2ND CIRCUIT UPHOLDS DISCIPLINE FOR RELIGIOUS PUBLIC EMPLOYEES WHO PROSELYTIZE ON THE JOB

The U.S. Court of Appeals for the 2nd Circuit has affirmed the dismissal of two separate lawsuits by born-again Christian employees of Connecticut public health agencies after they were reprimanded for proselytizing to clients while administering state services. *Knight v. Connecticut Dep't. of Public Health*, 2001 WL 1580134 (Dec. 12) Balancing the employees' interests in free speech and free exercise of their religion with the state's interest in promoting efficient operations and avoiding Establishment Clause violations, the court determined that the discipline imposed by the state in these cases was permissible to ensure that they refrained in the future from imposing their religious views on the clients of these state health agencies.

Jo Ann Knight was employed as a nurse consultant for Connecticut Department of Public Health (CDPH), a position whose responsibilities include supervising and surveying the provision of medical services by various Medicare agencies to home health care patients, in part by interviewing patients at their home. On October 1, 1996, Knight was visiting the home of a same-sex male couple, one of whom was in the end stages of AIDS. After Knight had completed her survey, the two men began discussing religion. At that point, Knight said that she felt a "leading of the Holy Spirit" to talk with them about salvation. As the conversation progressed, one of the men told Knight that he did not believe that he would be punished because he was gay, to which Knight responded, "[A]lthough God created us and loves us, He doesn't like the homosexual lifestyle." After this visit, the couple filed administrative complaints against the CDPH alleging discrimination on the basis of sexual orientation in the provision of state services, and ultimately filed a lawsuit against Knight, which was later dismissed.

On January 3, 1997, Knight received a letter from the Department suspending her for four weeks without pay "for the good of the service and specifically, for misconduct in her dealings with a homosexual couple during a home visit." The suspension was later reduced to two weeks without pay, and her duties were restricted to exclude home visits to patients. Knight was also required to create a "Plan of Correction," which needed to be approved by the program manager before Knight would be allowed to resume making home visits. In October 1997, Knight sued the CDPH, alleging violations of the First and Fourteenth Amendments, Title VII and other related claims. The district court threw out Knight's case on cross motions for summary judgment, finding that Knight's religious speech had caused her CDPH clients distress and had interfered with the performance of her duties, and the state was therefore permitted to take disciplinary action. The district court rejected any equal protection challenge, finding that she had not been singled out for adverse treatment based on her religion, and determined that the state was not required to accommodate her need to proselytize to satisfy its obligations under Title VII.

Nicolle Quental was a sign-language interpreter for the Connecticut Commission on the Deaf and Hearing Impaired (CCDHI). Quental had been certified by the Registry of Interpreters for the Deaf, and had sworn to a code of ethics, which included an oath that she, as an interpreter, "shall not counsel, advise or interject personal opinions .... Just as interpreters/ transliterators may not omit anything which is said, they also may not add anything to the situation.... The interpreter/ transliterator's only function is to facilitate communication. He/ she shall not become personally involved." In October 1997, Quental was on an interpreting assignment at the University of Connecticut health center. During the initial conversation between Quental and the client, designed to help the interpreter discern the client's manner of signing, the client shared some of her religious beliefs and personal history, including the fact that she had been sexually abused. Upon hearing this information, Quental told the client that "the Lord could help her," just as He had helped Quental deal with problems from her past. She gave the client some religious literature, and pressed the topic beyond the time necessary to familiarize herself with her client's signing style because she believed that it "would give [her client] some hope." A few days later, the CCDHI received a complaint about Quental's conduct, and although the sign language statements of the client to her mental health advocate were considered inadmissible hearsay, the court allowed the advocate to testify that the client had "appeared agitated and used very strong signs and was very gestural" while explaining to her what had happened during the encounter with Quental. After investigating the complaint, the CCDHI issued a letter of reprimand to Quental, stating that she "was free to hold her religious beliefs and live by her religious convictions, but that during the time she is being paid by the state of Connecticut to provide interpreting services, she should not promote her religious beliefs." (In 1996, Quental had been reprimanded for praying over a mental health client so that, according to her, the Lord could deliver him from smoking, just as he had helped her quit.)

Quental sued the CCDHI in January 1999, but the district court judge dismissed her case, essentially for the same reasons given by the court in the Knight litigation. The appeals in both of these cases were consolidated for consideration by the Second Circuit.

Writing for the panel, Judge Pooler first considered Knight's and Quental's First Amendment claims using the Supreme Court's *Pickering* test regarding public employee speech. Because all of the parties had apparently conceded that the employees' speech dealt with a matter of public concern, and as the district courts had not addressed this prong in their opinions, the court assumed that this first element had been satisfied and proceeded to balance the employer's interests in providing "effective and efficient public services" with the employees' free speech rights. The court found without difficulty that the employees' speech had been disruptive to the agencies' operation and would continue to impede the performance of their duties in the future. Knight's clients had not only complained but had filed lawsuits against the DPH and Knight personally, and Quental's client had become visibly upset as a result of her encounter.

Judge Pooler also noted that the agencies were validly concerned about avoiding any Establishment Clause violations that might stem from having their employees proselytizing while performing state-sponsored duties, distinguishing the recent Supreme Court cases that had dismissed similar Establishment Clause concerns expressed by the state when religious groups had requested equal access to public facilities. When the government acts as an employer, the court held, it must be "accorded some leeway" when it "endeavors to police itself and its employees in an effort to avoid transgressing" the First Amendment, "even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of the gov-

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ernment." The court noted that, in *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999), it had previously upheld the use of a state interpreter for a deaf student in a Catholic school specifically because an interpreter's speech is supposed to be "neutral" and ideally "will neither add to nor subtract from" the learning environment. Knight and Quental, on the other hand, were actively seeking to promote religious messages while working with clients on state business, which raised a legitimate First Amendment concern that the state was entitled to obviate.

The panel next rejected the employees' equal protection claim, finding that they had not been treated differently from other employees who had attempted to promote their personal views, whether about religious or another "potentially inflammatory" topic such as sex or politics, while performing their duties as state employees. The plaintiffs had presented an alternative argument that their claim deserved special consideration because it was a "hybrid" claim; specifically, they insisted that, even if the state's action might otherwise be acceptable as to most public employees, heightened scrutiny should apply because it had the practical effect of infringing upon both their free exercise and free speech rights. While acknowledging that dicta in the Supreme Court's peyote case, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990), offered some support for the idea that such hybrid claims are entitled to stricter scrutiny, Judge Pooler noted that the circuits were split on the question of whether governmental action that infringed both free speech and free exercise rights required a more compelling justification than would an action infringing one of those rights alone. The panel determined that it was unnecessary to weigh in on this "hybrid rights" debate, however, because it had already given full consideration to the employees' free speech rights during its *Pickering* analysis.

The employees had also argued that, under Title VII, the state was required to "reasonably accommodate" their religious beliefs unless it could demonstrate that doing so would cause undue hardship. In order to make out a prima facie case under Title VII, however, Knight and Quental had to show that 1) they held a bona fide religious belief conflicting with an employment requirement; 2) they informed their employers of this belief and 3) they were disciplined for failure to comply with the conflicting employment requirement. The court found that the employees in this case had failed to satisfy prong two because, even though their employers knew that they were born-again Christians, neither woman had requested of her employer "any sort of accommodation for [her] need to evangelize." Such specific notice was necessary, according to the panel, because "hold[ing] otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employees' religion which could require an accommodation." Even assuming that the women had made out a prima facie case, the court rejected their Title VII claim because their requested accommodation was not reasonable in light of the Establishment Clause concerns that would inevitably arise were these women permitted to proselytize while performing their state functions. Moreover, the court emphasized that the plaintiffs' supervisors had placed limitations only on their speech as it pertained to the performance of their duties. In Knight's case, the CDPH had specifically allowed her to continue to lead prayer at staff meetings and the CCDHI had offered to work with Quental regarding accommodations for her religious beliefs. Accordingly, the court concluded that neither plaintiffs' Title VII claim had merit. Finally, the court summarily affirmed the district courts' adverse rulings on a number of other unspecified smaller issues unique to each employee. *Sharon McGowan*

[Editor's Note: Two days after the 2nd Circuit's ruling in *Knight*, the U.S. Court of Appeals for the 7th Circuit issued a similar ruling in *Anderson v. U.S.F. Logistics (IMC), Inc.*, 2001 WL 1590091 (Dec. 14), upholding the district court's refusal to issue a preliminary injunction against an employer who had forbidden a born-again Christian employee who ended all communications with customers and others by saying "have a blessed day." Writing for the court, Judge Cudahy said the employer could be legitimately concerned that some customers would be offended by such comments in a business context. The employer in this case acted after receiving complaints from a customer. A.S.L.]

LESBIAN/ GAY LEGAL NEWS

Louisiana Appeals Court Finds Itself With Jurisdiction on Sodomy Appeal

The Louisiana Electorate of Gays & Lesbians, Inc. (LEGAL(La.)) challenged the Crime Against Nature statute on state privacy grounds and a variety of other state constitutional grounds. *Louisiana Electorate of Gays & Lesbians, Inc. v. State*, 2001 WL 1549017 (La. App. Nov. 14, 2001) (unpublished). After a five-day bench trial, LEGAL(La.) received a ruling from Judge Carolyn Gill-Johnson, on March 17, 1999, that the Crime Against Nature statute, La. Rev. Stat. §§ 14:89, violated the privacy clause of the state constitution, art. 1, §§ 5 ("[e]very person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy") (emphasis added). Judge Gill-Johnson's ruling was limited, however, to instances of private, noncommercial consensual sexual conduct between adults.

A Crime Against Nature under La. Rev. Stat. §§ 14:89 is "[t]he unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal.... Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime." It is also "[t]he solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation."

LEGAL(La.) appealed, inter alia, the part of the decision that upheld the Crime Against Nature statute in instances *other than* private consensual sex. The state argued that the court hearing the appeal, a Louisiana appellate court, had no jurisdiction under the State Constitution, art. 5, §§ 5(F). Appeals on state constitutional issues, argued the State, must go directly to the Louisiana Supreme Court.

During the course of LEGAL(La.)'s litigation, the Louisiana Supreme Court had ruled in a separate case, *State v. Smith*, 766 So. 2d 501 (La. 2000), that the right of privacy does not extend to oral or anal sex in a motel room between consenting heterosexual adults. The "crime against nature" issue is for the legislature, not the courts, to decide, insisted the court. The Supreme Court directed Judge Gill-Jefferson to reconsider her decision. She did so, but still, on March 9, 2001, held the law unconstitutional as it applies to consensual sex acts. The issue arose in *Smith* after the State was unable to prove that a rape had occurred; the court found the defendant guilty only of a "crime against nature."

The question for the appellate court was whether it had jurisdiction over the constitutional issues raised by LEGAL(La.). LEGAL(La.) argued that jurisdiction in the court is discretionary over aspects of the statute found unconstitutional, and that the court had jurisdiction over parts of the appeal not dealing with constitutional issues, and where the lower court had not found the statute unconstitutional. The State argued that the appeal may only be heard by the state Supreme Court.

In addition to the privacy clause, LEGAL(La.) had argued at trial that the Crime Against Nature statute violated a series of constitutional provisions. The statute was alleged to: (1) violate the Bill of Attainder prohibition,

art. 1, §§ 23; (2) discriminate against lesbians and gay men based on physical condition, culture, and religion, art. 1, §§ 5; (3) curtail freedoms of speech and press, art. 1, §§ 7; (4) impair the right to assemble peaceably and to petition the government for redress of grievances, art. 1, §§ 9; (5) discriminate on the basis of physical condition by curtailing access to public areas for assembly and to governmental accommodations, art. 1, §§ 12; (6) constitute a state endorsement of religious beliefs and an establishment of religion, art. 1, §§ 8; (7) be arbitrarily applied and enforced against lesbians and gay men and reward police misconduct by such application and enforcement, art. 1, §§§§ 2 & 3; and (8) subject lesbians and gay men to excessive, cruel, and unusual punishment, art. 1, §§ 20.

The only issue decided by Louisiana's 4th Circuit appellate court was that the court does not have jurisdiction over the subject matter of this appeal. The Louisiana Constitution states that a case is appealable to the Supreme Court if "a law or ordinance has been declared unconstitutional." Art. 5(D). The circuit court does not have discretionary jurisdiction. "The Supreme Court's jurisdiction in such matters [is] exclusive, with review of any other issues presented by the case being conducted in the proper circuit or appellate tribunal after the Supreme Court ha[s] completed its appellate review," wrote the court, citing *City of Baton Rouge v. Ross*, 654 So. 2d 1311, 1328 n.3 (La. 1995) (Calogero, C.J., concurring).

The appeal was dismissed, with the court stating that the Louisiana Supreme Court has appellate jurisdiction over all issues in the case.

The case report does not make clear why LEGAL(La.) wanted the intermediate appellate court to hear the case. The Supreme Court's Smith ruling forewarns plaintiffs that they are not likely to succeed at that level. Appealing the case in circuit court would likely prolong the litigation, but the ultimate result seems preordained. The Louisiana system of elected judgeships, and the odds of electing a favorable panel, may be playing a part in LEGAL(La.)'s strategy. *Alan J. Jacobs*

New Jersey Prosecution for "Consensual" Oral Sex?

On appeal by the State, a panel of the New Jersey Appellate Division reversed a judge's sentencing of a man convicted by a jury of second degree sexual assault for engaging in oral sex which he claims was consensual. The sentence was three years probation and a small fine. *State of New Jersey v. Cooke*, 2001WL 1585748 (Dec.13).

According to the trial record, in August of 1997 L.B. was sleeping in his living room and was awakened by Joseph Cooke performing oral sex on him. Cooke had been drinking earlier. Cooke said that he had been invited to the house earlier that evening, but could not remember performing oral sex, but said it could have happened. L.B. testified that a week earlier, while he was sleeping in his living room, he was awakened by "a person's head was bobbing up out of [his] lap" while he had an orgasm. He chased the person out of the house, but did not make a report of this to the police. Cooke admitted being there and performing oral sex without consent on someone. Cooke also had sex in the house a month earlier "but did not know with whom because it was dark."

The Appellate Division, in remanding the case for re-sentencing, found that the trial judge abused his discretion in not jailing Cooke and in not imposing probation for life under New Jersey's version of Megan's Law. The conviction carries a range of five to ten years and a presumptive term of seven years. The Appellate Division dismissed the finding of the trial judge that a jail sentence would have been a "serious injustice" and faulted him for considering his belief that the sex was consensual despite the jury's finding. The trial judge had found in sentencing that "...in this case I believe a serious injustice would be done because I don't find that this defendant committed an act of sexual assault upon the victim. I believe the victim was a willing participant in this event. I believe what the victim said in his statements [made after conviction] that he knew the victim. He didn't pick the house, just walk down the street, there's a house. Let's go up to it 3 o'clock in the morning. Oh, the door's unlocked. Isn't that interesting. The door's unlocked. I'll walk in, and then two weeks later he goes back to the same place. Now there's other men in the house and they were just allegedly trespassed upon in this house two weeks earlier and the door is still unlocked and he walks in again. We'd have to be deaf, dumb and blind and accept as the truth that this was totally involuntary ..." *Daniel R Schaffer*

Massachusetts Court Refines Discrimination Test; Straight Man's Harassment Complaint Fails

In a November 16 opinion granting the defendant summary judgement on sexual harassment claims brought by a heterosexual man, the Superior Court of Massachusetts refined the test for prima facie discrimination using circumstantial evidence. *Carozza v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 2001 WL 1517584 (Mass.Super.).

Plaintiff Mark Carozza was employed for three years in a 55 person unit of Blue Cross and Blue Shield of Massachusetts, Inc.. Forty-eight employees in the unit, including all of Carozza's supervisors, were women; three were openly gay men. Carozza alleges that a female supervisor rubbed his shoulders, stopping when asked. Carozza announced to a human resources manager his intention to file a sexual harassment complaint. After interviewing Carozza, the HR manager wrote in an internal memo: "I'm concerned about everything I saw when I met with him. This is a VERY angry ... ex-Marine, looking for a job where he will carry a gun. He has enormous disrespect for women and for his leaders — a deeply rigid view of organizations, a devotion to hierarchy and an absolute sense of what is appropriate business practice, with no room for deviation . .. hatred of women, and an absolute expectation that he will be promoted to Customer Service ... I contact Terri and Greg to express great concern about this associate's volatility and about resulting workplace safety. We set precautions in motion..." (Carozza alleges that the memo is defamatory.)

Later that month Carozza engaged in a verbal dispute with an acting supervisor over his use of company time. That supervisor's incident report alleges that Carozza angrily used "the 'F' word" several times. Blue Cross then informed Carozza that he was fired for swearing at a supervisor.

Carozza claims he was fired by Blue Cross because he rejected his supervisor's sexual advances. Where, as here, the evidence is circumstantial, discrimination is traditionally shown through four elements: protected class, acceptable performance, termination, and that the employer sought to fill the plaintiff's position by hiring another individual with similar qualifications. Noting first that every sex-discrimination plaintiff belongs to the class protected by Title VII, Justice Ralph Gants reasoned that, because male heterosexuals do not belong to a suspect class that has historically suffered from discrimination, satisfying the first three elements of the test does not reasonably permit a presumption that the firing was discriminatory. Additionally, recent Massachusetts law would allow a heterosexual male to satisfy the fourth element merely by showing that he was replaced by another heterosexual male, rather than a woman or gay man, with similar qualifications. The test is also unresponsive to cases where, as here, the employer gives insubordination rather than performance as the reason for the firing. Justice Gants refined the test by replacing the fourth element with a requirement that the alleged perpetrator of the sexual harassment participate in some fashion in the decision to fire, which did not happen here.

Carozza also claimed he was subject to a hostile work environment. Justice Gants countered that the following acts did not add up to a hostile environment: a gay male spoke about sexual matters with other co-workers and was overheard by the plaintiff, a straight female coworker showed the plaintiff photographs of a gay male coworker in his underwear, and a gay

coworker told him "Not only do the gays put you down, but so do the women."

As to being called "asshole" and "sleaze ball," Justice Gants found "abundant" evidence that Carozza's coworkers disliked him because of his intolerant conduct toward them, not because he was male or heterosexual. Justice Gants noted approvingly Massachusetts courts' typical generosity toward sexual harassment plaintiffs, then warned that courts trivialize the cause of action when they allow trial for any plaintiff who simply characterizes workplace events as sexual harassment, a concern other judges have expressed in terms of not allowing Title VII to devolve into a mere code of workplace civility. Carozza may proceed on the complaint that his firing was in retaliation for his harassment complaint within Blue Cross as the retaliation test requires only the plaintiff's subjective belief in discrimination. *Mark Major*

Labor Arbitrator Blasts School District for Anti-Gay Censorship

Arbitrator Paul E. Glendon strongly criticized school authorities of the Plymouth-Canton, Michigan, Community Schools for censoring displays on gay and lesbian history mounted by two openly-gay teachers. *Plymouth-Canton Community Schools and Plymouth-Canton Education Association*, Grievance No. 99/00–02 (Glendon, Arb.) Glendon's opinion, issued on November 29, found that the acting superintendent of schools violated union contract rights and constitutional rights when he ordered that both displays be removed from the schools.

Michael Chiumento, the band teacher at West Middle School, and Thomas Salbenblatt, a math teacher at Salem High School, had both put up displays about gay and lesbian history in October 1999. Chiumento's display was in a locked display case in the main hallway beside the middle school gymnasium. Salbenblatt's display was on a bulletin board in his classroom. The interim superintendent, Kenneth Walcott, claiming to have received complaints from some parents, decided that the material in the displays was inappropriate and ordered that they be removed, without revealing to the teachers the source or nature of the complaints. Ironically, both teachers had posted similar displays in previous years without any problem, and their building principals had no objections to the displays. The removal of the displays became a local media story, and Walcott was broadcast on television news telling a reporter that the teachers were improperly trying to promote the gay "lifestyle" at school.

The teachers union filed grievances on behalf of both teachers, complaining that their academic freedom rights were being violated and that Walcott had steamrollered the teachers without following procedures specified in the union contract, which required that any complaints from the public be put through a hearing process, and which obligated the school district to protect academic freedom of teachers from assaults mounted by members of the public.

In the arbitration process, Walcott testified that he was not intending to censor anything, but demanded that the displays be removed because they did not relate to the school curriculum. Arbitrator Glendon saw right through this. "Walcott cannot be taken at his word," wrote Glendon, "because it is painfully apparent that his real reason for ordering grievants to take down these displays was that they themselves are gay and in his personal opinion their purpose was to 'promote [their] own lifestyle.' It is true, as the Employer emphasizes, that it brought no formal charges to that effect against either grievant. But if anything what Walcott did was even worse, and potentially more damaging to their reputations and professional standing, than formal disciplinary charges. He went on television and stated that 'clearly' was what they tried to do, and he reinforced that statement in a meeting with Salbenblatt by repeatedly using the word 'promotional' and telling Salbenblatt (as Walcott admitted), 'if that's your lifestyle, that's your choice' but he couldn't 'take us off our mission.'"

Glendon also found that the school district failed in its obligation to afford proper procedures to the teachers in this matter, and violated its duty to protect the academic freedom of teachers in the face of complaints from parents. "The plain truth of the matter is that after Walcott received public complaints about these displays he did not invoke the review procedures… to have them judged fairly and impartially but simply adopted the complaints as his own, without any consideration for contractual or policy requirements or practical precedents, and compounded that injustice by himself subjecting the grievants to public harassment."

Glendon also found that Salbenblatt's constitutional rights of free speech had been violated, as the bulletin board was in his classroom and he was generally free to put anything up that he felt was appropriate to communicate to his students. (Glendon totally rejected Walcott's argument that Salbenblatt's rights were limited to putting up math displays.) Said Glendon, "The restriction [the school authorities] imposed on Salbenblatt was not reasonable, because it applied only to him and was based, *falsely*, on grounds that were applied to no other teacher."

Glendon ordered the school district to provide a written apology to each teacher and to "desist from such violations in the future." The teachers had not sought any sort of damages, merely a declaration that they were in the right and could mount such displays in the future without fear of interference from the administration.

Lambda Legal Defense & Education Fund provided advice and assistance to the union attorneys who appeared on behalf of the teachers before the labor arbitrator. A.S.L.

Civil Litigation Notes

In *Marley v. Ibelli & Rose*, 2001 WL 1346010 (U.S.Dist.Ct., S.D.N.Y., Oct. 31), U.S. District Judge Buchwald dismissed tort claims brought by a former Cooper-Hewitt Museum employee against co-employees for on-the-job harassment allegedly inspired by the plaintiff's sexual orientation and demeanor. Buchwald found that the claims should have been brought against the employer rather than co-employees under the Federal Tort Claims Act, and that all the claims were either barred or insufficiently supported by factual allegations in the complaint. J. Craig Marley worked at Cooper-Hewitt, a Smithsonian Institute museum in New York City. He was hired in January 1997 and discharged in January 2001. Marley alleged that two women on the staff created a hostile environment for him through inappropriate remarks about gay men and effeminate men, inappropriate touching, and generally harassing conduct. In addition to filing a discrimination charge with the Smithsonian's EEO office after his discharge, Marley filed a tort action in state court against his two former co-workers, alleging assault, battery, intentional infliction of emotional distress, and tortious interference with contract. In effect, Marley blamed the two co-workers for his dismissal. The defendants sought to remove the case to federal court, claiming that tort claims against them for things they did at work should really be brought against the government employer, and that the Federal Tort Claim Act would shield them from any personal liability (and the government from any other liability). Judge Buchwald agreed with their argument, finding that individual government employees are generally immune from individual tort liability for acts performed within the scope of their employment. Marley tried to get around this by seeking to amend his complaint to state a constitutional claim, but Judge Buchwald refused to exercise discretion to allow the amendment, finding based on the facts alleged that Marley would not be able to make out a constitutional claim.

The Court of Appeals of Maryland has imposed an indefinite suspension from law practice on Gary E. Thompson, a married man who was convicted for stalking a thirteen-year-old boy. *Attorney Grievance Commission of Maryland v. Thompson*, 2001 WL 1609420 (Dec. 17). A hearing judge had determined that Thompson's offense did not put him in violation of Maryland Rules of Professional Conduct for lawyers, Rules 8.4(b) or (c), under which discipline had been sought, but the disciplinary authority appealed. The court determined that

the offense for which Thompson was convicted sufficiently brought into question his ethical standards as to justify suspension, although several members dissented, calling for disbarment instead. The hearing judge had reasoned that Thompson's misconduct had nothing to do with his law practice, which focuses mainly on elder law, and his pedophilia is unlikely to have any effect on his elderly clients. But the Court of Appeals was not convinced.

We previously reported on *Sharon S. v. Superior Court of San Diego County*, 2001 WL 1294101 (Cal. Ct. App., Oct. 25, 2001), in which the court cast doubts on the legality of all existing second-parent adoptions in California. According to an Associated Press report carried in the *Washington Blade* on Nov. 30, the court has rejected a motion to reconsider its ruling, but has amended its opinion to remove some of the language suggesting that existing same-sex adoptions are unlawful.

Multnomah County, Oregon, Circuit Judge Ellen Rosenblum has ruled that the Portland schools may not allow the Boy Scouts to hold recruitment activities during the school day because the organization denies membership to atheists, according to a Dec. 14 report in the *Portland Oregonian*. Judge Rosenblum stated that the school superintendent must revise existing policies that allow the Scouts to enter the schools to recruit new members.

According to a report in the *Houston Chronicle* on Dec. 15, the U.S. Court of Appeals for the 5th Circuit reversed the dismissal of Gloria Swidriski's lawsuit against the Houston Police Department claiming that the department violated the civil rights of her son, Marc Kajs, who was murdered by his former partner, Ilhan Yilmaz, on March 29, 1998. Swidriski claims that Kajs had attempted to get help from the domestic violence unit of the police department because of threats from Yilmaz, but was turned away. The Court of Appeals reportedly said that if, as the complaint alleges, it was the police department's policy "to afford less protection to a victim of domestic violence in a homosexual relationship," that would be "sufficient to state an equal protection claim." However, the appeals court also affirmed the district court's ruling that no "state-created danger" existed in the situation. Further litigation is now likely in *Swidriski v. Houston Police Department*.

Recommending the dismissal of a same-sex harassment case brought under Title VII, Magistrate Ellis of the U.S. District Court for the Southern District of New York found that Glenn Ciccotto's amended complaint was devoid of evidence as to specific incidents of harassment, or that he was harassed because of his sex. Ciccotto alleged that he was called "dick" and "cocksucker" by co-workers, that various male co-workers made sexual advances and stared at him, as well as calling his home and leaving lewd messages on his answering machine. Ellis found that Ciccotto's complaint neither named names nor specifically alleged that this harassment was aimed at him because of his sex, as opposed to sexual orientation. *Ciccotto v. LCOR, Inc.*, 2001 WL 1606705 (Dec. 11).

The *New York Post* reported on Dec. 3 that actor Tom Cruise has dropped a $100 million defamation suit against Michael Davis, a publisher who had claimed that he had a videotape showing Cruise engaged in homosexual conduct. According to a settlement of the case approved by L.A. County Superior Court Judge Emilie Elias, Davis has admitted that his claim was untrue. According to settlement documents, Davis states: "Tom Cruise does not appear on the videotape … [He] is not, and never has been, homosexual and has never had a homosexual affair." Now, that's settled. Rumormongers, beware! The settlement did not require Davis to make any payment to Cruise.

Soap opera time. For a detailed view into a wild and wacky workplace, check out the opinion in *Teal v. Chicago Sun-Times, Inc.*, 2001 WL 1609384 (U.S.Dist.Ct., N.D. Ill., Dec. 14), in which the court grants summary judgment to the employer on a claim by a discharged employee that she had suffered retaliation for claiming about sexual harassment. The company discharged her after investigating complaints that she was engaging in harassing activity, specifically directed against a male employee whom she believed to be gay. The whole story of what the investigation turned up is too detailed to include here, but the entertainment value provided by Judge Darrah's opinion is high. The court found that there was no basis in the record for finding that the employer retaliated against Teal for engaging in protected activity under Title VII when she was discharged.

In *Hedrich v. Board of Regents of the University of Wisconsin System*, 2001 WL 1620128 (7th Cir., Dec. 19), the court affirmed summary judgment in favor of the employer, rejecting a novel claim by a woman who was denied tenure at the University of Wisconsin at Whitewater that she was subjected to sexual orientation discrimination by the faculty in her predominantly-female department because she was a heterosexual woman who had a close relationship with the only male faculty member in the department. Writing for the court, Circuit Judge Diane P. Wood found no support in the record for the theory that Hedrich's sex or sexual orientation had anything to do with the tenure denial.

The BNA *Daily Labor Report*, No. 233 (Dec. 6, 2001), reports that the EEOC has settled a same-sex harassment case that was brought against River Oaks Diagnostic Network, Inc., in Houston, Texas, with the signing of a consent decree on Nov. 26. Female employees claimed that a female supervisor had subjected them to extensive unwanted sexual attention, and that management had refused to take action. The monetary terms of the settlement were not made public. The company will be obligated to undertake special training and to guarantee that employees who report improper conduct by supervisors are not subjected to unlawful retaliation. *EEOC v. River Oaks Diagnostic Network, Inc.*, U.S.Dist.Ct., S.D.Tex., No. H–01–3966. A.S.L.

Criminal Litigation Notes

On Dec. 6, a Texas jury imposed a life sentence on a Georgia teen, James Charles Embree, age 19, convicted of murdering a gay professor with whom he had sex. Embree tried to use a "homosexual panic" defense to no avail. Embree had pled guilty to the crime, and the jury was only concerned with the sentencing portion of the case. *Washington Blade*, Dec. 14.

In *State of Hawaii v. Bani*, 2001 WL 1474865 (Hawaii Supreme Ct., Nov. 21), the court found that Hawaii's version of "Megan's Law" requiring convicted sex offenders to register with the state and authorizing notification to the public of their identities and residences is constitutionally flawed in not giving the defendant an opportunity for a hearing specifically to determine whether such public notification is warranted. The court premised its ruling on the state constitution's due process clause protection for liberty. A.S.L.

Legislative Notes

D.C. Domestic Partner Benefits It appears that a domestic partner benefit plan for District of Columbia municipal employees, enacted years ago, may finally go into effect when President Bush signs this year's appropriations bill for the D.C. government. On December 4 a congressional conference committee agreed to a version of the bill that eliminates a restriction on the District spending any money to fund partnership benefits. Such a restriction has appeared in the last nine annual District appropriations bills. *Washington Blade*, Dec. 7. However, the final version of the bill accepted House provisions banning the D.C. Human Rights Commission from enforcing an order requiring the Boy Scouts to offer membership to two openly-gay leadership applicants and forbidding the District from spending money on needle exchange programs. House Republicans are apparently eager to avoid spending taxpayer funds on preventing D.C. residents who use IV drugs from contracting HIV, even if it means spending more taxpayer money on expensive medical services to keep them alive after they do so. This is called ideological fiscal economy.

Atlanta, Georgia Domestic Partnership Ordinance Mayor Bill Campbell has vetoed a bill passed by the City Council on Dec. 4 that would

have disqualified companies that don't have domestic partnership benefits plan from contracting with the city for goods or services. Although the mayor did not comment publicly on the veto, the bill had been criticized, even by some in the gay community, as being poorly drafted and giving the city and contractors inadequate lead-time to come into compliance. The only member of the council who voted against it, Lee Morris, chair of the council's finance committee, pointed out that the city presently has problems finding bidders for some of its contracts, and argued that it was bad policy to quickly enact the domestic partnership requirement without adequate study and lead-time for implementation. *Daily Labor Report* No. 238, Dec. 13, 2001, p. A–11.

Snohomish County, Washington The county council voted 3–2 on Dec. 19 to protect county employees from discrimination on the basis of sexual orientation. The council split along party lines, leading to arguments that the measure was being rammed through in the face of an anticipated change in the political balance of the council when newly-elected members take office in January. This is an anti-discrimination policy that may be headed for a speedy repeal. *Seattle Times*, Dec. 20.

San Diego, California Boy Scouts Lease Bowing to legal opinions, the San Diego City Council voted 6–3 to renew a lease of a 16–acre parcel in the city's Balboa Park to the local Boy Scouts Council. The Scouts will continue to pay a nominal $1 annual rental, in addition to an annual $2500 administration fee, and have committed to making $1.7 million worth of improvements in the property during the next 7 years of the lease. Dissenters argued that the city should not be doing business with a discriminatory organization, but the majority argued that canceling the lease would unfairly punish thousands of kids who participate in the Council's programs. *Los Angeles Times*, Dec. 5.

Minnesota Domestic Partnership Benefits A tie vote in the state legislature's Subcommittee on Employee Relations results in domestic partnership benefits for same-sex partners of state employees, negotiated by the public sector unions, going into effect on December 21. However, when the full legislature convenes in 2002, it is expected that Republican's will raise the issue and attempt to past legislation rescinding the benefits. *Minneapolis Star Tribune*, Dec. 11.

Federal — 9/ 11 Victim Compensation Special Master Kenneth Feinberg, appointed by the Justice Department to administer the federal relief fund for victims of the September 11 terrorist attacks, has issued interim regulations under the authority of Public Law 107–42, Title IV. The fund was intended both to compensate victims and to insulate the airlines from damage claims for personal injuries arising from the 9/ 11 events. One of the major policy questions facing Feinberg is whether surviving same-sex partners of 9/ 11 victims should be entitled to the same financial compensation that is being afforded to surviving legal family members. The interim regulations, which are published online at http://www.usdoj.gov/ victimcompensation/ victimcompfedreg.htm, do not address the issue directly. A quick review of the regulations indicates that Feinberg is apparently treating the compensation plan as a substitute for litigation, as it was apparently intended by Congress, and thus is likely to construe eligibility the way a trial court would construe it in a suit for damages against the airlines. Claims can be filed by actual survivors who suffered physical injuries, and by the executors or administrators of the estates of victims who died in the events. Those who would have claims against the estates or would be beneficiaries under wills apparently stand the best chance of receiving compensation. This doesn't sound good for surviving gay partners, since California and Vermont and Hawaii may be the only states that expressly authorize wrongful death suits by surviving partners (and then limited to those who are registered partners under state laws), and attempts to include gay partners under intestate succession have been notably unsuccessful. Comments on the interim regulations are due by January 21, 2002, and can be submitted by email to victimcomp.comments@usdoj.gov or by fax to 301–519–5956. The regs will eventually be codified at 28 CFR Part 104. • • • Meanwhile, predicting that surviving same-sex partners of 9/ 11 decedents are unlikely to get quick compensation from the feds, two New York organizations, Empire State Pride Agenda and the Stonewall Community Foundation, have started their own 9/ 11 Fund to collect donations and distribute compensation to gay partners. Donations to "The 9/ 11 Gay & Lesbian Family Fund" can be sent to Stonewall at 119 W. 24 St., NY NY 10011. For information, check their website at www.stonewallfoundation.org.

Federal — Education Policy The education policy bill passed by Congress in December at the behest of the Bush Administration includes several provisions of concern for lesbian/ gay law. Most prominently, it requires public schools to open their doors to military recruiters, and instructs public school districts that are federal fund recipients (virtually all of them, that is) to allow equal access to the Boy Scouts of America. This merely codifies a recent court decision to the same effect, which pointed out that the Boy Scouts have the same rights of access to the schools as the Ku Klux Klan, an organization with some resemblance to the Scouts in certain of its membership policies and tenets. A.S.L.

Law & Society Notes

In a letter sent to Matt Foreman, executive director of the Empire State Pride Agenda, on November 30, Robert M. Bender, Jr., Chief Executive Officer of the American Red Cross in Greater New York, pledged that gay survivors and partners of victims of 9/ 11 will be treated without discrimination by the Red Cross in provision of benefits from funds donated to the Red Cross to compensate victims of the terrorist attacks. Bender enclosed with his letter a set of formal guidelines adopted by the Red Cross on November 28 listing various kinds of evidence that could be considered in determining whether a benefit applicant was involved in a relationship with a victim that would qualify them for assistance. The guidelines list 16 different items of potential evidence, and state that registration as domestic partners is not required, although it is one way to prove the necessary relationship. Staff are also advised not to deny service for lack of verification, but to refer disputed cases to a supervisor, and supervisors are to contact organizational officers before denying any assistance. The guidelines were issued in response to complaints that gay applicants were being turned away without being given adequate opportunity to prove the nature of their relationships to victims.

Faculty members at the University of South Carolina voted in favor of a university non-discrimination policy that includes sexual orientation on Dec. 5, but their action stirred up a hornet's nest of protest among state legislators, some of whom vowed to take fiscal revenge against the university if the policy is approved by the administration. *Washington Blade*, Dec. 14.

Collective bargaining between Florida's public university teachers and the state Board of Education has come to an impasse over two issues: pay raises, and a demand by the teachers' union for a non-discrimination provision that includes sexual orientation. The Board is resisting the non-discrimination demand, claiming that agreeing to such a provision would be contrary to the intent of the state legislature, which is controlled by the Republican Party and dominated by Republican Governor Jeb Bush. *South Florida Sun-Sentinel*, Dec. 20.

Faculty members at the University of Las Vegas Boyd School of Law created such a ruckus when Marine recruiters came on campus on Oct. 24 that the law school's dean, Richard Morgan, felt compelled to quell legislative unrest by formally apologizing to the Board of Regents for the conduct of his faculty. The faculty members were engaging in "ameliorative activity" to counter the impact on their institution of allowing representatives of a discriminatory employer on campus. Dean Morgan told the Regents that they shouldn't take action against the faculty members who disrupted the program,

because he had authorized them to engage in protest activity. *Las Vegas Review-Journal*, Dec. 8.

The Snohomish County, Washington, Health District board has approved new union contracts under which employees with same-sex domestic partners will be able to get insurance coverage for their partners, according to a Dec. 10 report by *The Herald* in Everett, Washington.

Another first for Vermont: The Green Mountain Council of the Boy Scouts of America has adopted a nondiscrimination policy that includes sexual orientation, and has stated that openly gay men and boys are welcome to join the organization as leaders and members. The Council took this action because the leaders tired of being accused of discriminatory policies and suffering pressure to be expelled from public schools and facilities. Vermont is, at least legislatively, the most gay-friendly jurisdiction in the nation, with a state civil union law, a state non-discrimination law, and provision of domestic partnership benefits to state employees. *Albany Times Union*, Dec. 18.

The Palm Beach County, Florida, Sheriff's Office has adopted a plan to offer medical benefits to same-sex and opposite-sex domestic partners of its employees, beginning in January. The Sheriff, Ed Bieluch, an elected official, decided to adopt this policy for the 3,000–employee department because he decided it was "the right thing to do." *South Florida Sun-Sentinel*, Dec. 14.

The *Washington Post* reported Dec. 10 that a survey by the William M. Mercer consulting firm determined that among companies with 500 or more workers, 16 percent offer employees benefits coverage to same-sex partners of their employees, up from 12 percent a year earlier. Among the very largest companies, with more than 20,000 workers, about a third provide such benefits. Ironically, these gains have come at a time when employers are trimming benefit plans in response to rising costs, including dropping coverage for retired workers.

Opponents of Miami-Dade County's ordinance banning sexual orientation discrimination have obtained sufficient petition signatures to force the county commissioners to take action. Either they can repeal the ordinance or they must put a repeal question on the ballot next September 10. On Dec. 18, Miami-Dade Supervisor of Elections David Leahy certified that Take Back Dade-Miami, an anti-gay organization, had managed to obtain 51,026 signatures, more than enough to meet the requirements of the law. *South Florida Sun-Sentinel*, Dec. 19.

Two stories appearing in mid-December illustrated the differing ways that religious denominations are dealing with the issue of homosexuality. The Associated Press reported Dec. 18 that a formal complaint has been filed with the hierarchy of the United Methodist Church against Rev. Mark Edward Williams, who "came out" at the denomination's Pacific Northwest Annual Conference in June. A United Methodist Judicial Council will determine whether he will be removed from his pulpit at Woodland Park United Methodist Church in Seattle. The council ruled in October that the Methodist Book of Discipline forbids the appointment of gay pastors. Just days earlier, on Dec. 15, the *Press-Enterprise* in Riverside, California reported that Temple Beth El, a Reform Jewish congregation, has voted to make permanent the appointment of Rabbi Harold F. Caminker, an openly-gay man, who had joined the congregation on an interim basis in August. Caminker, previously married and the father of three daughters, divorced in 1995 and "came out" to his peers in the Reform rabbinate. The president of the congregation, Jim Orens, told the newspaper that Caminker's sexual orientation was not an issue in the decision about his hiring. Caminker has been a leader in interfaith activity in Riverside, inviting the executive director of a local Muslim mosque to speak at the synagogue on Yom Kippur.

The *South Florida Sun-Sentinel* reported Dec. 18 that a mystery donor had presented $200,000 to the South Florida Council of the Boy Scouts of America to show support for the organization's ban against gay leaders and members. The donor had offered the money as a challenge grant, and the Council has raised another $100,000 toward matching it. The gift was inspired by the decision of the Broward County United Way to suspend support for the Scouts because of their discriminatory policies.

An openly lesbian politician, Cathy Woolard, won a run-off to become City Council President of Atlanta. *Atlanta Journal*, Dec. 2. A.S.L.

International Notes

Egypt An Egyptian appellate court has reduced the sentence of a teenager who was swept up in the mass arrests of gay men at a popular nightclub essentially to time served, commenting that a youngster could not be expected to appreciate his best interest in such matters. Young Mahmoud was convicted on September 18 in the Cairo Juvenile Court and sentenced to three years in jail and three years probation. The appeals court reduced the sentence to six months of each, and since Mahmoud had been jailed since his arrest last May 10, he was ordered immediately released. *International Gay and Lesbian Human Rights Commission* Press Release, Dec. 19. Twenty-three men who were arrested in the same police action are now serving sentences of various lengths, having been convicted of violating laws against "habitual practice of debauchery" and "contempt of religion." The Emergency Security Court that convicted them acquitted 29 other men who had been arrested at the same time.

Sweden — Reuters reported on December 9 that a male sperm donor for a lesbian couple was held liable by a Swedish county court for child support after the couple split up. Although most sperm donors in Sweden are anonymous, in this case the lesbian couple chose a friend to be a "known donor." The court found that since his identity as the biological father was not in doubt, he could be compelled to pay the equivalent of $265 a month to help support the child conceived with his sperm. The man has appealed the ruling, arguing under Swedish law that sperm donors are generally held to have no parental obligations.

Netherlands We have to correct a report from the December *Law Notes* concerning co-parent rights in the Netherlands. According to Kees Waaldijk, our principal informant on Dutch law, the new law going into effect January 1 will give co-parents various rights, duties and responsibilities with respect to the biological or adoptive children of their partners, but will not give them parental status. Waaldijk also informs us that Iceland has had a similar rule since 1996 for its registered partners with respect to their children.

Netherlands The Associated Press reported on Dec. 12 that in the first six months since the new Dutch law opening up marriage to same sex couples went into effect, approximately 2,100 men and 1,700 women have participated in same-sex marriages, which comprised 3.6 percent of all new marriages performed during the period April 1 - September 30. The Central Bureau of Statistics reported that the figure was more than 6% of all marriage during April, but has stabilized at about 3% of the marriages performed each month.

Canada The *National Post* reported on Dec. 7 that the British Columbia Supreme Court has ruled against Gregory Wald's suit seeking a share of the estate of the late David Spencer, a wealthy department store heir who had reportedly set up Wald in an apartment while they were having a 2–1/ 2 year affair, only to terminate the relationship when his financial advisor convinced him that Wald had been abusing the credit cards that Spencer gave him. The court found that Spencer was entitled to make his testamentary dispositions and revise his will to remove a substantial bequest to Wald. In prior litigation, reported as *Wald v. Horning*, 1999 CarswellBC 443 (B.C. Sup. Ct. in chambers), Wald sued the financial advisor for interference with inheritance, which the court found to be an attempt to end-run the province's abolition of the old common law action of alienation of affections.

Philippines The *Manila Standard* reported on Dec. 6 that the lower house of the national legislature is expected to pass House Bill 2784, titled "An Act Prohibiting Sexual Discrimina-

tion on the Basis of Sexual Orientation and Providing Penalties Therefor." The legislation, authored by Rep. Loretta Ann Rosales, would penalize discrimination against lesbians, gay men, bisexuals, transsexuals, and intersexuals. As such, if enacted it could become the first legislative recognition of intersexuals as a protected group. Characteristic of a new openness toward sexual minorities, the newspaper also reported that the Philippine National Police and the Armed Forces of the Philippines have announced that they will accept gay people in their ranks provided they don't engage in conduct "inimical to public morals."

India The Naz Foundation, a gay rights group, has filed a public interest suit in the Delhi High Court asking for a ruling that the law against "unnatural offenses" which penalizes consensual sodomy, be declared in violation of the right to life and liberty under Article 21 of the Indian Constitution. A division bench of the court has issued notices to the Delhi Government, the social welfare ministry, the Police Commissioner and the National AIDS Council asking them to respond to the complaint, which argues, among other things, that the continued maintenance of the law is a barrier in the fight against AIDS. *Times of India*, Dec. 8.

Spain Continuing a process of making amends to members of groups that were persecuted under the right-wing Franco regime, the Spanish parliament approved a measure pledging to expunge the criminal records of gay people who were imprisoned during that time, and to seek ways to compensate them for years of torture and imprisonment, according to a Dec. 13 report in *The Guardian*. Previous similar measures were passed seeking to compensate former political prisoners and anti-Franco guerilla fighters. A.S.L.

Professional Notes

Following the lead of the American Bar Association, which years ago approved an affiliation with the National Lesbian and Gay Law Association, the American Medical Association has approved an affiliation with the Gay and Lesbian Medical Association, which will be part of the AMA's Specialty and Service Society. Two days after the Dec. 3 vote to include GLMA, the AMA leaders approved a resolution in support of domestic partner benefits in the medical profession. *Washington Blade*, Dec. 14. A.S.L.

AIDS & RELATED LEGAL NOTES

California Defamation Litigation Concerning Statements About an AIDS Doctor

A California Court of Appeal panel upheld a damage award for defamation where false statements were made that a physician had AIDS. *Cable v. Todisco*, 2001 WL 1555372 (Cal. App. 4 Dist., Dec. 5).

Dr. Douglas Cable and his former nurse, Joan Todisco, have had a tortured history in the California courts. In 1991, the parties contracted to have Todisco provide home health care services for Cable's terminally ill patients, most of whom had AIDS. A dispute arose in 1995 over a division of the profits and Todisco sued and was awarded almost $200,000.00.

After her victory on the contract issue, Todisco did not stop there. Todisco told a number of people, falsely, that Cable was dying of AIDS. After this, Cable's practice started to decline and he suffered from depression and anxiety. In 1996, Cable brought this action against Todisco for defamation of character and infliction of emotional distress. Todisco represented herself pro se in the litigation and, as a result, it took years for the matter to go to trial. At trial, Cable offered evidence of lost revenue from Todisco's statements of between $800,000 and $1,100,000. The court found, however, that Cable's losses were not solely attributable to Todisco's statements. The court specifically found that the "sad fact remains that Dr. Cable's specialty in infectious diseases, particularly HIV/ AIDS cases would also impact damages in at least two ways: (1) the death rate among AIDS patients must work to reduce patient rolls, and (2) Dr. Cable's non-HIV/ AIDS patients may very well go to other doctors" for fear of being infected. As a result, the court awarded damages to Cable in the sum of $250,000 and reimbursement for psychological counseling of $27,000.

Todisco appealed the judgment, but the court of appeal affirmed the trial court's decision. In its decision, the appeals court stated: "We agree with the trial court that it is now time for the parties 'to disengage.' We share the court's hope that despite 'having destroyed that which [they] built,' the parties 'can go forth ... in the future and rebuilding [their lives] in a productive and beneficial way.'" This case and the behavior of the parties begs the question of whether litigation solves anything. *Todd V. Lamb, a litigator*

Housing Works Beats Back Giuliani's Motion to Dismiss Its Constitutional Claims

A New York federal district court judge has ruled that Housing Works, a not-for-profit organization that administers programs dedicated to serving people living with HIV/ AIDS, may proceed with discovery in its civil lawsuit against New York City, Mayor Rudolph Giuliani and numerous other high-ranking municipal officers for allegedly violating the organization's constitutional free speech and equal protection rights. *Housing Works, Inc. v. Giuliani*, 2001 WL 1537551 (Nov. 30).

In two separate complaints, Housing Works has alleged that the mayor and members of his staff and administration purposefully refused to renew various service contracts with Housing Works because of the organization's public protests and criticism of the mayor's HIV/ AIDS policies. In a scrupulously detailed decision and order that exceeds one hundred pages, District Judge Marrero denied significant portions of the defendants' Rule 12(c) motion to dismiss, concluding that Housing Work's complaint sufficiently stated a cause of action under 42 U.S.C. section 1983, for alleged violations of the First and Fourteenth Amendments to the U.S. Constitution.

Since its founding in 1991, Housing Works has operated several multi-million dollar programs funded in part by New York City to provide housing, counseling and other services to people living with HIV/ AIDS. Housing Works explains in its complaint that in addition to providing direct services to the public, it also "has long been a vocal and militant critic of the Giuliani Administration's attempts to cut and restrict essential services and benefits provided for low-income people with HIV and AIDS." The organization has filed lawsuits and staged protests and engaged in other acts of civil disobedience against the Giuliani Administration over the years.

Housing Work alleges that beginning in 1997, in retaliation for its criticism of Giuliani's policies, the defendants refused to renew contracts with Housing Works and prevented it from securing funding through other city, state and federal grants. The defendants have attempted to justify their actions by noting in support of their motion to dismiss that as early as 1995, Housing Works suffered from severe financial mismanagement. According to Housing Works, this is merely a pretext for discrimination since all financial irregularities that were uncovered by an independent audit in 1995 were corrected, to the City's satisfaction, by the following year.

Leaving aside these factual issues for purposes of the defendants' motion to dismiss, the court focused on the legal limits placed on federal, state and local governments in terminating their contractual relationships with independent contractors because of the latter's exercise of their right to free speech. The defendants argued that since the City had not in fact terminated any existing contracts with Housing Works, but simply refused to renew contracts that had expired and refused to award new contracts to Housing Works, the plaintiff had not stated a viable claim under precedent estab-

lished by the Supreme Court in 1996 in *Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668. The court rejected this position, and found as a matter of law that in light of the long-standing and continuous relationship between Housing Works and the City, any adverse decision against Housing Works as a result of the exercise of its free speech rights even as to prospective contracts could be actionable under *Umbehr*.

The court similarly concluded that Housing Works' complaint contained sufficient allegations to survive a motion to dismiss as to its equal protection claims. Judge Marrero noted: "Housing Works has met its burden at the pleading stage by alleging that many other non-profit service organizations had financial management problems and that Housing Works was singled out for different treatment with no rational basis, in this case on the unacceptable grounds of its exercise of First Amendment rights."

Housing Works sued Giuliani and the other government officials both in their official and individual capacities. The City moved to dismiss the complaints as to all of the individual defendants on the basis of qualified immunity, and based on its position that Housing Works failed to allege that the individually named defendants participated directly in the alleged constitutional violations. The court rejected the City's argument of qualified immunity as to all of the defendants, ruling that by 1997 the defendants should have known that their alleged retaliatory conduct may have violated Housing Works' constitutional rights as interpreted by the Supreme Court in the 1996 *Umbehr* decision. After examining in detail the factual claims in Housing Works' complaints, the court concluded that the allegations against Giuliani and all but two of the individually named defendants pleaded sufficiently the element of "direct participation."

The court dismissed Housing Works' claims for punitive damages and its causes of action that were based on alleged violations of New York State's constitution and common-law fraud. Judge Marrero's decision nonetheless is a victory not only for Housing Works, but also for other organizations that wish to compete for city contracts without giving up their right to aggressively advocate on behalf of the people or causes they serve. *Ian Chesir-Teran*

Florida Supreme Court Revives "Condom in Coke Bottle" Emotional Distress Suit

In 1999, the Florida 5th District Court of Appeals threw out a jury verdict in favor of two women who claimed to have suffered great emotional distress for fear of contracting HIV and other sexually-transmitted diseases when they thought that a used condom was floating in a bottle of coke from which they drank. The jury had awarded $75,000 to each of the plaintiffs and $20,000 for loss of consortium to the husband of one of them, and the trial court had reduced the awards to $25,000 for each woman and $8,000 to the husband. The appeals court, noting expert testimony that a harmless mold had been mistaken by the women for a condom, reversed the verdict, holding that under Florida's "impact rule" there could be no recovery for emotional distress in the absence of an actual physical injury.

The Supreme Court has now revived the verdicts, ruling in an opinion by Justice Anstead that the finds that the impact rule should not stand in the way of a viable emotional distress claim. Anstead wrote that "public policy dictates" such a result, "in that a cause of action for emotional distress caused by the ingestion of a contaminated food or beverage should be recognized despite the lack of an accompanying physical injury" because "ingestion of a food or beverage containing a foreign substance constitutes an 'impact'." The court notes that some other jurisdictions have reached a similar conclusion, citing another condom-in-a-coke-bottle case, *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970), in which that court found such circumstances to meet impact requirements, and in a later case even loosened standards further by waiving the requirement that plaintiffs show a physical manifestation of their emotional injuries. *Culbert v. Sampson's Supermarkets, Inc.* 444 A.2d 433 (Me. 1982).

The opinion drew a dissent from Justice Harding. Harding quoted the court of appeals decision, noting that after an all-state search for precedent, the court had found no case allowing damages in this kind of scenario for fear of AIDS in the absence of some evidence that "the virus was present" such that a fear of contagion was reasonable. Harding also objected that the court's ruling amounted to an advisory opinion.

No wonder liability insurance for business is so high! A.S.L.

Another Parting Shot At Giuliani From the Federal District Court

In a scathing opinion issued on December 11 in *Henrietta D. v. Giuliani*, 2001 WL 1602114 (U.S.Dist.Ct., E.D.N.Y.), District Judge Sterling Johnson endorsed the report and recommendations prepared by U.S. Magistrate Judge Cheryl Pollak to ensure the City of New York's compliance with its responsibilities to people with HIV/ AIDS and denied the City's demand that the recommendations be held up while the City appeals Johnson's ruling to the U.S. Court of Appeals.

In the course of his opinion, Johnson also granted the request by the Plaintiffs to strike from the record documents submitted by the City which had not been disclosed to the plaintiffs during the discovery phase of the lawsuit, in violation of the Federal Rules governing discovery of relevant information by parties to a lawsuit.

Judge Johnson found all of the City's objections to Judge Pollak's report to be totally without merit. In essence, Pollak had fashioned a report that requires the City to comply with city, state and federal law and regulations in making services and benefits available to people with HIV/ AIDS. Johnson found that the City was trying to raise new objections to Pollak's report that had never been presented to Judge Pollak during the period when she was conferring with the parties on the substance of her report, and found that the City's objections were now precluded from consideration as a result.

As to the City's attempt to supplement the documentary record before the court with materials that had not been produced in response to the plaintiffs' discovery demands, Johnson wrote: "Considering the length of time City Defendants had to produce the document in question, the Court finds that City Defendants' conduct constitutes flagrant bad faith and a callous disregard of the Federal Rules of Civil Procedure."

Most importantly, however, Johnson ruled that Pollak's recommendations, which require the City to comply with the law and also require the State to monitor the City's performance, should go into effect without waiting to see what the court of appeals might say in response to an appeal by the City. Johnson rejected the City's argument that the expansion of staff that would be required to comply will impose an irreparable harm on the City, observing that the City has been on notice since the court issued its first ruling in this case more than a year ago that it would be ordered to comply with all legal requirements, including the levels of staffing specified in the City legislation that had created the Division of Aids Services and Income Support a bill that had been masterminded by Tom Duane during his time on the City Council to ensure that the Giuliani Administration could not administratively reduce City services to people living with AIDS. Nonetheless, the City was now complaining that it needed more time to comply, an argument that Johnson found unconvincing.

As Judge Johnson observed, "As Plaintiffs are persons who suffer from AIDS and HIV-related illness, granting the stay requested by City Defendants does not serve the public interest. Rather, it is in the public interest that Plaintiffs be given meaningful access to the benefits and services to which they are entitled as soon as feasibly possible. This Court finds that the balance of factors clearly weigh against granting a stay."

The Plaintiffs are represented by volunteer lawyers from Pillsbury Winthrop LLP, with the

assistance of lawyers from Housing Works and the HIV Law Project. A.S.L.

W. Va. Court Refuses to Block Subpoena for Doctor's Records

In *Feathers v. Board of Medicine*, 200l WL 1525179 (Nov. 28), the Supreme Court of Appeals of West Virginia affirmed the lower court's decision to subpoena 30 random patient files of the appellant doctor to determine whether his fees were reasonable. The doctor sought a writ of prohibition which would have halted the enforcement of the Board's subpoena, raising confidentiality concerns about HIV-related patient information in the files, but it was denied. Quoting from the case *Allen v. Bedell*, 454 S.E.2d 77 (W.Va. 1994), the court said writs of prohibition provide a drastic remedy to be invoked only in extraordinary situations.

One of Dr. Feathers' arguments was that the Board's subpoena is procedurally detective because it did not exempt from its coverage the files of patients who had submitted to HIV testing or the mental health records of some patients. Dr. Feathers' concern is that a person's HIV status or mental health is statutorily protected information that can not be obtained by subpoena. The court disagreed, asserting that Dr. Feathers did not carry the burden of proving the information is privileged, and the Board did establish a right to have its subpoena enforced.

The outcome of this decision presents one question: what information is protected when you visit a doctor? A person taking an HIV test, or someone with metal illness, should be entitled to have their information kept confidential, but this court apparently did not agree. *Tara Scavo*

AIDS Litigation Notes

In *Matter of Dexter*, 2001 WL 1355722 (N.C.Ct.App., Nov. 6), the court approved the Durham County District Court's placement of five children with their father, after finding that their mother, from the whom the father is divorced, had neglected the children. The mother argued on appeal that the trial court failed to take into account that father was HIV+, but the court of appeals treated the trial court's factual finding that placement with the father would be in the childrens' best interest as conclusive on appeal.

The *Albany Times Union* reported Dec. 10 that Thomas J. O'Brien, who admitted having sex with two boys while knowing that he is HIV+, will be sentenced to twenty years in prison on two counts of first-degree sodomy. (Although New York has repealed its laws against consensual sodomy, sodomy with minors remains a criminal offense.) According to the news report, both of the young boys have repeatedly tested negative for HIV. The sentencing is scheduled to take place Jan. 4 in Albany County, New York, Court.

U.S. District Judge Sweet applied a downward departure from sentencing guidelines in *United States v. Martin*, 2001 WL 1537700 (S.D.N.Y., Dec. 3), in part due to the defendants' declining health due to AIDS. A.S.L.

AIDS Law & Society Notes

President George W. Bush has designed Patricia Funderburk Ware to be the executive director of the Presidential Advisory Council on HIV and AIDS, a body created in 1995 to offer recommendations to the White House on HIV/AIDS programs. Ware is a prominent exponent of "abstinence-only" educational programs, and directed the Office of Adolescent Pregnancy Programs during the administration of Pres. George H. W. Bush. *Washington Times*, Dec. 10.

Revised Guidelines for HIV Counseling issued by the Centers for Disease Control and Prevention include, for the first time, a recommendation that counselors refer people for legal services, thus recognizing that importance of legal advice to persons with HIV. The Guidelines can be found on-line at www.cdc.gov/nchstp/ od/ draft.htm. David Schulman, an HIV/ AIDS attorney in the Los Angeles City Attorneys Office, spearheaded a national effort to get the CDC to revise its initial draft to include this recommendation. Those seeking more information about the issue can contact him at dschulm@atty.lacity.org.

The *Wall Street Journal* reported on Dec. 20 that the U.S. lags behind many other countries in HIV-testing because the holder of patents on a new technology for simplified, rapid testing is refusing to allow its use in the United States. Bio-Rad Laboratories, Inc., holds the patent on a simple test-kit that uses a litmus-type test to detect the presence of antibodies to HIV in saliva. The test can be performed simply by dipping the test paper into the subject's mouth and seeing if it changes color. Widespread availability of such testing in the U.S. would drastically decrease test expenses and would eliminate the problem that a substantial portion of those who go to confidential or anonymous test sites do not return to find out their results. The *Journal* reports that Bio-Rad did license some rights to three large companies in the U.S., but those companies presently market the much more lucrative laboratory-based tests and don't want to hurt their own revenues by making the simplified test available. The CDC has asked the Justice Department to consider mounting an antitrust action against the drug companies to make this test available on public health grounds.

A study presented on Dec. 18 at a meeting on infectious diseases in Chicago sponsored by the American Society for Microbiology reported that half of those under treatment for HIV-infection in the U.S. have strains of the virus that are resistant to at least one of the standard AIDS drugs now on the market. The high prevalence of drug-resistant virus was seen as a major challenge for efforts to cope with the HIV/AIDS epidemic. *Chicago Tribune*, Dec. 19. A.S.L.

AIDS International Notes

South Africa On Dec. 14, Judge Chris Botha of the High Court in Pretoria ruled that the government must expand an existing experimental program to make appropriate AIDS medications available to pregnant women giving birth in all public hospitals. Statistics show that about 200 HIV+ babies are born every day in South Africa, but the government has resisted expanding the program beyond a few experimental locations, on grounds both of expenses and of President Mbeki's opposition to HIV-related medications on the ground that he is still not convinced that HIV is the cause of AIDS. AIDS organizations in South Africa cheered the ruling, only to learn a few days later that the government will appeal it to the constitutional court, claiming that Botha was without jurisdiction to make such a ruling on a matter of government policy. *Associated Press*, Dec. 16 & 19.

Canada Quebec Superior Court Justice Jean-Jacques Croteau dismissed a discrimination lawsuit brought by gay stockbroker DeWolf Shaw against First Marathon Securities, Ltd., who alleged that he was discharged because he has AIDS. The judge asserted that Shaw had provided no evidence of discrimination on the basis of his sexual orientation or his health status. Shaw still has a lawsuit going against National Bank of Canada, which bought First Marathon in 1999. *Globe and Mail*, Dec. 13.

Malaysia The Selangor provincial government has backed away from a proposal to restrict condom sales, which had been brought forward to appease Muslim groups that objected to the easy, widespread availability of prophylactics. The objectors complained that even small children could easily gain access to condoms, which offended moral propriety, but the government has concluded that the war against HIV and other sexually-transmitted diseases should take priority over these moral qualms. The matter has been heavily debated in the letters-to-the-editor columns in Malaysian newspapers for several months. *Straits Times*, Dec. 13. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

The Lavender Law 2002 conference will be held in Philadelphia on October 10–12, 2002, at the Loews Hotel. The conference is timed to coincide with Columbus Weekend and Philadelphia's Outfest Block Party. Save the date!

RESEARCH ANNOUNCEMENT

ATTENTION YALE LAW SCHOOL ALUMNI. For an academic research project on the experience of LGBT persons at Yale Law School, I am seeking telephone interviews with LGBT graduates of this institution. I would be grateful if you would share your experience; your participation will enable me to construct a more complete picture of the LGBT student experience over the years. Interviews are strictly confidential and typically last 20 minutes. I am eager to talk with all individuals, and am conducting interviews through the end of February. To schedule an interview, please email (derek.dorn@yale.edu) or telephone (203/752–0007). Thank you! Sincerely, Derek Dorn (YLS '02)

LESBIAN & GAY & RELATED LEGAL ISSUES:

Beger, Nico J., *Que(e)rying political practices in Europe: Tensions in the Struggle for Sexual Minority Rights* (University of Amsterdam Ph.D. thesis, Nov. 2001, available from nicobeger@t-online.de).

Brandes, Joel R., *Visitation Rights of Non-Parents*, NYLJ, Dec. 19, 2001, p. 3.

Student Articles:

Marston, Jennifer, *Yesterday, Today, and Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 Oregon L. Rev. 301 (Spring 2001).

Note, *Common Law Adoption: An Argument for Statutory Recognition of Non-Parent Caregiver Visitation*, 33 Suffolk U. L. Rev. 163 (1999).

Wong, Caroline M., *Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?*, 80 Oregon L. Rev. 267 (Spring 2001).

EDITOR'S NOTE:

All points of view expressed in *Lesbian/ Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/ Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail. • • • Note: Due to year-end commitments by the editor, this issue of *Law Notes* closed especially early in December. Legal developments occurring late in the month will be covered in the February issue.