara County Superior Court Judge William Martin found that the verdict was not supported by the evidence and ordered a new trial. Goodman, who is a lesbian, alleged that when she objected to performing strip searches, she was referred to internal affairs rather than being provided with counseling and training, as would normally be the case. She also said her attempts to transfer to other units where she would not have to perform such searches were thwarted because of her sexual orientation. A first trial of her claim resulted in a mistrial due to the loss of a juror last spring. In October, a second jury voted 10–2 to award $435,000 in compensatory damages and $500,000 in punitive damages. Judge Martin, a former deputy district attorney, sided with the two dissenting jurors, finding that Goodman brought her woes on herself. The city attorney claimed that Goodman was placing an inappropriate construction on what happened to her. BNA Daily Labor Report No. 225, Nov. 26, 2001, at A–6/7.

California — Sexual Orientation Discrimination — In an unpublished disposition, the U.S. Court of Appeals for the 9th Circuit ruled in *Grimes v. West Group Company*, 2001 WL 1507270 (Nov. 27), that the plaintiff's allegations fell far short of making out a prima facie case of constructive discharge and discrimination on the basis of race and sexual orientation. Affirming the district court's decision granting summary judgment to the employer, the court's per curiam order observed that plaintiff Kurt Grimes apparently left West Group to take a better job elsewhere after having personality problems with his supervisor.

Pennsylvania — Civic liability for threatened "outing" — in *Sterling v. Borough of Minersville*, 232 F.3d 190 (3rd Cir. 2000), the court made history by finding that the mother of a teenager whose suicide was attributed to a threat by a local policy officer to reveal the youth's homosexuality to his grandfather would have a constitutional privacy claim against the officer and the municipality. However, on Nov. 7, a federal court jury concluded by a prepon-

derance of the evidence that the officer had not made such a threat, and also rejected charges that the police department and the city were negligent in training of police officers. Nonetheless, the appellate decision stands as a precedent on the law for future cases. *Allentown Morning Call*, Nov. 8.

Florida — Defamation of Gay Judge — A long-running defamation suit by Rand Hoch, an openly-gay former workers compensation judge in Florida, against a law firm which made derogatory comments about him during a seminar for clients, has reportedly been settled. The case had been scheduled to go to trial at the end of November in Orlando, but a settlement was reached shortly before the trial date. For details on the case, see the Florida Court of Appeals decision upholding the legal validity of Hoch's claim: *Hoch v. Rissman*, 742 So. 2d 451 (Fla. App., 5th Dist., 1999). Terms of the settlement were not disclosed to the press. *Law.com*, Nov. 30.

Illinois — Sexual Orientation Discrimination — This one is about the perils of settling too quickly. Michael Hakim claimed to have been discriminated against by his employer, Outsourcing Collection Services, on the basis of "perceived sexual orientation" in violation of the Cook County (Chicago) Human Rights Law, and filed a charge with the county commission. Then a became a co-plaintiff on an existing Title VII suit against his employer, claiming retaliation, assault and battery, and discrimination. His attorney initiated settlement negotiations, but the employer, believing his claim to be totally without merit, refused to offer any money. While settlement talks were pending, Hakim sent an affidavit to the district court from a witness who supported his claims, and the district court held an evidentiary hearing on the issues raised in the affidavit with counsel for both sides present. A few days later, Hakim's attorney phoned the employer's attorney, and they ultimately agreed on a settlement by which Hakim would withdraw his charges and the employer would abandon any claim against him for its litigation costs (which could be available to a prevailing party). The parties agreed on settlement terms on May 18, not realizing that the previous day the district court had entered a default judgment against the employer based on testimony at the hearing! Hakim wanted to back out of the settlement, but the district court said no, vacating its decision upon learning that the parties had settled. The 7th Circuit backed up the district court, finding that it had acted reasonably in the circumstances. *Hakim v. Payco-General American Credits, Inc.*, 2001 WL 1512916 (Nov. 29).

Massachusetts — Sexual Orientation Hostile Environment - Continuing Violation — Justice Diane M. Kottmyer of the Massachusetts Superior Court ruled in *Handrahan v. Kaiser Systems, Inc.*, 2001 WL 1470340 (Sept. 13) (not reported in N.E.2d) that John Handrahan's charge that he was subjected to hostile environment harassment by a female employee was not untimely, even though most of the events underlying the charge occurred more than six months prior to his filing of a complaint with the Mass. Commission Against Discrimination, because there were events falling within the six month period that related back to a continuing course of conduct by the harassing employee, and it was not clear that Handrahan should have concluded prior to the six month mark that he had to file a claim to get relief from the company. Handrahan, a gay man, alleged that a female co-worker continually came on to him with name calling, moaning and groaning, unwanted touching, etc., and that the employer did not take his complaints seriously.

Vermont — Here's a strange one. Die-hard opponents of the Vermont Civil Union Act came up with a new strategy to challenge its validity: a claim that 14 state legislators who voted for the Act had placed $1 bets in an office pool about whether the proposal would pass. The opponents claim that their votes for the bill (necessary for its passage) should be disqualified because they had a personal financial stake in the outcome of the vote, violating state ethics rules. Amazingly, they made this argument in a hearing to the Vermont State Supreme Court on Nov. 28, in a suit brought by a group of town clerks, legislators and taxpayers who remain unhappy about the law. *Associated Press*, Nov. 29. A.S.L.

Criminal Litigation Notes

Federal - California — Sustaining Conviction for Murder of Gay Victim — In *Ervin v. LaMarque*, 2001 WL 1488612 (U.S.Dist.Ct., N.D. Cal. Nov. 14), U.S. District Judge Chesney denied a petition for writ of habeas corpus filed by Herbert Ervin, who received a jury verdict of first degree murder for stabbing William Ziegler to death. Ervin's direct appeal of his conviction had been rejected by the California Court of Appeal.

According to Ervin, he was drunk and high from pot and stabbed Ziegler in self-defense after Ziegler tried to fondle Ervin's buttocks and implied that he want to have further intercourse with Ervin. Ervin is a young black man, and Ziegler was an older white man. At trial the prosecution and defense stipulated that Ziegler was gay, but the prosecution successfully opposed the attempt by the defendant to introduce evidence that Ziegler had sexual relations in the past with young black men. Ervin argued on appeal that such evidence would corroborate his story that Ziegler had aggressively attempted to have sex with him. While the court acknowledged that such evidence might have been helpful to Ervin, it concluded that exclusion of the proffered evidence was not an error of constitutional dimensions, commenting: "To the extent the prior encounters showed that Ziegler had a sexual preference for black men, the evidence would have been relevant to bolster petitioner's credibility. However, the jury already had before it undisputed evidence of Ziegler's sexual preference for black men. The parties had stipulated that Ziegler was homosexual, and the evidence that Ziegler owned a pornographic tape focusing on black men was not disputed. Thus, to the extent the evidence of Ziegler's prior encounters was relevant on the issue of petitioner's credibility, such evidence was cumulative."

Ervin also claimed that the trial judge had confused the jury with inaccurate clarifications of the initial charge on how to distinguish between first and second degree murder. The court found that the attempted clarification in response to a question from the jury was inaccurate, but that the error was harmless, rejecting Ervin's argument that they jury might have reached a different conclusion following an accurate charge. The undisputed evidence at trial showed that Ziegler was stabbed 62 times, and another witness present at the scene testified that Ziegler never made a pass at the defendant.

Federal - Arizona — Anti-Gay Violence — The U.S. Court of Appeals for the 9th Circuit affirmed a denial of a writ of habeas corpus sought by Jeffrey Landrigan, who had brutally murdered a gay man and been sentenced to death. *Landrigan v. Stewart*, 2001 WL 1504448 (Nov. 28). Landrigan claimed he had been denied effective assistance of counsel, because his lawyer failed to offer any evidence on the theory that he had a genetic predisposition to violent conduct. The court of appeals observed that such evidence might have reinforced the court's decision to sentence Landrigan to death on grounds that he was extremely dangerous and might again escape prison and murder somebody. Landrigan was serving a 20–year sentence for stabbing a man to death when he escaped and killed the victim in this case, Chester Dean Dyer, while "on the lam." Addressing the court prior to his sentencing, he complained: "I think that it's pretty fucking ridiculous to let a fagot [sic] be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it."

Ohio — Although Ohio courts upheld a $100 fine for Charles Spingola for tearing a rainbow flag down from a flagpole at the Ohio statehouse during the 1999 Gay Pride Parade, in a new decision issued Nov. 28, Franklin County Environmental Judge Richard C. Pfeiffer, Jr., dismissed charges against Spingola and Thomas R. Meyer for burning a rainbow flag during the

most recent Gay Pride Parade in Columbus. Pfeiffer ruled that flagburning is symbolic speech protected by the U.S. constitution, whether it is an American flag or a rainbow flag. *Columbus Dispatch*, Nov. 29.

Texas — Murder Conviction — The Texas Court of Appeals in Austin upheld a 50–year sentence of Nolan Webb for the murder of a gay man, Gary Goins. *Webb v. State of Texas*, 2001 WL 1509547 (Nov. 29). Webb and Goins had been fellow prison inmates. They ran into each other on the street after being released, and Goins invited Webb back to his apartment. The men developed a casual friendship, Goins expressing sexual interest in Webb but being rebuffed. On the night in question, Webb claims he was sleeping on a couch in Goins' apartment and awoke to find Goins looming over him, threatening to rape and murder him. Webb claims that there was an ensuing struggle and that Goins was accidentally stabbed to death. The medical examiner's testimony refuted the idea that Goins was killed in a struggle. The court found no basis to set aside the jury's verdict, concluding that the jury, which evaluated the demeanor of witnesses, could have believed Webb's story or the state's evidence, and evidently chose to believe the latter. The court also rejected an argument that Webb's counsel was ineffective. A.S.L.

Legislative Notes

National - Gay Friendly Legislative Environments — The *Washington Blade* (Nov. 9) undertook a project to evaluate the "gay-friendliness" of U.S. states by evaluating state laws that could be classified as "pro-gay" (such as non-discrimination statutes) and "anti-gay" (such as sodomy laws). Ranked on a scale from +100 points to –100 points, the *Blade* analysis by Lisa Keen placed Vermont as the most gay-friendly state and Oklahoma as the least gay-friendly. The top ten states in terms of the legal environment for gay people were: Vermont, District of Columbia, Connecticut, New Jersey, Rhode Island, New Hampshire, Massachusetts, Wisconsin, California and Hawaii. The bottom ten (from worst upwards) were Oklahoma, Mississippi, Virginia, Alabama, Kansas, Idaho, North Carolina, Utah, South Carolina, and Florida. New York ranked 16th, with a score of +6 points. (Vermont's score was +97, Oklahoma's –92.).

Maryland — Finally conceding defeat in their efforts, opponents of the Maryland law banning sexual orientation discrimination have abandoned their referendum campaign to seek a repeal of the law. As a result, the effective date of the law was delayed only slightly, as it went into effect on Nov. 21 rather than Oct. 1. TakeBackMaryland appeared at first to have obtained enough signatures, but a lawsuit challenging their efforts led to close scrutiny that appeared likely to invalidate many signatures and cause the measure to be thrown off the ballot. *Washington Post*, Nov. 22.

Colorado - Denver — Transgender Rights — The Denver City Council voted Nov. 5 to amend the city's human rights ordinance to ban gender identity discrimination. The existing ordinance already bans discrimination on the basis of race, sex, ethnicity, sexual orientation, and religious beliefs. Complainants must first go through a city administrative process before filing suit in court. The vote on the measure was 11–1. *Denver Post*,*Rocky Mountain News*, Nov. 6.

Minnesota — The issue of domestic partnership benefits for state employees is back before the Minnesota legislature, which has proved hostile to the idea in the past. Members of the state's public employee unions overwhelmingly ratified a collective bargaining agreement after a 14–day strike in which such benefits are specified. Now the question is whether the legislature will ratify the agreement, and political observers speculated that the inclusion of the benefits could be the killer. *Star-Tribune*, Nov. 20.

Oregon Multnomah County — The Multnomah County Board of Commissioners voted Nov. 8 to add gender identity and sexual orientation to the county's civil rights ordinance. A final vote was to be taken Nov. 29. The proposal is patterned on a measure adopted last year by the Portland City Council. *Portland Oregonian*, Nov. 9.

Washington State - Snohomish County — The *Herald* in Everett, Washington, reported on Nov. 29 that the Snohomish County Council approved a new labor contract earlier in November under which domestic partners of county government workers will be able to get the same insurance coverage as spouses of county workers. The vote was 4–1, the only Republican on the council casting the dissenting vote.

California - Santa Barbara — The Santa Barbara Board of Supervisors rejected a proposed ballot initiative that would have praised the Boy Scouts of America as "wholesome and worthwhile" and criticized the Board for a March 30 resolution condemning the Scouts' anti-gay policies. Even local Scouting officials were proposed to the initiative, which the stated would bring "more division and stress to our county," and the Board of Supervisors reiterated its policy of not discriminating against any youth group seeking to use county facilities. *Los Angeles Times*, Nov. 8.

California Oakland — Domestic Partnership Benefits — A city council committee in Oakland has approved legislation based on a San Francisco ordinance that requires proposed city contractors to have domestic partnership benefits plans in order to qualify to do business with the city. The measure was proposed by Danny Wan, the council's first openly-gay member, and was expected to receive full approval from the Council by December. City staff estimated that the new law could increase the cost of contracts by between 0.5 and 2 percent. One business executive testified before the committee that the cost to businesses contracting with the city of San Francisco had been "minimal." *San Francisco Chronicle*, Nov. 14. A.S.L.

Boy Scouts Developments

The *Peoria Journal Star* reported Nov. 16 on the controversy in Knox County, Illinois, between the United Way and the local Boy Scouts council. The United Way voted last year to add "sexual orientation" to its non-discrimination policy, and the Scouts are the only funding recipient that refused to sign a non-discrimination statement. The United Way has decreed that Boy Scouts will get no funding this year, and local churches have organized their own fund-raising drive for the Scouts, who point out that none of the other local United Way organizations in their 14–county area have made such a non-discrimination demand. The United Way responds by pointing out that none of their other funding recipients had any problem about signing the non-discrimination statement. A.S.L.

Law & Society Notes

In the aftermath of the Sept. 11airplane highjackings and World Trade Center attacks, gay rights groups and pro-gay lawmakers have been urging the U.S. Justice Department to recognize the same-sex partners of victims in dispensing funds under emergency relief legislation. U.S. Rep. Barney Frank (D-Mass.) and 44 other members of Congress sent a joint letter to Attorney General John Ashcroft, a notorious foe of gay rights, asking that the term "survivor" in the legislation be broadly construed to include surviving same-sex partners. The letter was signed by 29 Democrats and 16 Republicans, including Rep. Stephen Horn (R-Calif.), a frequent collaborator with Frank on gay-sensitive issues in federal legislation. *San Francisco Chronicle*, Nov. 20. The Frank letter does not specifically mention gay partners, but a letter to Ashcroft from a group of gay rights organizations led by Lambda Legal Defense Fund tackles the gay issue directly. The main potential stumbling block (aside from Ashcroft's own views) is the federal Defense of Marriage Act, which establishes a policy that same-sex couples are not to be treated as spouses under federal law regardless of whether they have a recognized status under state or foreign law. On Nov. 26, Ashcroft announced the appointment of attorney Kenneth R. Feinberg to administer the federal relief fund, and newspaper reports indicated that Feinberg will make the initial de-

cision on whether surviving gay partners will be entitled to benefits. Feinberg was recently involved in negotiating the settlement of German Holocaust survivor claims, so he is experienced in dealing with contentious claims situations.

A poll released by the Kaiser Family Foundation indicated that about 3/4's of gay respondents reported feeling more accepted by society today than a few years ago, but the same percentage of respondents reported experiencing discrimination. *Washington Post*, Nov. 13. The polling numbers were derived from telephone interviews with 405 "randomly selected, self-identified lesbians, gays and bisexuals in 15 major U.S. cities last November," according to an Associated Press report. The pollsters also surveyed a larger national sample of the "general public" to determine attitudes towards gay people, and found that 64% of those surveyed felt that there is more acceptance of gay people in the U.S. today than there was a few years ago, but only 29% of the respondents thought this was good for the country. • • • A poll reported in England of 10,500 self-identified gay people found that 65.5% of gay men believed they were born with their sexual orientation, but only 46.3% of lesbians stated a similar belief. About 5.5% of the lesbians questioned claimed to have made a "conscious choice" as adults to lead a lesbian lifestyle, compared to only 2.4% of the gay men surveyed. The poll by market research company ID Research also found that gay construction workers, police and firefighters and accountants greatly outnumbered gay hairdressers or vicars! *Sunday Herald*, Nov. 11.

November Election Results: Referenda that might have posed setbacks for gay rights were defeated in three Michigan municipalities on Nov. 6. In Traverse City and Kalamazoo, voters rejected amendments to their city charters that would have banned enactment of policies prohibiting sexual orientation discrimination. In Huntington Woods, the voters approved a measure ratifying a gay right ordinance previously enacted by the city government. In all three votes, the margin was decisive. However, voters in Houston, Texas, narrowly approved a measure banning domestic partnership benefits for municipal workers; a proposal to extend such benefits had been introduced in the city council, and then withdrawn by its sponsors in the face of public controversy. *Grand Rapids Press*, Nov. 7; *Houston Chronicle*, Nov. 7. And voters in Miami Beach decisively voted to approve domestic partnership benefits for city workers, as well as pension benefits for surviving partners of police and fire workers. In both cases, the pro-gay enactments garnered more than 65% of the vote, according to the BNA Daily Labor Report, No. 216 (Nov. 9, 2001); *Washington Blade*, Nov. 16.

Cornell University psychology professor Ritch Savin-Williams, who is openly gay, has published two studies in the current issue of The Journal of Consulting and Clinical Psychology, on the subject of suicide by gay and lesbian teens. Since the late 1980s there has been a general view, based on a study conducted under the auspices of the U.S. Department of Health and Human Services, that lesbian and gay teens are much more likely to be suicidal than non-gay youth. Savin-Williams' new study finds the former study results to be exaggerated, mainly due to a failure by earlier studies adequately to probe the initial responses about suicide. According to Savin-Williams, when one distinguishes between suicidal thoughts and actual attempts, and also examines those attempts that use obviously ineffective methods, many of the differences between gay and non-gay youth fade to statistical insignificance. He concludes that lesbian and gay teens are no more likely seriously to attempt suicide than non-gay youths, although the gay teens are much more likely to have thought about it. Summarized in *USA Today*, Nov. 26.

An internal investigation by the Boston Housing Authority determined that Authority official and housing police have been harassing an openly gay tenant for years at the BHA's West Broadway project. The victim held back from filing charges for fear of losing both his part-time job with the Authority and his apartment, according to a Nov. 20 report in the *Boston Herald*. Now that the matter is out in the open and the Authority has virtually confessed its guilt, he plans to seek a remedy through the Mass. Commission Against Discrimination, which has jurisdiction over sexual orientation discrimination claims. *Jenner v. Boston Housing Authority*.

With the end of the federal fiscal year, the FBI reported its data on hate crimes nationwide for calendar 2000. 8,063 incidents fitting the definition in the federal Hate Crimes Statistics Act were reported to the bureau during that year, compared with 7,876 in the prior year. Initial news reports did not break down the figures to compare sexual orientation motivated hate crimes. *Baton Rouge Advocate*, Nov. 20.

In an on-again, off-again comedy of errors, the Western Territory of the Salvation Army announced that the organization would comply with San Francisco's requirement that city contractors have domestic partnership benefits programs, in order to qualify for city contracts, and then was overruled by the national organization, which rescinded a prior decision to allow regional offices to set their own policies on employee benefits programs. Apparently, the Salvation Army's national headquarters was flooded with communications from individuals and groups opposed to the organization providing any benefits to the partners of its unmarried employees. *San Francisco Chronicle*, Nov. 14.

To nobody's surprise, Pope John Paul II, speaking to a congress on family issues in November, condemned same-sex couples as threatening the "natural institution" of the family. "The power of changing the creator's original project was not given to man," said the Pontiff, who presumably will eschew the use of aircraft in future, and junk all the microwaves in the Vatican. *Yahoo! News*, Nov. 28.

Overreaction? Responding to "reports" that people were using the park for sexual cruising, city officials in Crystal River, Florida, closed Yeomans Park on Nov. 28 for an indefinite period. The city manager, Phil Lilly, said there had been no arrests in the park, and the number of "reports" was small, but that the reports raise public safety issues, specifically, in Lilly's words, "Parents should be able to bring their children into a public park and not be worried about letting their children go into a restroom. Not that they would be molested, but what they would see." *St. Petersburg Times*, Nov. 29. A.S.L.

Developments in European and United Kingdom Law

Same-sex partnership litigation. On Sept. 11, *Karner v. Austria* (Application No. 40016/98), http://www.echr.coe.int/hudoc (Admissibility decisions), the first case on same-sex (vs. transsexual) partnerships to reach the European Court of Human Rights, was declared "admissible" (arguable). Mr. Karner's landlord sought to evict him from his apartment after the death of his male partner (the tenant). Finding for the landlord, the Austrian Supreme Court interpreted gender-neutral legislation permitting the unmarried partner of the tenant to succeed to the tenancy as applying only to different-sex partners, because that was the intent of the Austrian Parliament. In agreeing to consider the merits, the European Court declined to follow 1986 and 1996 decisions of the former European Commission of Human Rights (which used to screen cases for the Court) declaring applications with identical facts inadmissible as "manifestly ill-founded" (obviously not a violation of the Convention). The dramatic increase in the legal recognition of same-sex partnerships in Europe over the last five years will be an important factor in the case.

Same-sex partnership bills. On Oct. 24, the Relationships (Civil Registration) Bill, http://www.parliament.the-stationery-office.co.uk/pa/pabills.htm, was introduced by Jane Griffiths MP in the House of Commons of the United Kingdom Parliament and given a first reading after a vote of 179–59. The second reading debate on Nov. 23 was adjourned until May 10, 2002. The bill would permit unmarried same-sex and different-sex couples in England and Wales (the Scottish Parliament

and probably also the Northern Ireland Assembly have jurisdiction over family law) to register their relationships and acquire some but not all of the rights and obligations of married different-sex couples. Without government support, a private member's bill is unlikely to become law, but it could inspire a government bill depending on the degree of political opposition it generates. On Nov. 14, the Swiss Federal Office of Justice published a draft bill that would become a Federal Law on Registered Partnership Between Persons of the Same Sex. The draft is available in German, French or Italian at http://www.bj.admin.ch (gleichgeschlechtliche Paare, Couples homosexuels, Coppie omosessuali). The bill excludes certain rights of married different-sex couples including joint and second-parent adoption, because this would mean that a child would legally have two fathers or two mothers (a very disturbing concept in most European countries). A period of public consultation on the bill will end on Feb. 28, 2002.

Anti-discrimination legislation. France has complied with the European Community's Council Directive 2000/78/EC, requiring that sexual orientation discrimination in employment be prohibited by Dec. 2, 2003, by passing the Loi No. 2001–1066 du 16 novembre 2001 relative a la lutte contre les discriminations, http://www.legifrance.Gouv.Fr/html/frame_jo.html. The law adds "orientation sexuelle" as a prohibited ground of discrimination to, among other laws, the Labor Code and the Penal Code, alongside "moeurs" (morals, manners, customs, ways), a "closeted" ground added in 1985 and 1986 with the intention that it would cover sexual orientation.

Sex discrimination litigation. The argument that sexual orientation discrimination is also sex discrimination was rejected again by the Court of Appeal of England and Wales (3–0) on July 31 in *Pearce v. Governing Body of Mayfield Secondary School*, [2001] I.R.L.R. 669, 2001 WL 825287. All three judges agreed that s. 3 of the Human Rights Act 1998 (which requires courts "[s]o far as it is possible to do so" to interpret legislation in a way that would avoid sexual orientation discrimination violating the European Convention on Human Rights) could not be used to change the interpretation of the Sex Discrimination Act 1975 so as to prohibit the harassment suffered by a lesbian schoolteacher (see [June 2000] LGLN), because a House of Lords decision implies that s. 3 does not apply to cases arising before Oct. 2, 2000 (the date of entry into force of the 1998 Act). Lady Justice Hale would have found this interpretation persuasive, without invoking s. 3 of the Human Rights Act 1998, but for *Smith v. Gardner Merchant Ltd.*, [1998] 3 All E.R. 852, the Court of Appeal's own binding precedent which only the House of Lords can overrule. Both Pearce and *Secretary of State for Defence v. MacDonald*, [2001] I.R.L.R. 431, [Summer 2001] LGLN, might be appealed to the House of Lords. *Robert Wintemute, London*

Other International Notes

Egypt - The infamous trial of 52 men rounded up in a police raid on a club known to have a gay clientele resulted in 23 convictions and 29 acquittals on charges of obscene behavior and, in a few cases, contempt of religion, with resulting prison sentences of one to five years of prison. The different sentences were apparently attributable to confessions of sexual activity made by some of the men while under torture-interrogation, according to a report by the International Lesbian and Gay Human Rights Commission, which actively monitored the trial. *Washington Blade*, Nov. 16. There is no criminal law in Egypt outlawing homosexual relations, as such.

Victoria, Australia — The ability of lesbians to access assisted reproductive technology in Victoria, Australia, remains blocked pending a High Court ruling on the state's appeal of a trial decision last year invalidated a state law restricting such access to heterosexual couples. It had appeared that the Infertility Treatment Authority would issue new guidelines under which lesbians could qualify for treatment, based on a theory of "psychological infertility," under which they would be deemed incapable of becoming pregnant through unassisted heterosexual intercourse, but the proposed guidelines were hastily withdrawn due to protests from right-wing politicos and local Catholic church functionaries. The head of the Authority rationalized the pull-back as practical, since if the High Court reverses the earlier ruling, no such guidelines would be needed. *The Age*, Nov. 21.

The Netherlands — Co-Parent Rights and Responsibilities — As a result of a law passed on Oct. 4 and going into effect on Jan. 2, 2002, when a child is born after that date to a woman who is part of a lesbian married couple or a registered partnership of two women or a man and a woman, the marital partner or registered partner will be considered the parent of the child. Thus, if Sally and Jill marry in the Netherlands (as they have been able to do since last spring) and Jill has a child through donor insemination, Sally will be considered the legal parent of the child upon its birth. Another first for the Netherlands. (From information supplied by Prof. Kees Waaldijk of Leyden University).

Vancouver - Canada On Nov. 19 police officials in Vancouver announced that they had cause to believe that the death of Aaron Webster, whose body was found by his best friend in an area of Stanley Park known as a gay cruising ground, was a hate crime. Police said that it appeared Webster had been beaten with a baseball bat or a pool cue. On Nov. 18, approximately 1500 people attended a rally and prayer service in memory of Webster at the park. *Chicago Tribune*, Nov. 20.

Israel — In a breakthrough of sorts, the President of Israel, Moshe Katsav, held a meeting with members of the Political Council for Gay Rights, at the invitation of the Council's leader, Menahem Shizaf, a lawyer and editor of a monthly gay-interest newspaper called *Keshet*. However, President Katsav put a damper on the symbolic value of the meeting by indicating that it should not be interpreted as either encouragement or criticism for the gay community, according to a Nov. 28 report in the *Jerusalem Post*. But then, of course, the presidency in Israel is largely a symbolic post, so Katsav's further statement that he thought it was important to hear the gay rights advocates out but did not see "how I can help you" was not unexpected. He did indicate that if Michal Eden, an openly-gay city council member in Tel Aviv, were to become the city's mayor and then invited him to attend the annual Gay Pride celebration, he would come. Eden, politically ambitious, responded: "You've given me a challenge." In comments to the *Post* after the meeting, Shizaf indicated that Israel is among the most progressive countries on gay rights, behind Denmark and the Netherlands but ahead of England and the U.S. A.S.L.

Professional Notes

William H. Gardner, an attorney with the firm of Hodgson Russ, was honored Nov. 29 at the annual "Gayla" sponsored by Gay and Lesbian Youth Services of Western New York. Gardner, a former board member of Lambda Legal Defense & Education Fund and one of the handful of attorneys who have argued a gay rights case before the U.S. Supreme Court (*New York v. Uplinger*, 467 U.S. 246 (1991)), was honored for his extensive volunteer service to the lesbian and gay community. *Buffalo News*, Nov. 18. A.S.L.

AIDS & RELATED LEGAL NOTES

Employee With AIDS Who Chose Long-Term Leave May Sue For Discrimination

A Texas man who took long-term disability leave for fear that his employer would otherwise fire him because he has AIDS can claim discrimination under the Americans with Disabilities Act, said a federal district court on Oct. 31. *Swatzell v. Southwestern Bell Telephone Company*, 2001 WL 1343429 (N.D.Tex.). The court denied the employer's motion for summary judgment and set the case for trial.

Before being diagnosed with AIDS, Don Swatzell had a perfect attendance record as a phone operator with Southwestern Bell. He was recommended for promotion three times in his 14 years with the company, but his commendations stopped abruptly when he informed his boss that he had AIDS. According to Swatzell, he repeatedly asked his boss for some form of accommodation so that he could comply with his therapeutic drug regimen and cope with a host of medical complications. These requests fell on deaf ears. Even his plea for extra bathroom breaks went unanswered, forcing Swatzell on one occasion to defecate on himself and remain in soiled clothes until his shift ended. Swatzell had reason to believe his termination was imminent, and, rather than lose his job and health insurance benefits, he went on disability leave, cutting his income by half.

The company argued that because Swatzell elected to take his leave, it had not committed any act that would trigger the ADA. But Chief U.S. District Judge Buchmeyer found otherwise. "Earning one-half pay is an adverse decision affecting employment if Swatzell took the long-term disability leave for fear that he would be terminated because of his disability," he held. Southwestern Bell also argued that because Swatzell's request for accommodation amounted to a need for an unlimited number of sick days, he was not a "qualified" individual under the statute. On this point and on whether or not Swatzell had been unlawfully retaliated against because of his requests for accommodation, the court found the facts sufficiently in dispute to warrant a trial.

However, the court found for Southwestern Bell on Swatzell's claims that the harassment he suffered amounted to a hostile work environment or an intentional infliction of emotional distress. While the court recognized the existence of a harassment claim under the ADA analogous to that under Title VII, Judge Buchmeyer found that Swatzell's factual allegations did not rise above the baseline needed to make out such a claim. *Travis J.Tu*

Florida Appeals Court Affirms Strong Protection for Privacy of HIV-Related Information

In the context of a discovery dispute, the Florida 3rd District Court of Appeal quashed a discovery order issued by the Miami-Dade County Circuit Court for a doctor's patient records, relying on the state's strong legislative policies protecting confidentiality of HIV-related patient information. *Sachs v. Innovative Healthcare, Inc.*, 2001 WL 1359495 (Nov. 7).

The underlying dispute is actually between Dr. Mark Sachs and Innovative Healthcare, a wholesaler of pharmaceutical products. Sachs purchased Immunecare, a pharmacy, which purchased pharmaceuticals from Innovative. Disputes arose between Immunecare and Innovate leading to this lawsuit involving charges of breach of contract, quantum meruit, tortious interference with business relationships, defamation and so forth. In the course of discovery, Innovative requested, both during depositions and through interrogatories, various patient records that would show the identity of patients. About 80% of Dr. Sachs's patients are HIV+, as that is his treatment specialty. Sachs resisted discovery of his patient's names and identifying information, citing the state's strong policies protecting HIV-related information. The trial judge, Michael B. Chavies, overruled Sachs's protests and issued a discovery order requiring that the records and information be turned over to Innovative.

Unanimously ruling to quash the order in an opinion by Judge Ramirez, the appeals court noted two relevant statutes. Fla. Stat. Sec. 456.057(5), governing ownership and control of medical patient records, provides that such records are to be kept strictly confidential and not disclosed to "any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient." In subsection (6), the statute provides a discovery exception for cases in which the doctor is charged with malpractice. Fla. Stat. Sec. 381.004(3)(e) specifically provides that no person "who has obtained or has knowledge of [an HIV] test result pursuant to this section may disclose or be compelled to disclose the identity of any person upon whom a test is performed, or the results of such a test in a manner which permits identification of the subject of the test" except for certain strictly delineated circumstances listed in the section, none of which include discovery during civil litigation that does not directly involve the patient.

Taking these statutes together, the court found that even if the interrogatories and requests for production were limited to the mere identification of Immunecare patient, there would be a violation of the patients' rights under the privacy statutes. Since the overwhelming proportion of Dr. Sachs's patients are HIV patients, "the only way to protect the confidentiality of the patients is to protect their identities," wrote Judge Ramirez. "Thus, the trial court ignored the essential requirements of the law by entering an order which required the disclosure of the identities of the Immunecare patients. On remand, the trial court may fashion an order that provides discovery redacting the identifying information." The court concluded by speculating about alternative ways that the plaintiff could obtain the information it needed to prosecute the case. A.S.L.

AIDS Law Litigation Notes

California — Nursing Home Liability for Injury to AID Patient — The California Court of Appeal, 2nd District, upheld a jury verdict against Skyline Healthcare Center, holding the defendant 30% responsible for injuries to Leonard Lawson, an AIDS patient who inadvertently set himself on fire while a resident of the Center. *Lawson v. Skyline Healthcare Center*, 2001 Westlaw 1190581 (Oct. 3). Lawson's AIDS-related complications included both mental and physical impairment. The Center staff was aware that he smoked and that it was possible he could set himself afire, so he was restricted to smoking in a designated location in the presence of a staff member, and he had to obtain cigarettes from a nursing station. On the occasion of his injury, he went to the designated location with two cigarettes, smoked one without incident, and then accidentally lit the wrong end of the second one, starting a fire that spread to his clothes. His screams for help went on for five to ten minutes before any member of the staff responded. The court rejected the Center's argument that the jury erred in assessing any liability against it, characterizing it as doing "a disservice to health care professionals," and stating that it "borders on the frivolous." See *AIDS Policy & Law*, Nov. 23, 2001, at 6.

California — San Francisco Superior Court Judge James Robertson II issued a temporary restraining order against Michael Petrelis and David Pasquarelli, AIDS activists charged with making threatening phone calls to staff members of the *San Francisco Chronicle* in response to stories published by the *Chronicle* about rising rates of HIV infection and other sexually transmitted diseases among gay men in the Bay Area. *San Francisco Chronicle*, Nov. 13. The order bars the two men from contacting or stalking anybody on the *Chronicle* staff, and might be turned into a permanent injunction after an end-of-November hearing.

Navy-Marine Criminal Appeals Court — The U.S. Navy-Marine Corps Court of Criminal Appeals determined in *United States v. Richardson*, 2001 WL 1380510 (Nov. 6) (not reported in M.J.) that a military judge did not err in concluding that an HIV+ servicemember was not subjected to inappropriate pre-conviction punishment by the method of detention used in his case, and that there was no 8th amendment violation of cruel and unusual punishment. The servicemember was convicted of unauthorized absence, wrongful use of cocaine, and issuing worthless checks. It appears that he was suicidal and was placed in various isolation settings with inadequate heat. It also appears that the confidentiality of his HIV-status was violated on at least two occasions, resulting in his perception that everybody in "the brig" knew he was HIV+. But the court found that the method of detention was appropriate, and noted that the judge had taken Richardson's condition into effect by imposing a very lenient sentence upon the conviction.

Ohio — HIV-Discrimination — A Cleveland, Ohio, Common Pleas Court jury awarded $5 million in compensatory damages to Russell Rich, an HIV+ man who claims he was constructively discharged as a McDonald's restaurant manager because of his HIV-status in violation of Ohio public policy. Rich, a veteran manager in McDonald's franchise system, was hired to manage a company-owned restaurant in July 1997, having previously been recognized by McDonald's several times as an "outstanding manager" in earlier assignments. Shortly after being given this new assignment, however, Rich suffered an HIV-related illness and was briefly hospitalized. After that, relations with his general manager went rapidly downhill, he was relieved of many of his managerial functions, and threatened with being assigned to sell hamburgers at the front counter. The suit alleged wrongful discharge in violation of public policy, and the jury quickly returned the large verdict after a nine-day trial. A spokesperson for McDonald's said that the company disagrees with the jury's verdict and is considering its options.

v. McDonald's, Ohio Ct. C.P., No. 98368481 (Oct. 26, 2001), as reported in BNA Daily Labor Report No. 212, Nov. 5, 2001.

Ohio — Inadmissible Polygraph Evidence Leads to Mistrial — Columbus, Ohio, police officer Richard Thorpe was standing trial in a Franklin County court on twelve counts of spreading contagion, based on charges by a former girlfriend that they had unprotected intercourse on twelve occasions before she learned that Thorpe was HIV+. The girlfriend was on the stand, being cross-examined, when, in response to a question about whether she and Thorpe had sex when Thorpe was on duty, she blurted out, "He failed three polygraphs." Thorpe's attorney promptly objected to this response to his own question, and Judge Richard C. Pfeiffer, Jr., promptly declared a mistrial. The *Columbus Dispatch*, reporting on this dramatic development on Nov. 21, indicated that "authorities" confirmed that Thorpe had flunked three polygraph tests, and that Jane Burris, the former girlfriend, had passed the polygraph tests. But polygraph evidence is widely held to be inadmissibly prejudicial and thus not to be mentioned during trial. A.S.L.

AIDS Law & Society Notes

National — The *San Francisco Chronicle* reported Nov. 25 that the Bush administration is urging states to revise their public health laws to give officials sweeping powers to deal with epidemics. The immediate stimulus for this is the fear of biological warfare by terrorists. The administration recommends adoption of laws allowing public health authorities to take over hospitals, seize drug supplies, quarantine people exposed to infectious pathogens, draft doctors to treat them, force patients to be vaccinated, and order police to restrain residents from leaving contaminated areas. The CDC put out proposed legislation at the request of HHS Secretary Tommy Thompson shortly after the Sept. 11 World Trade Center attack. The proposed law would not require evidence of bioterrorism to trigger the emergency powers; indeed, the existing HIV epidemic could be sufficient to trigger the law.

California — Los Angeles County Sheriff Lee Baca, confronting reality in the county jail, authorized the distribution of condoms to male prisoners housed in the "gay section" of the jail, arousing both praise and criticism. *Los Angeles Times*, Nov. 30. Although sex in jail is a felony under California law, and Baca disclaimed taking the position that it is OK for gay inmates to have sex with each other behind bars, he observed that the county is spending $180,000 a month on AIDS-related medications for 220 HIV-infected inmates, and that normal intake at the jail detects 500 inmates per month who are HIV+. Some critics asserted that Baca should be distributing the condoms (which are being donated by AIDS service organizations) to all inmates, not just those self-identified as gay. Others believe the distribution program is wrong, and cited the slippery slope of handing out clean intravenous works to inmates who are abusing drugs.

California — Dr. Tom Coates, director of the AIDS Research Institute at UC-San Francisco, told gay.com that the current AIDS prevention public health campaigns are a failure, pointing to rising HIV infection rates among gay men in San Francisco. Coates commented that gay community leaders bear part of the responsibility, due to failure to make HIV transmission a major issue of community discussion. *San Francisco Chronicle*, Nov. 30.

California - San Francisco — Republican legislators determined that federal money should not be used to teach gay men how to have sex safely have pressured San Francisco's Stop AIDS Project to cease running safe-sex workshops for gay men as part of an effort to stem the reported increase in HIV infections among gay men. The daughter of Chief Justice William Rehnquist, Health and Human Services Inspector General Janet Rehnquist, investigated reports about the workshops and determined that they could be viewed as "obscene" and as "encouraging, directly…sexual activity," and thus ineligible for federal public health money, leading Rep. Mark Souder (R.-Ind.), chair of the Subcommittee on Criminal Justice, Drug Policy and Human Resources, to begin a formal inquiry into the program. Some Republican legislators remain committed to allowing the epidemic of HIV to run its course among gay men without any federal public health intervention other than abstinence campaigns, which is about all they are willing to fund. *Associated Press*, Nov. 17.

Connecticut — Names Reportings — The Connecticut Department of Public Health will begin collecting on adult residents with HIV infection, although it will give individuals the option to be recorded anonymously. Dr. Joxel Garcia, the commissioner, rejected the proposal that the state adopt a system of "unique identifiers" to obviate the need to keep any names in a central file. AIDS advocates in the state expressed some doubts about how this sort of dual-track system would work, since it would be up to doctors and clinics to let patients know about their right to opt out of having their names reported. *Hartford Courant*, Nov. 7.

Massachusetts — The state's Division of Medical Assistance Board of Hearings ruled that an HMO was obligated to cover a liver transplant needed by an HIV+ patient. The ruling came in a case brought by Gay & Lesbian Advocates and Defenders on behalf of a 41 year old Roxbury resident whose HIV condition is under control but whose life is threatened unless he can have a liver transplant to deal with HCV-related liver disease. The ruling rejected an argument by the HMO that the transplant procedure is "experimental" and thus not covered by Medicaid. *GLAD Press Release*, Nov. 14. A.S.L.

International AIDS Notes

Canada — The federal Health Department reported that the incidence of HIV infection stemming from same-sex activity jumped up 14% in Canada from 1999 to 2000, the first upward jump in new infection rates since 1993. The rise is particularly dramatic in urban areas with large gay populations, such as Vancouver. *Globe and Mail*, Nov. 30.

Canada — Blood Collection Policy — After an advisory committee meeting held to consider the policy of Canada's blood agencies against collecting blood from gay men, the committee decided against recommending any change in the policy. The three-day meeting had produced testimony from a host of experts, blood donors, recipients, and gay rights organizations, to review all aspects of donor-screening methods used by Canadian Blood Services and Hema-Quebec. Canada has essentially adopted the same regulatory approach followed by the FDA in the United States, of disqualifying as donors any man who has had sexual relations with another man at least once since 1977, regardless of having subsequently tested HIV-negative. *National Post*, Nov. 10. Opining that safety of the blood supply is paramount, the panel stated, "It is prudent to continue to qualify donors for donation through application of criteria that reduce the chance of infectious blood being collected."

Britain — A high court judge issued an injunction against the *Sunday Times* on Nov. 3, barring it from printing the identity of an HIV-infected healthcare worker who is believed to have treated more than 10,000 patients after becoming infected but before learning of his HIV-status. The healthcare worker's identity came out after he developed an AIDS-related illness, thus "outing" him to the hospital's where he worked. The hospitals are now attempting to devise plans to track potentially exposed patients and offer testing and counseling. A news report in the *Sunday Times* on Nov. 4, which preserved the worker's anonymity, reported that he was "devastated" upon learning he was HIV-positive as a result of developing the illness. The *Guardian* reported on Nov. 19 that the worker was arguing that there should be no large-scale project to notify all the patients he had treated, pointing out that the likelihood of anybody having been infected by him was virtually nil. The worker claims his right to privacy would supersede the "right to know" of his patients under these circumstances.

South Africa — The *NY Times* reported Nov. 27 on a lawsuit pending against the South African government to compel provision of drugs to pregnant women in order to prevent HIV transmission to their children. The government is now offering the treatment, nevirapine, to pregnant women at 18 pilot sites, but reaches only about 10% of the women who give birth annual in South Africa, at a time when 70,000 HIV+ babies are being born each year in the country. Gilbert Marcus, an attorney for the plaintiffs, argued to the court on Nov. 26 that limiting availability of the drug to selected test sites "arbitrarily, unnecessarily and irrationally amounts to a conscious choice, vigorously defended by respondents, which results in the predictable yet avoidable deaths of those children." Judge Chris Botha, hearing the case, seemed to signal agreement to this argument.

China — The intermediate people's court of Xingtai, a city in North China's Hebei Province, ruled that a hospital should pay the equivalent of US $43,770 to a four-year-old girl as compensation for her HIV-infection, incurred from her mother who was infected with contaminated blood transfused by the hospital. The mother died in 1999. The court found that the hospital used the blood without subjecting it to the usual testing procedures. *China Daily*, Nov. 17.

Indonesia - A spokesperson for the Johor state government confirmed that HIV testing is not mandatory for marriage licenses for Muslims living in the state, even though there was a religious ruling by a Muslim leader to that effect. Although the state will make testing available for Muslims who wish to comply with the religious ruling, it will not require such tests. *New Straits Times*, Nov. 17. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Beckett, Clare, and Marie Macey, *Race, Gender and Sexuality: The Oppression of Multiculturalism*, 24 Women's Studies Int'l Forum 309 (May-Aug. 2001).

Blumberg, Grace Ganz, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev. 1265 (Oct. 2001).

Chambers, David L., *For the Best of Friends and for Lovers of all Sorts, A Status Other than Marriage*, 76 Notre Dame L. Rev. 1347 (Oct. 2001) (part of symposium on the legacy of Marvin v. Marvin, famous California palimony case).

Cook, Shayna S., *Cain: Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement*, 99 Mich. L. Rev. 1419 (May 2001) (book review essay).

Dosanjh, Kiren, *Calling on* Oncale*: Federal Courts' Post-*Oncale *Approach to the "Evidentiary Routes" to Discriminatory Intent in Title VII Same-Sex Harassment Claims*, 33 Urban Lawyer 547 (Summer 2001).

Ellman, Ira Mark, *"Contract Thinking" Was* Marvin's Fatal Flaw, 76 Notre Dame L. Rev. 1365 (Oct. 2001) (part of symposium on legacy of Marvin v. Marvin, famous California palimony case).

Herring, David J., *Troxel and the Rhetoric of Association Respect*, 62 U. Pitt. L. Rev. 649 (Summer 2001).

Howard-Hassmann, Rhoda E., *Gay Rights and the Right to a Family: Conflicts Between Liberal and Illiberal Belief Systems*, 23 Hum. Rts. Q. 73 (Feb. 2001).

Hoy, Serena J., *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J. L. & Politics 381 (Spring 2000).

Huff, Eileen P., *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 Am. U. J. Gender, Soc. Pol. & L. 695 (2001).

Lee, Tracey, *Trans(re)lations: Lesbian and Female to Male Transsexual Accounts of Identity*, 24 Women's Studies Int'l Forum 347 (May-Aug. 2001).

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McGowan, David, *Making Sense of* Dale, 18 Constitutional Commentary 121 (Spring 2001).

Regan, Milton C., Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L. Rev. 1435 (Oct. 2001).

Rose, Katrina C., *When Is An Attempted Rape* Not *An Attempted Rape? When the Victim is a Transsexual* Schwenk v. Hartford*: The Intersection of Prison Rape, Title VII and Societal Willingness to Dehumanize Transsexuals*, 9 Am. Univ. J. of Gender, Soc. Pol. & L. 505 (2001).

Specht, Tim, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. Ill. Univ. L. Rev. 411 (2001).

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Case Comment, *Constitutional Law Indefinite Moratorium on Adult Entertainment Licenses Violates First Amendment* D'Ambra v. City of Providence, *21 F. Supp. 2d 106 (D.R.I. 1998)*, 33 Suffolk Univ. L. Rev. 409 (2000).

Current Events, *Hernandez-Montiel v. I.N.S., 225 F. 3d 1084 (9th Cir. 2000)*, 9 Am. U. J. Gender, Soc. Pol. & L. 717 (2001) (case holding that effeminate Mexican man qualifies for treatment as member of oppressed social group for purposes of U.S. asylum law).

DeFranco, Elaine M., *Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union?*, 85 Marquette L. Rev. 251 (Fall 2001).

Errickson, Lindsay Ryan, *Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act*, 54 Vanderbilt L. Rev. 2057 (Oct. 2001).

Symposia:

Unmarried Partners and the Legacy of Marvin v. Marvin, 76 Notre Dame L. Rev. No. 5 (Oct. 2001) (some articles noted separately above); *Employment Discrimination and the Problems of Proof*, 61 La. L. Rev. No. 3 (Spring 2001).

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Hubbard, Ann, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Northwestern Univ. L. Rev. 1279 (Summer 2001).

Okin, Jaclyn A., *Has the Supreme Court Gone Too Far?: An Analysis of* University of Alabama v. Garrett *and Its Impact on People With Disabilities*, 9 Am. U. J. Gender, Soc. Pol. & L. 663 (2001) (case holding 11th Amendment immunity shields states from direct suits by job applicants or employees for disability discrimination under the ADA).

Patel, Preeti, *The Politics of AIDS in Africa*, 15 Int'l Rel. 79 (April 2001).

Shriver, Christina M., *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. Ill. Univ. L. Rev. 319 (2001).

EDITOR'S NOTE:

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