PENNSYLVANIA SUPREME COURT ALLOWS CO-PARENT VISITATION SUIT

In a 5–2 decision announced on December 28, the Pennsylvania Supreme Court ruled in *T.B. v. L.R.M.*, 786 A.2d 913, that the common law doctrine of *in loco parentis* can be used by a lesbian co-parent to sue for visitation with the child she helped to raise before breaking up with her former partner.

The case involves a lesbian couple who were "engaged in an exclusive, intimate relationship," according to the opinion by Chief Justice Zappala. They "shared finances and expenses through a joint bank account and jointly purchased a home." They decided to have a child, with L.R.M. becoming pregnant with sperm from a donor chosen by T.B. T.B. cared for L.R.M. during the pregnancy, went with her to childbirth classes, and was present in the operating room during the delivery of their daughter on August 27, 1993.

Although the women did not have a formal, written parenting agreement, they lived together with the child and L.R.M. named T.B. as legal guardian of the child, who referred to T.B. as Aunt T. (She also referred to T.B.'s sisters as aunts.) T.B. participated fully in performing parental duties and, according to her lawsuit, has a parental bond with the child.

The parties split up in 1996 when T.B. moved out and began a relationship with another woman. T.B. visited the child once shortly after the breakup, but then L.R.M. "refused all visitation requests, telephone calls and gifts for the child," so T.B. filed a lawsuit seeking "shared legal and partial custody and visitation."

The matter was referred to a judicial hearing officer, who issued a ruling that T.B. was entitled to visitation under the doctrine of in loco parentis, a common law doctrine that recognizes the possibility of an adult who is not legally related to a child having parental duties and responsibilities as a result of a bond formed with the encouragement of the child's legal parent or parents. The hearing officer relied on a then-recent Pennsylvania Superior Court decision, *J.A.L. v. E.P.H.*, 453 Pa. Super 78, 682 A.2d 1314 (1996), which had held that when a child forms a psychological bond with a third party, the court should protect the child's interest in preserving that bond, even if it means some diminishing of the rights of the child's parent. The hearing officer also concluded that it was in the child's best interest to have visitation with T.B.

L.R.M. appealed the hearing officer's ruling to the Court of Common Pleas, which affirmed it and granted T.B. one visitation period per month. L.R.M. then appealed to the Superior Court (in Pennsylvania, an appeals court below the level of the Supreme Court). The Superior Court approved the hearing officer's ruling in principle, but felt that a fuller hearing was necessary before the Common Pleas court could determine whether visitation was in the child's best interest.

The Supreme Court agreed to review the case to determine whether it was appropriate to use *in loco parentis* in this way. The Pennsylvania Supreme Court had not previously ruled on any claim for visitation by a lesbian co-parent.

L.R.M. argued that allowing T.B. to seek visitation would violate the relevant Pennsylvania statutes, which only specifically authorize a limited range of people to seek visitation, not including unmarried partners of their parents. Justice Zappala found L.R.M.'s argument unpersuasive, stating that it would lead to "a far-reaching change in the common law a change that could potentially affect the rights of step-parents, aunts, uncles or other family members who have raised children, but lack statutory protection of their interest in the child's visitation or custody."

The Supreme Court found that T.B. was not relying on the statute to assert her claim for visitation rights, and thus the statute was essentially irrelevant. T.B. was relying entirely on the doctrine of *in loco parentis*, and appeared from the facts to qualify under that doctrine, based on her relationship with the child. Still to be determined, of course, was whether it is in the child's best interest to authorize visitation.

L.R.M. argued that the lack of any recognized legal status for her relationship with T.B. should disqualify T.B. from seeking visitation with L.R.M.'s child, but Zappala found this argument irrelevant as well. "Simply put, the nature of the relationship between [L.R.M.] and [T.B.] has no legal significance to the determination of whether [T.B.] stands in loco parentis to [the child]. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties. What is relevant, however, is the method by which the third party gained authority to do so." In this case, T.B. gained such authority with the initial consent and encouragement of L.R.M. during the course of their relationship.

The court also rejected L.R.M.'s argument that T.B. was a mere "caretaker" of the child, and thus found irrelevant prior court decisions that rejected visitation claims by people who were serving in such capacities. In this case, the record before the hearing officer supported the conclusion that T.B. was a parental figure for the child. Finally, the court rejected L.R.M.'s attempt to use the U.S. Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57 (2000), which had struck down a Washington state statute that allowed any person without qualification to file a claim for visitation with a child. Justice Zappala found this precedent totally irrelevant, since the Pennsylvania court was applying "a well-established common law doctrine" rather than the kind of "breathtakingly broad" statute at issue in *Troxel*.

The Supreme Court majority concluded that T.B. is entitled to a full hearing on the merits of whether it would be in the child's best interest for T.B. to have visitation rights.

Justice Saylor wrote a dissenting opinion that was joined by Justice Castille. Saylor insisted that the statute should govern this case, and that once the legislature had established the public policy as to who can assert visitation claims, it was inappropriate for the court to resort to common law doctrines to go beyond the statute. Further, Saylor claimed that the majority was misapplying *in loco parentis*, which had previously been used in Pennsylvania to protect the rights of people with a legal or biological relationship to the child, albeit not a legal parent relationship. Ultimately, Saylor argued, the question whether a same-sex co-partner, or any non-marital partner, of a parent should be entitled to visitation presented a legislative question, and since the legislature has not addressed it, the court should refrain from doing so.

Lambda Legal Defense Fund senior trial counsel Patricia Logue argued the case for T.B. before the Pennsylvania Supreme Court, with the assistance of local co-counsel Roger D. McGill. Amicus briefs supporting T.B.'s claim were filed by the ACLU, the Support Center for Child Advocates, the Center for Lesbian and Gay Civil Rights in Pennsylvania, and 53 other organizations, including the National Association of Social Workers, which has frequently filed legal briefs supporting the claims of lesbian and gay parents. A.S.L.

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SUPREME COURT CONTRACTS ADA COVERAGE YET AGAIN

In a unanimous ruling that may have implications for protection from discrimination for people with HIV/AIDS, the U.S. Supreme Court ruled on January 8 that a woman with carpal tunnel syndrome that made it painful for her to perform various repetitive assembly-line tasks does not have a "disability" within the meaning of the Americans With Disabilities Act (the ADA). The ruling in *Toyota Motor Manufacturing, Kentucky, Inc.. v. Williams*,122 S.Ct. 681, continues the trend in the federal courts to reduce the number of people who are protected by this statute.

The ADA forbids employers with 15 or more employees from unjustifiably discriminating against persons with disabilities. It also forbids unjustified discrimination in government services, public transportation, and by businesses offering goods and services to the public. (A separate federal statute forbids discrimination against the disabled in housing.) The statute's definition of who qualifies as "disabled" turns on whether a person has a physical or mental impairment that "substantially limits" the individual in performing a "major life activity." Major life activities are not listed in the statute, but regulations list "manual activities" as among those that might qualify.

Ella Williams was an assembly line worker at Toyota who developed pain in her hands, wrists and arms from the repeated tasks she had to perform. She was diagnosed with bilateral carpal tunnel syndrome, and her doctor placed her on permanent work restrictions, precluding her from lifting more than 20 pounds or from "frequently lifting or carrying of objects weighing up to 10 pounds," engaging in "constant repetitive…flexion or extension of her wrists or elbows," performing "overhead work," or using "vibratory or pneumatic tools."

Toyota responded to Williams' limitations by reassigning her to inspection-type jobs that did not require repeated motions of the types described by her doctor, but over time the jobs to which she was assigned evolved and repetitive tasks began to show up, resulting in recurrence of her problems. She asked to have her tasks reduced to exclude the problematic ones, but ultimately was discharged for frequent absences. She sued Toyota, claiming to have suffered disability discrimination from the company's failure to accommodate her needs. On the last day she had worked at Toyota, her doctor had placed her on a "no-work-of-any-kind" restriction due to her deteriorating physical condition.

The trial court granted judgment to Toyota, finding that Williams did not qualify as having a disability because, in the trial judge's opinion, her carpal tunnel syndrome did not substantially limit a major life activity. Williams had argued that she was substantially limited in performing manual tasks, housework, gardening, playing with her children, lifting, and working. The trial court rejected gardening, doing housework, and playing with children as major life activities, and concluded there was insufficient evidence to find that Williams was substantially limited in lifting or working. As to manual tasks, the trial court found that Williams had testified she could do a wide variety of tasks with her hands, and was thus not substantially limited.

The U.S. Court of Appeals for the 6th Circuit disagreed, finding that her carpal tunnel syndrome had substantially limited her in performing manual tasks necessary for her job, and that was enough to find she was disabled. The appeals court sent the case back to the trial court, which still had to consider whether Williams could perform essential job functions if given a reasonable accommodation. But Toyota applied to the Supreme Court for review of whether the appeals court had properly analyzed the disability issue.

Writing for the unanimous court, Justice Sandra Day O'Connor concluded that the appeals court's analysis was fatally flawed. Referring to past cases and the language of the statute, O'Connor asserted that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."

O'Connor explained that carpal tunnel syndrome varies in its impact and permanency. Some people suffer only minor inconvenience for brief periods of time, while others incur substantial limitations in the use of their hands for prolonged periods. In addition, carpal tunnel may impose specific limitations on performing particular tasks without seriously affecting the individual's ability to do many other tasks with their hands.

According to the Court, for somebody to be protected under the ADA, it is not enough for them to show that they have an impairment that prevents or substantially limits them from performing some aspect of their job. Rather, the individual must show that their impairment substantially limits them from performing one or more major life activities, and the Court is unwilling to conceded that the ability to perform an essential aspect of one's job is necessarily a major life activity.

O'Connor wrote: "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." According to O'Connor, focusing narrowly on whether the impairment affects job performance would so broaden the definition of disability that many more people would be covered by the ADA than Congress had contemplated when it passed the statute. Furthermore, since the definition of disability applies not only to employment cases, but also to public transit and public accommodations cases, it would not be logical to have the determination of whether somebody is disabled be based on their work-related activities.

Turning to the evidence in this case, O'Connor found that Williams had testified that she was able to carry on the broad range of daily activities, like brushing her teeth, preparing her food, bathing, and performing household chores. On the other hand, the things Williams could not do, such as lifting heavy objects or performing repetitive tasks on an assembly line, did not strike O'Connor as being major life activities under the concept of "tasks central to most people's daily lives." Most people don't work on assembly lines, and most people do not, on a daily basis, lift heavy objects or perform activities that require them to keep their arms raised for long periods of time.

It is uncertain what impact this ruling may have on discrimination claims by HIV-infected people. Some of the lower courts have routinely treated HIV-infection as a disabling condition, either because of its impact on reproductive activity or because of the wide variety of ways that being HIV-positive may limit somebody's activities. However, other lower federal courts have taken off in different directions. For example, in a decision issued on December 18, a federal district judge in Dallas ruled that an HIV-positive man had failed to show that his infection had substantially limited any of his major life activities and dismissed his employment discrimination claim against the telephone company. (The case is *Blanks v. Southwestern Bell Communications, Inc.*, 2001 WL 1636359 (N.D. Tex.), reported on below.)

When the ADA was passed, protection for HIV-positive people was a large part of the discussion in Congress, and the committee reports and floor debate made clear that many members of Congress intended and assumed that this statute would provide such protection. However, the language of the statute itself poses a complicated analytical test for determining who is "disabled" and thus protected from unjustified discrimination. There is no protection if a person is unable to perform essential job functions, even with reasonable accommodation. More significantly, there is no protection unless an individual is either substantially limited in a major life activity because of their physical or mental impairment, or is regarded

by the employer as being so limited even if he or she is not actually limited.

In 1999, the Supreme Court, by a slim majority, ruled in a trio of cases that the question whether somebody is substantially limited is to be determined taking account of any medication or assistive devices that would make it possible for them to function. If medicine or remedial devices make it possible to perform a function, then the Court would consider that the individual is not substantially limited in performing that function. This ruling, taken together with the new ruling in *Toyota* and the continually evolving efficacy of HIV medications, may spell the end of protection for many HIV-positive people, especially those who cannot persuade a court that reproduction is a major life activity for them that has been substantially limited.

The only HIV-related case considered by the Supreme Court so far, *Bragdon v. Abbott*, 524 U.S. 624 (1998), involved a woman who credibly testified that her HIV-status had caused her to give up dreams of having children, and the Court concluded that the infection had substantially limited her in the major life activity of reproduction. But some lower courts have refused to accept similar arguments from HIV-positive gay men. Thus far, no court has accepted the argument that having to use barrier contraception to prevent HIV-transmission imposes a substantial limitation on the major life activity of having sex, and only one court has even gone so far as to hold that having sex is a "major life activity," in a case involving a man whose medication for a non-HIV-related condition impaired his ability to achieve an erection. (This says a lot about the everyday lives of our federal judges, doesn't it?)

The current precarious state of federal disability discrimination law means that HIV-positive people might be well-advised to look first to state disability laws if they encounter workplace discrimination. The New York law has a much broader definition of disability than the federal law, and in California the legislature amended its state law to make clear that the U.S. Supreme Court's decision on medication and assistive devices did not apply. (Indeed, under California law, the need for assistive devices has traditionally been part of the definition of who suffers from a disability.) Unfortunately, in many places the state law closely tracks the language of the federal law, and state courts interpret it to be no more protective than the federal law. This was true in Kentucky, where Ella Williams filed her claim against Toyota. A.S.L.

LESBIAN/GAY LEGAL NEWS

Vermont Supreme Court Rejects Challenge to Civil Union Act

In a unanimous per curiam opinion issued on Dec. 26, 2001, the Vermont Supreme Court rejected a double-barreled attack on the recently-enacted Civil Union Act, which establishes a status for legal recognition of same-sex partners. *Brady v. Dean*, 2001 WL 1673775. The plaintiffs included Vermont taxpayers, state legislators, and three Vermont town clerks. The taxpayers and legislators claimed that the law was invalidly enacted because a group of supporters of the law maintained a betting pool on the outcome of the third reading of the bill in the state house of representatives. The town clerks alleged that their rights of free exercise of religion were abridged improperly by the Act's requirement that they issue licenses to civil union applicants. Washington County Superior Court Judge Matthew I. Katz dismissed the case, and plaintiffs appealed.

The court first held that the taxpayers and legislators lacked standing to challenge the bill based on their argument that the betting-pool participants should have been disqualified from voting because they had a personal stake in the outcome of the vote. The court viewed this as a separation of powers issue, finding that the Vermont constitution gave to the house of representatives the function of determining the qualifications of its members, thus making the question whether these legislators should have been allowed to vote a "political question" inappropriate for judicial resolution. Indeed, even though a leader of the opposition had drawn the existence of the betting pool to the attention of legislative leaders, nobody had made a formal objection to the actual vote on the measure.

"We further conclude," wrote the court, "that, as a policy matter, a proper regard for the independence of the Legislature requires that we respect its members' personal judgments concerning their participation in matter before them… A member's decision to vote on a matter before the House represents, in our view, a core legislative function that must remain inviolate to ensure the continued integrity and independence of that institution."

Turning to the religious free exercise argument, the court found it equally invalid, suggesting in passing that public officials may not trump validly enacted laws by claiming that executing those laws would violate their personal religious beliefs: "We accept for purposes of analysis the highly questionable proposition that a public official here a town clerk can retain public office while refusing to perform a generally applicable duty of that office on religious grounds. We observe, however, that this proposition which means that the person religious beliefs of a public officer may in some circumstances trump the public's right to have that officer's duties performed is neither self-evident nor supported by any of the cases cited by plaintiffs."

But the court found it unnecessary to cope directly with these assertions, because it concluded that the burden on free exercise was so small as not to raise a serious constitutional issue. For one thing, the Civil Unions Act authorizes clerks to appoint assistant clerks to issue licenses of the clerks have personal reservations about doing so, and the court was unwilling to accept the proposition that even the act of appointing such an assistant would impose an unconstitutional burden on free exercise. And, apart from the issue of assistants, the court found that requiring clerks to issue these licenses did not impose a substantial burden on the clerks. A.S.L.

Georgia Appeals Court Finds Vermont Civil Union Lacks Extra-Territorial Effect

In what may be the first published appellate court decision to consider whether a same-sex civil union contracted in Vermont has any legal effect in other states, the Court of Appeals of Georgia ruled on January 23 in *Burns v. Burns*, 2002 WL 87654, that a Georgia woman who obtained a civil union with her same-sex partner in Vermont was not "married" to her partner, and thus was still bound by a court decree that would prevent her from having visitation with her children while "cohabiting" with any adult to whom she is neither married nor related.

Darian and Susan (Freer) Burns had three children during their marriage, which terminated in a divorce decree on December 4, 1995. Under the terms of the divorce, Darian had custody of the children and Susan had visitation rights. When Darian learned three years later that Susan was living with a same-sex partner, he cut off her visitation. She filed a lawsuit seeking to hold him in contempt for interfering with her visitation rights. In response, the court issued a "consent order" incorporating her agreement with Darian that "there shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree."

Effective July 1, 2000, the state of Vermont allowed same-sex partners to enter into civil unions, and did not require that they be resi-

dents of Vermont. Burns and her same-sex partner went to Vermont on July 3, 2000, and obtained a license and certification of their civil union. They returned to Georgia, and Susan then exercised her visitation rights with her partner in residence, but Darian was opposed to this and filed a contempt motion with the court, claiming that this was a violation of the court's prior order.

Susan argued that she and her partner were now "married" and thus came within the terms of the order. She also argued that failing to recognize her right to reside with her partner while her children visited was a violation of her constitutional right of privacy. The trial court rejected both arguments, finding that the prior consent order was valid and enforceable and was being violated by Susan.

Susan appealed, but had no better luck before the unanimous three judge panel, which rejected her arguments in very brief opinion by Judge Yvette Miller.

Miller pointed out that the Vermont Civil Union Act clearly states that a "civil union" is not a "marriage," quoting "legislative findings" that were published with the Vermont law, stating that "a system of civil unions does not bestow the status of civil marriage." Miller pointed out that even if Vermont had purported to recognize same-sex marriages, that decision would not be binding on Georgia, since Georgia has passed a statute providing that same-sex marriages are not to be recognized in that state.

"What constitutes a marriage in the state of Georgia is a legislative function," wrote Miller, "not a judicial one, and as judges we are duty bound to follow the clear language of the statute. The Georgia legislature has chosen not to recognize marriage between persons of the same sex, and any constitutional challenge to Georgia's marriage statute should be addressed to the Georgia Supreme Court."

The court also noted the federal Defense of Marriage Act, asserting that "Georgia is not required to give full faith and credit to same-sex marriages of other states," without engaging in any analysis of the constitutional merits or faults of that statute.

The court also rejected Susan's constitutional privacy argument, pointing out that the court decree that was being enforced against her was a "consent decree" to which she had agreed in order to settle the prior contempt proceeding. "Although she is correct that there is a right to privacy of intimacy between persons legally able to consent," wrote Judge Miller, "she waived that right (to the extent that right is interfered with here) when she agreed to the consent decree. That this right may be waived is clear. Indeed, if Susan wanted to ensure that her civil union would be recognized in the same manner as a marriage, she should have included language to that effect in the consent decree itself."

The court of appeals concluded that the trial judge was correct in finding the consent decree to be valid, and in finding that Susan was in violation of the decree and thus in contempt of court for having exercised visitation rights in her home with her children while her partner was residing there.

Disappointingly, the court never addressed the question whether Susan and her partner might be considered "related" to each other as a result of their civil union, even if not married. If the court's characterization of Susan's original argument is correct, it is possible that her attorney failed to frame the complaint in the alternative so that such an argument could be considered. Certainly the court did not raise it sua sponte. In light of the wording of the consent order, such an argument might have been more successful than the argument that Susan and her partner are "married." In addition, there is no discussion by the court of the possibility that Susan's alleged "waiver" of her privacy right might be found invalid because obtained under pressure. Had Susan not agreed to the consent order, it is possible that her ex-husband, who had physical custody of the children, could have tied her up in litigation for years during which she would have no contact with the children. To call this waiver "voluntary" seems a travesty.

The court's decision appears to be an open invitation for Susan to file an appeal to the Georgia Supreme Court, at least on the constitutional issue, which she indicated she would do in an interview with the *Atlanta Journal-Constitution* published on Jan. 26. A.S.L.

California Appeals Court Orders Parole for Rosenkrantz; State Files Immediate Appeal

In a startling development, a sharply divided panel of the California 2nd District Court of Appeal has ordered that convicted murderer Robert Rosenkrantz be released on parole, finding that California Governor Gray Davis did not have the authority to overturn a parole date set by the state Board of Prison Terms. *In re Robert Rosenkrantz*, 2002 WL 63786 (Jan. 18). Now 34, the openly-gay Rosenkrantz was convicted in the 1985 killing of Steven Redman, a homophobic friend of Rosenkrantz's brother who had outed Rosenkrantz to his family shortly after Rosenkrantz's high school graduation.

The court of appeal decision produced a curious result, in that the judge who wrote the opinion for the court, Miriam A. Vogel, also wrote a separate concurring opinion to endorse a conclusion by the trial judge that Gov. Davis has improperly adopted a uniform policy of denying parole in all murder conviction cases, when state law requires him to exercise discretion based on the individual case. In the opinion for the court, joined by Judge Robert Mallano (who evidently was unwilling to join in this blanket condemnation of the governor), Vogel held that Davis acted improperly because the appeal court had previously ruled that there was no evidence to support the conclusion that Rosenkrantz would present a danger to society on his release, and thus that he was entitled to be paroled after serving the minimum term to which he was sentenced, 15 years to life for second degree murder and 2 years for using a gun to commit his crime.

The dissenting judge, Reuben Ortega, argued that under Proposition 89, passed by California voters in 1988, the governor has total veto power over parole decisions by the state board. Ortega also insisted that there was no support in the record for the conclusion that Davis follows a no-parole policy, pointing out that Davis stated reasons grounded in the trial record for vetoing parole for Rosenkrantz, and that in fact Davis has paroled one convicted murderer. Ortega also argued that statements made in the heat of electoral politics, such as Davis's statement that if elected he would not parole killers, should not be held against public officials after they are elected.

Rosenkrantz's case has drawn extensive media attention, especially in California, because of the compelling facts of the case. Young Rosenkrantz was mainly closeted and unsettled about his sexual orientation, and certainly not "out" to family members, when he held a party to celebrate his high school graduation. His brother and Redman crashed the party and taunted Rosenkrantz with their beliefs that he was gay. According to one account, Rosencrantz and Redman got into a fight, and Rosenkrantz threatened to kill Redman if he carried out a threat to tell Rosenkrantz's father that he was gay. Redman did subsequently tell the father. Depending which testimony one believes, either the father threw Rosenkrantz out of the house or Rosenkrantz ran away, distraught at his father's negative reaction to the news.

The evidence before the jury showed that Rosenkrantz then acquired an Uzi, spent time practicing on a firing range, and staked out Redman's house about a week later. When Redman showed up, Rosenkrantz demanded that he contact the father and tell him that what he had said about Rosenkrantz was false. Redman laughed, called Rosenkrantz a faggot, and refused his demands. Rosenkrantz then literally blew him away with a stream of bullets from the Uzi, including finishing him off with shots to the head as Redman lay writhing on the pavement. Rosenkrantz ran away and was a fugitive until apprehended by police.

At trial, the jury evidently accepted Rosenkrantz's argument that he was acting under severe emotional distress and had not gone to Redman's house intending to kill him, and thus refused to convict on first degree (premeditated) murder. Under the second degree murder

conviction, Rosenkrantz was sentenced to serve at least 17 years and could be incarcerated for life if not granted parole.

Rosenkrantz turned out to be a model prisoner. He adjusted to acceptance of his homosexuality, and his family rallied around and became supportive of him. He attended classes in prison and earned a college degree, and never incurred any disciplinary action. He petitioned for parole as soon as he would be eligible. There followed a long, complicated series of decisions from parole boards and courts, with frequent reversals over a period of several years. Most recently, after being ordered by the court of appeal to reconsider the application (see 80 Cal.App. 4th 409 [2001]), the parole board, with stated reluctance due to the nature of the crime, set a parole date for Rosenkrantz, which was overturned by the governor.

In his 12–page statement in support of his decision to deny parole, Governor Davis discounted the evidence about Rosenkrantz's emotional distress and his rehabilitation in prison. It seems clear from the segments quoted in the court's decision that Davis believes that the jury should have convicted Rosenkrantz of first degree murder because the evidence, including his acquisition of the Uzi, target practice, and staking out Redman's house, could support a conclusion that the murder was premeditated, and that Rosenkrantz's firing of multiple bullets into Redman, including shots to his head when he was down and mortally wounded, showed extreme cruelty. On the other hand, the jury's decision not to convict on first degree shows that they were convinced that he genuinely did not go there intending to murder Redman and was acting out of distress during that week, a confused, closeted teenager whose world had been turned upside down by a jeering homophobe.

Rosenkrantz filed a new action seeking to overturn the governor's veto. When the state argued that the judge before whom Rosenkrantz had previously litigated was biased, the case was assigned to a new judge. But the new judge, Paul Gutman of L.A. County Superior Court, concluded that the governor was improperly applying a no-parole policy and that the parole board's most recent decision to set a parole date must be upheld.

The state argued to the appeals court that Proposition 89 gives Davis unreviewable power to veto a parole decision by the state board. The court majority was unwilling to go along with that argument, finding that even a convicted murderer has a right to due process of law, which means that decisions must be made in a procedurally and substantively fair way based on the individual's case. Judge Vogel's opinion holds that the governor's discretion is constrained by provisions of state law that require that a convict in Rosenkrantz's position be granted parole upon serving the specified minimum term, if the totality of the evidence shows that he can be released without danger to society. If the governor's motivation here was either a blanket opposition to parole for convicted killers or was premised solely on the nature of the offense without regard to Rosenkrantz's individual development during his prison term, then Rosenkrantz was denied a decision on the basis specified by law.

Although the court of appeal ordered Rosenkrantz's immediate release, the order was promptly stayed to give the state an opportunity to appeal. According to the *Los Angeles Times* (Jan. 19), Deputy Attorney General Robert Wilson, who represented the state in opposition to Rosenkrantz's appeal of the governor's veto, said that he would seek review in the Supreme Court, contending that the court's opinion "denies the governor his constitutional authority to decide whether a convicted murderer is safe to be released back into the community. A.S.L.

Divided Federal Appeals Court Throws Out San Francisco Suit by Anti-Gay Forces

A divided panel of the U.S. Court of Appeals for the 9th Circuit, in San Francisco, threw out a lawsuit against that city by anti-gay religious parties. *American Family Association, Inc. v. City and County of San Francisco*, 2002 WL 54634 (Jan. 16). The decision rejected charges that the city had stifled the constitutional rights of religious groups who project an anti-gay message.

The case arose out of the response by the San Francisco Board of Supervisors to an advertising campaign mounted by a coalition of anti-gay religious groups in 1998. The ad campaign, in television and newspapers, stated traditional religious arguments against homosexuality, suggested that gays could be "cured," and amassed statistics purporting to show that a homosexual "lifestyle" is dangerous and destructive.

On October 19, 1998, San Francisco Supervisor Leslie Katz sent a letter to the co-sponsors of the ads, American Family Association, Donald Wildmon, Kerusso Ministries, and the Family Research Council, as well as to some well-known anti-gay federal legislators, denouncing "hateful rhetoric against gays, lesbians and transgendered people," and asserting that anti-gay violence, such as that perpetrated against Matthew Shepard, correlates with such rhetoric. Shortly thereafter, the Board of Supervisors adopted two resolutions. One condemned the murder of Billy Jack Gaither in an apparent hate crime in Alabama, urged Alabama to pass a hate crimes law, and called on the Religious Right to accept some blame for creating a "climate of mistrust and discrimination" that can lead to such crimes. The second resolution specifically condemned the anti-gay advertising campaign and criticized one of the local San Francisco newspapers for publishing the advertisements. The resolution characterized the ads as being full of lies, and claimed that statements in the ads would "validate" oppression of gays or lesbians. The resolution urged local television stations to refuse to run the ads.

The addressees of Katz's letter joined together in a lawsuit against the city. They claimed that the resolutions violated the First Amendment Establishment and Free Exercise Clauses, and that the resolutions were also vulnerable on a theory emphasizing the intersection of free exercise and freedom of speech. District Judge Saundra Armstrong dismissed their case, which was then appealed to the 9th Circuit.

Judge Hawkins, joined by Judge Tashima, concluded that the plaintiffs had failed to assert a valid legal claim. While acknowledging that the resolutions, and Supervisor Katz's letter might be characterized as being official statements hostile to religion, and thus subject to attack under the Supreme Court's recent holdings that the Establishment Clause forbids not only government support for religion but also government hostility to religion, the majority of the judges found that there was no constitutional violation in light of the test normally used by the Supreme Court in Establishment Clause cases.

That test, derived from the old case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has three parts. To be constitutional, a government action must have a secular purpose, not have as its principal effect the advancing or inhibiting of religion, and must not lead to excessive government entanglement with religion. (The test was worked out in a series of cases dealing with government aid to religious schools.) According to Judge Hawkins, the secular purpose for the Board of Supervisors' actions was to try to prevent violence against gay people, and the primary effect of the resolutions was to promote equality for gay people and discourage anti-gay violence. No entanglement of the government with religion emerged from these actions.

The court majority also found no violation of free exercise of religion, pointing out that these resolutions were merely statements of condemnation, not actual statutes intended to control or direct human behavior. In the past, successful challenges of government actions based on the establishment clause had all involved instances where the government actually passed a law making some religious activity illegal. But, in this case, the government was just exhorting the religious groups to tone down their anti-gay rhetoric, without directly threatening to take any action. Similarly, on the free speech claim, the court majority found that the Supervisors had merely expressed their collective views, and did not bring any city regulatory power to bear on the TV stations or newspapers

to refrain from publishing these ads. Further, the court found no unlawful viewpoint discrimination here, because all the board was doing was stating its disagreement and asking others not to spread the message.

In his dissent, Judge Noonan focused on precedents holding that the government may not prescribe an official orthodoxy of speech and opinion, and that with their "going on record" resolutions the San Francisco supervisors were doing just that, purporting to speak on behalf of the government to castigate the views of certain religious organizations. This raised series free speech concerns for Judge Noonan, which he would prefer to resolve in favor of the plaintiffs.

The majority concluded that the trial judge had correctly dismissed all of the plaintiffs' claims, thus ending what many undoubtedly saw as a nuisance suit intended to impose litigation costs on the city of San Francisco for its valiant attempts to make its gay residents feel at home and welcomed. A.S.L.

Grandmother Wins Out Over Lesbian Mother's Custody Petition

The Florida 2nd District Court of Appeal ruled in *Sinclair v. Sinclair*, 2002 WL 63408 (Jan. 18), that Tina Sinclair's three children from her former marriage with Dale Sinclair should continue to reside with Dale's mother, Anita Mallette, their paternal Grandmother, even though Dale had been arrested on criminal charges and was being held in jail. Affirming a ruling by Sarasota County Circuit Judge James Parker, the appeals panel found that granting Tina's custody petition would not be in the best interest of the children and could be detrimental to their welfare.

Tina and Dale were married in 1986 and had three children before they separated in 1991. In that year, Tina moved to West Palm Beach, where she lives with her same-sex partner. The children continued to live with Dale and his mother in Sarasota County. The parties were divorced in 1997, with shared custody, Dale being given residential custody and Tina having visitation rights. It appears that Tina did not exercise her visitation rights, had only sporadic telephone contact with the children, and had fallen behind on the support payments she was supposed to make under the divorce decree. Nonetheless, in September 1998, when Dale was arrested (for reasons not specified in this opinion), Tina filed an "emergency petition" seeking full custody of the children.

The trial court found that the children had bonded with their Grandmother in a stable home setting, and did not really have much of a relationship with their mother due to her failure to exercise regular visitation. In these circumstances, the court found it would be in the best interest of the children to remain in the Grandmother's home, and that a change of residence to the mother's home could have detrimental effects on them. On appeal, Tina argued (with amicus assistance from Lambda Legal Defense Fund) that the court had inappropriately denied custody based on her residence with a same-sex partner, and had failed to abide by recent domestic relations developments concerning custody claims by grandparents. (Following on the U.S. Supreme Court's decision in *Troxel v. Granville*, the Florida Supreme Court ruled in *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000), that a narrower construction had to be given to Florida statutes concerning potential custodial rights of grandparents as against natural parents, which could not be determined solely on the basis of a best interest of the child.

In an opinion for the court, Judge Silberman observed that although the circuit court's decision predated the *Richardson* ruling, the result did not run afoul of *Richardson* because the court found both that staying with the Grandmother would be in the best interests of the children and that moving them to the mother's home would have detrimental effects. In a separate concurrence, Judge Northcutt, noting the participation of Lambda and the concern that Tina may have suffered discrimination due to "disapproval of her same-sex relationship," specifically addressed the issue, saying that the appeal court had studied the record for any sign of such discrimination and found none. Northcutt noted that the circuit court did not grant custody to the Grandmother; rather, it denied custody to Tina, thus leaving in place the existing arrangement under which Dale has custody and the children live in the house shared by Dale and his mother.

Judge Northcutt noted that from the time the parents separated, Dale had carried primary custodial responsibility (the separation lasted about six years until the divorce), and that Dale's mother had become the primary caretaker for the children. "It should also be noted," wrote Northcutt, "that Mr. Sinclair's incarceration did not automatically terminate his parental rights and responsibilities, or even alter the parties' legal relationships… To be sure, if Mr. Sinclair's incarceration had necessitated a change in caretakers, Ms. Sinclair would have been entitled to assume primary residential responsibility for them. But the children's care had been entrusted to Ms. Mallette [the Grandmother] since 1991 and, although not ideal, Mr. Sinclair's absence would not affect the continuity of that care. In other words, as a practical matter Mr. Sinclair's departure did not require a change in the parenting arrangement that had been devised by the parties many years before." Consequently, the circuit court had acted "within both the law and its discretion" by refusing to change things. A.S.L.

6th Circuit Rejects Challenge by Alleged Gay Escort to City Licensing Ordinance

In an unusual case, the U.S. Court of Appeals for the 6th Circuit has rejected a constitutional challenge filed by a gay male exotic dancer (and alleged "escort") against a city ordinance requiring registration of sexually-oriented businesses and prohibiting nudity in such businesses. *Currence v. City of Cincinnati*, 2002 WL 104778 (Jan. 24) (unpublished).

Greyson Currence describes his business as "male out-call dancer," providing"nude, exotic dancing services in homes or hotel rooms for paying customers." Evidently, Cincinnati police were investigating him, and had made surveillance videotapes in which he appeared nude with paying customers. Although the unsigned opinion does not spell out how this case came to be filed, it may be that law enforcement officials, who apparently believed but could not prove that Currence was selling sex to male customers, were threatening to arrest Currence for carrying on an unregistered sexually-oriented business within the city. The city actually contended, in arguing this case, that Currence was selling more than exotic dancing performances.

Currence alleged that he applied for a license and was turned down. He claims that the licensing scheme violates his First Amendment right to freedom of expression, noting that the Supreme Court has identified nude dancing as an "expressive activity" entitled to a certain level of constitutional protection (although not very much, to judge by recent cases). The city claimed that the case was not ripe for decision and Currence lacked standing, and also urged the court to abstain from deciding the merits on prudential grounds. Currence and the city both moved for summary judgment, which the district court denied to Currence and granted to the city, after finding that Currence did have standing and met ripeness requirements but could not prevail on the merits.

The court of appeals agreed with the district court that Currence was entitled to bring this challenge to the ordinance, and to the extent he was providing an "exotic nude dancing" service, his activity was entitled to a modicum of First Amendment protection (in this regard, disagreeing with the district court).

But the panel consisting of Circuit Judges Boggs and Guy and District Judge Carr (N.D. Ohio) concluded that the city ordinance is constitutional because it does not specifically focus on suppressing any particular kind of speech or activity due to its content, but is instead motivated by the need to deal with the "secondary effects" of nudity in sexually oriented businesses. Furthermore, the licensing scheme does not function as an unreasonable "prior restraint" of expressive activity because the ordinance requires a relatively expeditious

decision by city officials on all applications for licenses. Along the way, the court made the significant ruling that the 1st Amendment protection accorded to nude dancing as expressive activity was not lessened by the fact that the performance takes place in private rather than in a public accommodation such as a dance bar.

Wrote the court, "The ordinance expresses reasonable concerns about the secondary effects of sexually-oriented businesses such as: deleterious effect on surrounding businesses and residential areas, increased crime, diminution of property values, connection to unlawful sexual activities, increased unhealthful conduct, sexual transmission of disease, and harmful effects to children." Currence argued that these concerns did not apply to him, since he provided his services only to adults in private homes and hotel rooms, but the court was not persuaded, writing: "Certain secondary effects remain a concern with outcall services, such as: prostitution, exposure to minors, and obscenity. The City has an important interest in preventing such effects, and the nudity ban furthers this interest."

Maybe if Currence agrees to wear some leather while performing his services, he can get his license and end his problems with the police? Under the terms of the ordinance, if there is no nudity in his services, it is difficult to see how he could be denied a license. A.S.L.

Photographed Circuit Party Dancer Loses Tort Claims Against *Out Magazine*

In *Prince v. Out Publishing, Inc.*, 2002 WL 7999 (Cal.App. 2 Dist., Jan 3) (not officially reported), the California Court of Appeal affirmed a summary judgement in a tort case in favor of the defendant, publisher of *OUT Magazine*, which had printed photos of a man who had taken his shirt off and danced at a gay event in Los Angeles. The plaintiff, Tony Sabin Prince, sued *Out*, the photographer who took the picture, and two employees of the magazine for libel, common law misappropriation, statutory misappropriation and three species of invasion of privacy: false light, publication of private facts and unlawful intrusion. Though the misappropriation and invasion of privacy claims differ somewhat in their particular elements, the rationales of both the trial court in granting summary judgment and the appellate court in affirming were the same: one cannot display oneself in front of hundreds, if not thousands, of people in the flamboyant manner in which Prince had apparently done, and then complain, in essence, that his private space had been invaded.

In May 1998, *OUT* published a feature story on circuit parties titled "Dirty Dancing," which related charges of illegal drug use and rampant sexual activity at these events. The article focused on one party in Palm Springs and one promoter in particular, and discussed the event in close and tawdry detail. Prince appeared prominently in three photos in the article. One was a two page spread showing him dancing shirtless with another man, another showed his face and torso, while a third showed his face in a montage.

Prince denied that he had attended the Palm Springs event, claiming that the photos were taken at a different event in Los Angeles earlier that year. Unfortunately for Prince, the record showed that it was a similar event organized by the same promoter, also open to the public for a cover charge. It was featured in a local circular which advertised circuit parties.

When Prince complained to the magazine that the article revealed his sexual orientation for the first time to members of his family, professional associates and personal friends, and claimed that the photos, considered together with the title of the story and the captions accompanying one of the pictures, falsely portrayed him as a "drug whore" — one who takes illegal "recreational" drugs and engages in "wanton, unsafe sex" at these parties. His lawyer wrote to *OUT* demanding a retraction and, charging that *OUT* had illegally misappropriated his likeness, demanded $425,000 in damages.

OUT published a correction in the following issue (June 1998), stating that the photos which appeared in the "Dirty Dancing" article were taken at another event, and that the photographic depiction of particular individuals should not be taken to mean that these individuals engaged in any conduct described in the article.

Prince filed suit a month later, and defendants moved for summary judgment in October, 1999. Though counsel for plaintiff was granted several extensions to file the response to the motion, plaintiff's counsel missed the final deadline set by the court, and the court would not waive the default. Having denied plaintiff leave to cure the default, the trial court went on to examine the defense submissions to ascertain whether the defendants should prevail as a matter of law, and found that they should. Judgment was granted for defendants, along with $75,000 costs and fees. Motions to set aside the judgment and for new trial were denied, and Prince appealed.

The Court of Appeal, in an opinion by Judge Epstein, apparently agreed with the trial court on all points discussed. Prince could not prevail on a charge of libel concerning his sexual orientation, because it was true. He could not claim an invasion of privacy because he appeared in a large gathering which was open to the public all one had to do to attend was pay the door charge and he could not claim that statements made concerning drug use and sexual activity at these events were "of or concerning" him because the statements were either of such a general nature that they could not be read to apply to anyone in particular, or were attributed to individuals who were not and could not be mistaken for Mr. Prince. The appellate court rejected Prince's argument that his friends might assume that he was the "muscled, 20–something" individual called "Peter" who was quoted in the article discussing sex and drug use at circuit parties.("'This isn't real life. This is circuit life.' said Peter") "We have examined the photographs of plaintiff. He could not reasonably be described as a man in his mid–20s with blue eyes," wrote Judge Epstein. (Ouch!)

This story has attracted a fair bit of attention from the legal press around the country, unusually so for an unpublished opinion. In an article picked up nationally, by Law.Com, *The San Francisco Recorder* (a legal newspaper) stated that counsel for *Out Magazine* agreed that no new legal ground was broken by this opinion. *The Recorder* quoted defense counsel as saying that the court could have examined the cutting-edge issue of when someone might have an expectation of privacy, "but they chose not to do that."

The Recorder then concluded: "Meanwhile, the ruling might serve as a warning to other closeted Hollywood types to keep their clothes on if they don't want to be outed, especially when dancing with someone of the same sex in a sea of men doing drugs." *Steven Kolodny*

N.Y. Appeals Court Awards Expanded Visitation to Gay Male Sperm Donor

A unanimous four-judge panel of the New York Appellate Division in Albany ruled in *Tripp v. Hinckley*, 2002 WL 59605 (App. Div., 3rd Dept., Jan. 17), that a gay man from upstate New York who donated sperm to a lesbian couple is entitled to a "normal" visitation schedule with the children, despite a written agreement providing for less frequent visitation.

According to the opinion by Justice Robert Rose, William Tripp agreed to donate sperm so that Siobhan Hinckley and her partner could have children. Tripp and his partner and Hinckley and her partner collectively agreed that the women would be the children's custodial parents, but that the men would have regular contact with the children. The children were born in 1994 and 1996, and Tripp was listed as the father on their birth certificates. After the second child was born, all the parties signed a written "visitation agreement" that provided Tripp and his partner visitation of one day per week, one weekend per month, and one week during the summer.

After several years, Hinckley and her partner ended their relationship, and Tripp asked to have increased visitation. Hinckley and Tripp agreed that Hinckley would continue as physical custodian of the children, and that Tripp

would have access to their school and medical records, but Hinckley resisted an expanded visitation schedule, so Tripp filed suit in the Family Court for a visitation order. The judge appointed a law guardian, Paige Crable, to represent the children, and a court-appointed psychologist examined them.

The Law Guardian argued, with the support of the psychologist, that the children recognized Tripp as their Daddy, that he had been "consistently involved with the children since their birth," and that it would be in their best interest for the visitation schedule to be expanded. The Family Court granted Tripp visitation for one evening a week, alternate weekends and holidays, and two weeks in the summer. Hinckley appealed, arguing that Tripp was "merely a sperm donor" who should be restricted to the terms worked out in the written agreement.

Justice Rose stated that the undisputed evidence showed that Tripp was the father of these children, and they loved him as such. Furthermore, wrote Rose, "as to the effect of the parties' written visitation agreement, we note that while the courts have recognized such agreements, they are not binding and will be enforced only when the prescribed visitation schedule is found to be in the best interests of the children." He also noted that "visitation must be frequent and regular to be meaningful." The court rejected Hinckley's argument that by his prior agreement to the written visitation schedule, Tripp had waived his right to seek increased visitation.

Since the court-appointed professionals in this case the Law Guardian and the psychologist both agreed that expanded visitation would be in the children's best interests, the court saw no basis for overturning the Family Court's visitation order. Jane W. Williams of Cropseyville represented Hinckley and Anne Reynolds Copps represented Tripp on the appeal. A.S.L.

Bathhouse OD on Blue Nitro Leads to Unwanted TV Stardom

When Shaun Carter's friend reacted badly to a form of the drug GHB, which the two men had taken at a San Diego bathhouse, Carter accompanied the friend to a hospital. Carter ended up being videotaped at the hospital and portrayed in a TV show as someone who used and supplied drugs, and, implicitly, engaged in bathhouse sex. He sued the producers and distributor of the program, but the San Diego County Superior Court struck his claims under a statute designed to prevent SLAPP (Strategic Lawsuit Against Public Participation) suits — that is, suits meant to chill exercises of free speech. But now the Court of Appeal has narrowed the application of the statute and reinstated two of Carter's claims. *Carter v. The Superior Court of San Diego County*, 2002 WL 27229 (Cal. App. 4 Dist., 1 Div., Jan. 10).

In February 1999, Carter was at a San Diego bathhouse when he and a friend, Sean Chapman, ingested a substance known as "Blue Nitro," a form of the dietary supplement GHB. Chapman had an adverse reaction and lost consciousness. Paramedics transported Carter and Chapman to Scripps Mercy Hospital, where they were admitted to the emergency room.

Kenneth Druckerman, a photographer on assignment for New York Times Television, videotaped the scene, obtaining Carter's signature on a consent form that permitted the use of his "name, voice, picture, likeness and statements" for a television program "throughout the world in perpetuity." According to Carter, Druckerman gave every appearance of being a doctor or hospital staff member and told Carter he was making a videotape for training employees of Scripps, which Druckerman referred to as a "teaching hospital." Druckerman admitted he was wearing hospital apparel at the time. Carter did not read the form and was not given a copy of it.

The scene was included in a TV show called "Trauma: Life in the ER," distributed by Discovery Communications, Inc. (DCI). The program identified Carter by name and showed him in his underwear, in obvious distress. Viewers heard the following: (1) [paramedic] " … in a bathhouse. There was quite a party going on;" (2) [narrator] "Another victim from the bathhouse party is brought in;" (3) [Dr. Shawn Evans, Chapman's treating physician] "This guy appears to be having a bad reaction to something he may have ingested;" (4) [narrator] "Both men took GHB, a dietary supplement that can be fatal if taken in high doses;" (5) [Dr. Evans] "You gotta find something new all the time to get into. San Diego's favorite new drug;" (6) [Dr. Evans to Carter] "Well, he [Chapman] drank too much of your Blue Nitro;" (7) [Dr. Evans to camera] "a very, very, filthy chemical that acts on the brain."

Carter sued Scripps, its emergency room physicians, DCI, NYT Television and its parent, the New York Times Company (collectively NYT) for 1) invasion of privacy by public disclosure of private facts; 2) invasion of privacy by intrusion; 3) fraud; 4) defamation; 5) improper disclosure of medical records; and 6) as to DCI only, commercial misappropriation of his name and likeness. Superior Court Judge J. Richard Haden, applying the California anti-SLAPP statute, dismissed all of the claims against NYT and DCI. Carter filed for a writ of mandate in the Court of Appeal.

Reacting to what it described as "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech," the California legislature passed a statute meant to deter such suits. Under Civil Code section 425.16, "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Thus, if a defendant shows that a claim arises from an act "in furtherance of [its] right of petition or free speech … in connection with a public issue," the burden shifts to the plaintiff to establish that he will likely succeed on the merits, or his case will be dismissed.

For each of Carter's claims, the Court of Appeal (in an opinion by Judge McDonald, with acting Judge Aller and Judge O'Rourke concurring) first looked to see whether the complained-of conduct arose out of activity protected by the First Amendment. If so, the court then looked at whether Carter was likely to succeed on the merits.

1) Invasion of privacy by public disclosure of private facts. According to the court, any disclosure by defendants was part of their "news reporting activities regarding issues of public interest, including substance abuse and emergency medical treatment," and thus within the ambit of the anti-SLAPP statute. To prevail on the merits, Carter would have to demonstrate (1) public disclosure (2) of a private fact that is (3) offensive and objectionable to a reasonable person and (4) not of legitimate public concern. Carter argued that although drug abuse may be of legitimate public concern, his name and the details of his visit to the emergency room were not. The court — relying heavily on *Shulman v. Group W. Productions*, 18 Cal. 4th 200, 214 (1998) — held that private facts that are "substantially relevant" to newsworthy subject matter come under the "public concern" umbrella, so long as there wasn't a "morbid and sensational prying into private lives for its own sake." Under this test, the court found that the plaintiff's statements in the "emergency room, including the quantity of Blue Nitro he ingested or gave to Chapman and whether he had taken, any other drugs, were … related to the newsworthy topic." The court noted: "It may have been unnecessary for NYT and DCI to show Carter in his underwear or state that he had been at a bathhouse that night." Again relying on *Shulman*, the court added: "The standard, however, is not necessity.… [C]ourts do not, and constitutionally could not, sit as superior editors of the press."

2) Invasion of privacy by intrusion. Carter claimed that defendants NYT and DCI "disguised themselves as health care providers" and entered the emergency room with a video camera and sound recording devices at a time when he had a reasonable expectation of privacy." According to the court, "No constitu-

tional precedent or principle … gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast." Therefore, any alleged intrusion by NYT and DCI was not "in furtherance of [their] right of petition or free speech … in connection with a public issue or an issue of public interest." The claim was reinstated.

3) Fraud. Carter alleged that NYT and DCI defrauded him by representing to him that Scripps was a teaching hospital and that they needed his consent to videotape him for a program to be used in the training of hospital personnel. Again, the court held, the acts alleged were not "in furtherance of their free speech rights in connection with a public issue" and therefore the anti-SLAPP statute did not apply. The claim was reinstated.

4) Defamation. Carter alleged that NYT and DCI harmed his reputation by making false statements to the effect that he (1) had overdosed on an illegal drug or drugs; (2) had abused a substance; (3) had provided a dangerous or unlawful substance to his friend; (4) was a provider of dangerous or illegal substances to others; and (5) had been engaged in a homosexual orgy at a bathhouse. Here, according to the court, the allegations relate to defendants' speech in connection with an issue of public interest, and so the anti-SLAPP statute applies. As to the first four statements, the court found that Carter was not likely to prevail because he could not show that the statements were false. Noting that Dr. Evans never said that use of Blue Nitro is illegal [writer's note: GHB was added to the Federal schedule of controlled substances in 2000], the court went on: "Carter admitted he ingested Blue Nitro and gave some to Chapman. As a result of their ingestion and their bad reaction to the Blue Nitro, Carter and Chapman were transported to the hospital. According to Dr. Evans, Blue Nitro 'is unpredictable in terms of the effect it has.' These facts establish that Carter overdosed or abused a substance and had a reaction to it, and that he had provided the substance to another person."

As to whether he was engaged in a homosexual orgy at the bathhouse, the court found that "the only statements in the videotape that could be interpreted to have that meaning was an ambulance paramedic's comment that there was 'quite a party going on' at the bathhouse, and the narrator's statement that Carter was a 'victim from the bathhouse party.'" According to the court, a reasonable hearer would not conclude that Carter was engaged in a homosexual orgy. (Indeed, it may be that no one would have imagined that he was engaged in an orgy if he hadn't suggested it in his lawsuit.)

5) Confidentiality of Medical Information. Carter alleged that NYT and DCI disclosed medical information without consent in violation of the Confidentiality of Medical Information Act. Civil Code section 56 et seq. According to the court, any disclosure of medical facts about Carter was "in furtherance of their free speech rights in connection with the public issue of substance abuse and emergency medical treatment." The anti-SLAPP statute applied. Furthermore, according to the court, Carter could not prevail on the merits because none of the information disclosed fits the statutory definition of medical information: "individually identifiable information … in possession of or derived from a provider of health care, … regarding a patient's medical history, mental or physical condition, or treatment." Civil Code section 56.05, subdivison (f). However, Civil Code section 56.16 permits disclosure — unless there is a "specific, written request by the patient to the contrary" of "the patient's name, age, and sex; a general description of the reason for treatment (whether an injury, burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; [and] the general condition of the patient …."

The court found that the "medical facts about Carter that NYT and DCI disclosed were his name, age and sex, his appearance in the emergency room, his ingestion of Blue Nitro … and his negative responses to a number of questions, including whether he was trying to take his own life and whether he had any allergies or had taken other drugs." According to the court, this information fell under the ambit of section 56.16, and, because there was no written request by Carter to the contrary, disclosure was permitted.

6) Commercial Misappropriation. Carter alleged that DCI used his name and likeness without permission in its marketing of the program. According to the court, the anti-SLAPP statute applied "because the marketing of the videotape to cable operators is part of DCI's process of disseminating information to the public." Civil Code section 3344, subdivision (d), permits use of "a name, voice, signature, photograph, or likeness in connection with any news, public affairs , or sports broadcast or account." Thus, Carter could not establish likelihood of success on the merits.

The scorecard: Carter can now pursue two or his six claims, and California defendants will have a harder time using the anti-SLAPP statute to stop plaintiffs from having their day in court after their night on television. *Fred A. Bernstein*

N.J. Appellate Division Revives Same-Sex Harassment Workplace Claim

A New Jersey appellate court reinstated the case of a white woman who alleged that she was sexually harassed, discriminated against on the basis of her race and suffered extreme emotional distress at the hands of a black female co-worker. *Flizack v. Good News Home for Women*, 787 A.2d 228 (N.J. Super. A.D., Dec. 26). Although the lawsuit arose out of a single incident between the women, the court determined that the conduct was sufficiently egregious to permit the plaintiff's case to go to the jury.

Deborah Flizack, who is white, was employed as a night monitor by the Good News Home for Women (GNH), a residential drug and alcohol treatment center for adult women. Ernestine Winfrey, the Director of GNH and Flizack's supervisor, is African-American. According to Flizack's complaint, following an acrimonious staff meeting, Winfrey alleged approached Flizack, forcing her back into a table. Pressing her body up against Flizack, Winfrey allegedly said, "Are you still pissed at me … [b]ecause if you are I am going to have to stare into them big blue eyes and pat those white titties," while stroking Flizack's breast in a sexual manner. When Flizack attempted to get away, Winfrey embraced her, again in a sexual manner. Although Flizack was able to escape into the parking lot, Winfrey apparently pursued her, placing her arm around Flizack's neck and shoulder and "cuddling" her while attempting to usher her back into the building.

Although Winfrey denied that she had touched Flizack in an inappropriate manner, several individuals who apparently witnessed the incident corroborated plaintiff's version of the events. The incident was brought to the attention of GNH's board of directors, which called a meeting, presided over by the president of the board, Jack Welsh, to address the issue. According to Mary Beth Bubert, one of the board members present, Winfrey did not deny that something had happened, but attempted to "soft-pedal" the incident, and claimed that Flizack was merely a "disgruntled" employee who was either "imagining" the incident or "exaggerating" its significance. Ultimately, Welsh issued a warning letter to Winfrey, admonishing her for using "inappropriate" or "street" language and making "unwanted physical contact." The letter advised that "further violations may result in disciplinary action."

Soon thereafter, Bubert resigned from the board in protest, claiming that Welsh had not taken the allegations seriously and arguing that Winfrey should have been "monitored or disciplined," rather than simply warned. Although Welsh had anticipated that Flizack would return to work after this incident, she was apparently unable to do so, as she was suffering from "severe stress and emotional turmoil," the nature of which the district court did not describe other than to say that "the extent of plaintiff's disability … was substantial and wholly uncontested." Flizack sued GNH and Winfrey as a result of these events, but the trial judge dis-

missed the claims on summary judgment, finding that there was no evidence that Winfrey's conduct had been motivated by race or gender, and threw out the intentional infliction of emotional distress count for lack of evidence, even though the point had never been contested by the defendants. Finally, he dismissed her breach of contract count against GNH based on representations made in the employee manual, finding that they did not rise to the level of an actionable promise.

While observing that cases involving same-sex sexual harassment are "somewhat atypical," the Appellate Division panel acknowledged that such claims are viable under both the New Jersey Law Against Discrimination (LAD) and Title VII, as explained by the Supreme Court in *Oncale*. Similarly, the court characterized claims of race discrimination brought by white plaintiffs against black defendants as also "somewhat unusual," noting that "[g]enerally, an employee alleging such reverse discrimination is required to show some reason to believe his employer is the unusual employer who discriminates against the majority." Although the issue had not been specifically raised below, the court determined that the evidence, while "somewhat skimpy and equivocal," contained some indication that Winfrey possessed a "divisive 'black against white' view of the world." Because defendant had not briefed this issue, however, the court did not press the point.

The court next analyzed the four prong test for showing a hostile work environment under the LAD. The court turned first to the last prong of the test, which asks whether the conditions of employment and the working environment have been altered and the working environment has become hostile or abusive. Although the New Jersey Supreme Court has made clear that "it will be a rare and extreme cases in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile," the court found that a jury could find that the incident at GNH rose to that level. Comparing this case to one in which a supervisor's comments to a female employee (i.e., calling her a "jungle bunny,") had been sufficient to satisfy this prong of the test, the court determined that, while the language used by Whitney may not, standing alone, have been sufficient to alter the work conditions, her alleged comments coupled with her sexual misconduct gave the comments "a stark racist and sexual meaning immeasurably increasing its severity."

The court next questioned whether plaintiff could demonstrate that the conduct would not have occurred but for her protected trait (i.e., being a white woman). Noting that plaintiff must only satisfy a preponderance of the evidence standard when making out her prima facie case, the court determined that plaintiff had met her burden. The court was unpersuaded by defendant's argument that because she is not a homosexual, her conduct could not have been motivated by gender, and suggested that the defendant was "confus[ing] sex with sexual gratification." Under New Jersey law, the court ruled, harassing conduct that is sexual or sexist in nature automatically satisfies the but-for element of the four-part test. The court was more troubled by the idea that plaintiff would not have been harassed but for her race. In the end, however, the court relied upon the fact that Winfrey herself had injected race into the comments about Flizack's breasts, and found that this was sufficient to satisfy the required "minimal showing."

In assessing plaintiff's intentional infliction of emotional distress claim, the court concluded that a reasonable jury could find that Winfrey's conduct was "extreme and outrageous." Furthermore, in assessing whether Winfrey had the requisite level of intent, the court noted that Winfrey was aware that Flizack had been sexually abused as a child and was therefore a "fragile vessel" to whom sexual comments and behavior could be "particularly damaging"

Finally, the court determined that Flizack had demonstrated that the emotional distress she had suffered as a result of this incident, which had led to insomnia, bed-wetting, deterioration of relationship, and an inability to work that eventually caused plaintiff to file for bankruptcy, was "so severe that no reasonable person could be expected to endure it." While commenting that a claimant may not recover for "idiosyncratic emotional distress that would not be experienced by average persons," the court found that a reasonable person could likely have suffered tremendous emotional stress as a result of such an encounter, and found that Flizack's severe reaction did not fall outside of this "reasonable" range.

Finally, the court sustained the district court's rejection of any claim against GNH based on the contents of the employee manual, finding that the "general, cryptic credo" against discrimination was not an enforceable contract.

While not necessarily inappropriate in this case, the use of sexual harassment law by straight employees in the workplace to recover for the emotional distress experienced as a result of exposure to expressions of same-sex sexual desire is a trend that gay rights and employment discrimination advocates should watch closely. *Sharon McGowan*

Firefighter Survives Summary Judgment on Retaliation Claim, but Loses Sexual Harassment Claim Premised on Homophobic Harassment

A federal district court in Pennsylvania threw out the sexual harassment claims of a Philadelphia firefighter who was tormented by homophobic coworkers in his platoon. The court did, however, allow the firefighter to pursue claims of retaliation, as well as numerous constitutional claims against his municipal employer. *Bianchi v. City of Philadelphia*, 2002 WL 23942 (E.D. Pa., Jan. 7).

Robert Bianchi joined the Philadelphia Fire Department in 1977. After seventeen years of service, he was promoted in 1994 to the rank of lieutenant. Two years later, in March 1996, he assumed command of Ladder Company No. 2, Platoon A, and soon thereafter began to institute changes in the discipline and training at the firehouse, some of which were not well received by the members of the company. In April 1996, Bianchi claims that he began to be subjected to harassing treatment. Bianchi started finding used condoms and advertisements for homosexual magazines inside his desk drawer, along with explicit homosexual playing cards in his desk, his uniform, and his running gear. He received a postcard at the firehouse insinuating that he was homosexual and found envelopes with the return address from the Gay Firefighter's Association in his desk. In the most egregious incident, the harassers allegedly placed either urine or feces on the sleeve of Bianchi's running gear, which he claims caused a fungal infection around his mouth.

Though he initially kept quiet, Bianchi eventually brought these incidents to the attention of his supervisors. No official disciplinary action was taken, although more senior members of the department spoke to Bianchi's platoon, advising them that this conduct would not be tolerated. Following the running gear incident, Bianchi became more vociferous in his complaints and increasingly confrontational with other members of the fire department. On November 29, 1997, Bianchi informed Battalion Chief Robert Drennen that, because matters were not being handled to his satisfaction by the department, he intended to take his complaints outside of the department and bring them to the attention of the police, the civil service commission and his union. The following month, Bianchi was removed from his platoon and placed in a position with the Safety Office of the department.

In January 1998, Bianchi attended a meeting along with the president of his union, his union-hired counsel, and Battalion Chief and Special Investigations Officer, William Schweizer. At that meeting, the City notified Bianchi that he was removed from his firefighting line duties and would be subject to physical and mental exams before he could be returned to full work. Additionally, Bianchi claims that he was threatened by members of the fire department at this time. However, he returned to work on March 5, 1998.

Upon his return, threats from members of the fire department continued: specifically, a cap-

tain encouraged him to remain in his administrative position so that he would continue to be "safe," and an anonymous phone called stated that Bianchi's twin brother, who was also a member of the fire department, was in danger. On April 7, 1998, Bianchi received a threatening letter smeared with feces at his home. Bianchi promptly reported this incident to Battalion Chief Schweizer. At this point, the fire department initiated an investigation into these incidents, with the assistance of the police. A report issued in June 1998 sustained Bianchi's accusations of harassment and found that the firehouse constituted a hostile work environment for him. The report failed, however, to identify the individuals responsible for the incidents.

The following month, Bianchi took a medical leave on the advice of his doctor. On October 2, 1998, Bianchi's psychologist cleared him to return to work. The City's doctor, Dr. Hayes, then told Bianchi that based on the report of the contract psychiatrist, Dr. Arce, he could return to work. However, Dr. Hayes apparently changed his position after speaking with Bianchi's superiors in the fire department, and Bianchi did not return to active duty. Bianchi claims that he was promised a meeting with the Fire Commissioner and his own doctor, after which he would be reinstated, but this meeting never materialized and Bianchi did not return to work at any point.

In March 1999, the fire department's human resources manager sent a letter to Bianchi informing him that his sick leave would expire in June and advised him of the procedures to avoid dismissal if he needed more time away from work. In May 1999, Bianchi filed his lawsuit in federal court. In November 1999, the fire department sent another letter to Bianchi advising him that all of his accumulated leave was about to expire. Under the Civil Service Regulations of the department, unless Bianchi requested a leave of absence without pay, he would be separated from the department. Bianchi took no such action and was deemed to have abandoned his position.

District Judge Anita B. Brody turned first to Bianchi's claims of sexual harassment, which he brought under both Title VII and the Pennsylvania Human Rights Act. As Bianchi's case did not fall under the first two categories of actionable same-sex sexual harassment either that the harasser was motivated by sexual desire or that the harasser showed hostility towards participation of members of a particular sex in the workplace the court turned to the issue of whether Bianchi had adequately alleged a *Price Waterhouse* type of claim, i.e., that he had been discriminated against for failing to conform to a gender stereotype. Although suggesting that harassment of perceived homosexuals could sometimes serve as a mechanism for enforcing gender norms, the court found that Bianchi's was not such a case. With the exception of the April 1998 letter, which referred to Bianchi's new administrative position as a "pussy job," Judge Brody found that Bianchi had failed to draw a link between the accusations of homosexuality and alleged unmanliness.

The court also refused to accept Bianchi's argument that the "because of sex" requirement had been satisfied because the harassing materials were sexual in nature, noting that Title VII forbids harassment that is sexual in cause (i.e., "because of sex") and not merely sexual in kind. The court sustained, however, Bianchi's retaliation claim against the City's motion for summary judgment. Although Bianchi was not protected from homophobic harassment by Title VII, the court noted that "[a]s long as Bianchi … raised a reasonable inference that he was protesting conduct outlawed by Title VII, he has met his burden" of showing that he was retaliated against for engaging in protected activity. As the law of sexual harassment was continuously evolving, especially in the realm of same-sex harassment, the court found that Bianchi's belief that his treatment violated Title VII was reasonable at the time.

Although the City had insisted that Bianchi had voluntarily abandoned his position with the fire department, the record also supported the conclusion that Bianchi had been constructively terminated, especially in light of the unusual requirements placed on him to secure physical and mental testing prior to returning to active duty. The court noted that Bianchi had allegedly been threatened by department officials at the January 1998 meeting and had been removed from his position with the platoon after he suggested that he would bring his complaints outside the department and involve his union. All of these facts supported Bianchi's argument that he had been retaliated against for lodging complaints about the harassment to which he was being subjected.

The court also found that Bianchi had made an adequate showing that he had been punished for engaging in protected 1st Amendment activity. Speaking out about such egregious unprofessional conduct that was going unchecked by department officials qualified as a matter of public concern, according to the court, and therefore Bianchi was entitled to the protection afforded public employees by the 1st Amendment. The court sustained Bianchi's claim that the City had violated his constitutional right to petition the courts on similar grounds.

Finally, the court determined that Bianchi had not forfeited his constitutionally protected property interest in his job by failing to comply with the requirements of Dr. Hayes or by not seeking a medical leave of absence prior to the expiration of his leave. The department's unorthodox handling of Bianchi's case, which culminated with their determination that he had "abandoned" his position, raised sufficient questions of material fact to allow Bianchi's due process claim to survive summary judgment.

The court threw out all claims against the fire department, noting that it was a political subdivision of the city and therefore immune from suit as such. Bianchi's intentional infliction of emotional distress claim was also dismissed, as he had failed to demonstrate that his case qualified under the one of the limited circumstances where sovereign immunity would be waived for tort claims. *Sharon McGowan*

Gay Mailman Can Sue for Harassment Under Title VII

Federal District Judge Nancy Gertner ruled in *Centola v. Potter*, 2002 WL 122296 (D. Mass., Jan. 29), that Stephen Centola, a gay man who worked as a letter carrier for the U.S. Postal Service for over seven years, can sue that the agency for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964. However, the court ruled that Centola may not sue under President Bill Clinton's Executive Orders banning sexual orientation discrimination in federal government employment.

According to his complaint, Centola never came out on the job, but his co-workers apparently had him "figured out," since they tormented him with anti-gay epithets, placed "cartoons mocking gay men" at his work station, and asked him if he was marching in the gay parade or had contracted AIDS. They also placed a photograph of Richard Simmons "in pink hot pants" on Centola's work station. Centola also claimed that the supervisors treated him differently from other workers, monitoring his restroom use and restricting his mobility excessively. When he complained about this harassment, Centola alleges that things only got worse and eventually he was fired.

After filing a complaint with the Postal Service that got him nowhere, Centola sued in U.S. District Court in Boston, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as well as a violation of the presidential executive orders banning anti-gay discrimination in the public service. His lawsuit was filed on December 30, 1999. The Postal Service moved to have the case tossed out, arguing that Title VII does not forbid sexual orientation discrimination, and that the executive order is not enforceable through court action.

Judge Gertner embraced a sophisticated argument that has been adopted by several other courts over the past few years in analyzing harassment claims brought by gay employees. If the employee can credibly allege that he was being harassed because of failure to conform to gender stereotypes, the harassment can be characterized as sex discrimination, and thus covered under the federal statute. In this case,

Centola's closeted status at work played to his advantage, since it made this more of a perceived sexual orientation case, and such cases are usually based on fellow employees picking up on what they perceive to be effeminate mannerisms of their harassment victim, who does not meet their standards of manliness.

The judge pointed out that several recent cases decided by the federal courts in New England have used this analysis to find protection under Title VII for the victims of such harassment. Even though Centola testified at his deposition that he believed he was being harassed because of his sexual orientation, the judge was willing to indulge the argument that what he meant was his co-workers' perceptions based on stereotypical thinking about gender. And because he alleged that he suffered retaliation when he complained about this harassment, he had laid the proper factual basis for claims of both harassment and retaliation.

However, it was clear that the sexual orientation discrimination claim under the executive order had to be dismissed. Presidents do not have authority unilaterally to make law that is enforceable in the courts. Presidential executive orders can create rights within the administrative structure of the executive branch. Thus, an employee who encounters sexual orientation discrimination can file a complaint with their own agency, or with another federal agency that has been designated by the president to receive such complaints, but they cannot sue, because only Congress has the authority to make court-enforceable laws. The one exception to this, of course, is when Congress specifically delegates to the executive branch the authority to adopt rules or regulations for the enforcement of statutory rights, but so far Congress has not seen fit to do that in the context of sexual orientation discrimination.

In concluding her opinion, Judge Gertner pointed out that this is not yet a victory for Centola, because he still has the heavy burden of showing that the harassing conduct was so severe that it seriously altered his terms and conditions of employment. Many former employees who get their "foot in the door" in a sexual harassment case then fall short of proving sufficiently severe conditions to win in the end, but she held that Centola's allegations were sufficient to win him the opportunity to try to present such proof at trial. A.S.L.

1st Circuit Extends Logic of *Oncale* to Same-Sex Harassment Suits Under Title IX

Building on the 1998 Title VII ruling of the U.S. Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, the U.S. Court of Appeals for the 1st Circuit has concluded that same-sex discrimination and same-sex harassment can be actionable as a matter of law under Title IX, which forbids sex discrimination in educational institutions that receive federal financial assistance. *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (Jan. 9). However, applying this new legal holding to the allegations in the amended complaint, the unanimous panel concluded that the plaintiff failed to plead sufficient facts to survive the defendants' Rule 12(b)(6) motion, and affirmed the district court's order dismissing the action.

The plaintiff, Kate Frazier, a young woman alleged to suffer from learning disabilities, and her parents sued the Fairhaven School Committee, the superintendent of schools, the principal of Fairhaven High School, and two mid-level school administrators in 1999, after five years of difficulties while Frazier was enrolled at a public high school. Frazier's complaint alleged, among other things, that the school's "discipline matron" sexually harassed her during school hours in violation of Title IX. (The court's opinion refrained from cataloguing the plaintiff's specific allegations, and instead referred readers to the detailed opinion of District Judge Reginald C. Lindsay, reported at 122 F.Supp.2d 104.)

Writing on behalf of the three-judge panel, Circuit Judge Selya noted that as early as 1992, the Supreme Court had ruled that courts may turn to Title VII for guidance in interpreting the scope of liability under Title IX. In the case of same-sex harassment, Judge Selya explained that "the *Oncale* Court extended the statutory proscriptions of Title VII to same-sex harassment even though such harassment was 'assuredly not the principal evil that Congress was concerned with when it enacted Title VII,' and there is no principled basis for construing Title IX more grudgingly."

Nonetheless, the panel unanimously concluded that while the plaintiff's allegations of wrongdoing may very well have amounted to "insensitive" conduct on the part of school employees and administrators, it did not constitute conduct that was actionable under Title IX even if read in a light most favorable to the plaintiff.

In addition to dismissing the plaintiff's Title IX claims, the 1st Circuit also affirmed the district court's ruling that the plaintiffs could not seek monetary damages from the defendants under 42 U.S.C. section 1983 for allegedly violating the plaintiff's rights under the Individuals with Disabilities Education Act (IDEA), or under the Family Educational Rights and Privacy Act (FERPA) for allegedly failing to maintain the confidentiality of the plaintiff's records.

Michael W. Turner represented Frazier. The Fairhaven School Committee was represented by Gerald Fabiano and Pierce, Davis & Perritano. *Ian Chesir-Teran*

Anti-Lesbian Slurs Admissible and Probative of Intent in Title VII Termination Case

In *Menchaca v. American Medical Response of Illinois, Inc.*, 2002 WL 48073 (U.S.Dist.Ct., N.D.Ill., Jan. 14), a jury had awarded damages totaling more than $500,000 on a sex discrimination claim, and District Judge Kennelly was disposing of the defendant's motion for a new trial or to reduce damages.

The decision does not provide any coherent narrative of the case, but a section dealing with the employer's contention that certain prejudicial evidence should have been excluded reveals an interesting element in the case. There was testimony that the company official who made the decision to discharge Menchaca had referred to her as a "fucking dyke" and as a "pit bull dyke." The company claimed these were "stray remarks" that should not have been admitted because they did not relate to the termination decision. "But the law is clear," wrote Kennelly, "that evidence of actions or statements reflecting a decision maker's prejudice are admissible even if they are not directly connected to the employment decision… Title VII bars discrimination based on a woman's nonconformance with socially-constructed gender expectations [citing *Price Waterhouse v. Hopkins*], and Rippy's comments were reflective of an attitude that Menchaca was too 'tough' and thus did not conform to traditional sexual stereotypes. The evidence was unquestionably relevant."

The company complained that it was prejudice by this evidence, to which Kennelly responded: "But Rule 403 concerns only *unfair* prejudice, and there was nothing unfair about the prejudice to AMRI from this evidence, which concerned the attitude and intent of a decision maker. And even if the prejudice was somehow unfair, it was far outweighed by the strong probative value of the evidence." The court upheld the jury verdict on liability, but ordered a new trial on damages, finding fault with the jury instructions. (Evidently the case was tried before a different judge.) A.S.L.

Missouri Court Upholds Jail Term for Man Caught in Alleged "Crotch Slap" Game

In an unpublished decision, a panel of the Missouri Court of Appeals unanimously upheld the sexual misconduct conviction of a man who claimed that he was playing a "crotch slap game" with another man. *State v. McIntyre*, 2001 WL 1643798 (Mo.App. W.D., Dec. 26). Steven R. McIntyre was given a suspended sentence of 180 days, 2 years of unsupervised probation as well as 15 days of "shock probation."

The conviction was based on two incidents between December 1999 and February 2000. In the first, Steven R. McIntyre was accused of putting his hand between Billy Joe Morris's

legs and playing with his "private area" while they were alone in McIntyre's apartment. Earlier that evening, they and some mutual friends had gotten together. Morris told McIntyre to stop touching him, which he did, but when Morris got up to leave, McIntyre "swatted him on his rear end." The two live in the same building. The second incident was in McIntyre's car when they were alone. While driving, McIntyre ran his hand down Morris's' legs, and grabbed him in the crotch area. Morris told McIntyre to stop, which he did. Later that night, Morris reported that McIntyre told him that if he told anyone about the incident "some kind of physical harm" would be done to him. Morris testified that he never asked McIntyre to touch him and did not play the "crotch slap" game. The court record noted that both men are disabled.

At the police station, McIntyre said that his touching Morris was part of a "joke" which they and some of their friends played where they would slap each other between the legs when they saw each other. McIntyre admitted "to touching [Morris] inappropriately, approximately 30 times" on the outside of his clothing in his groin area. Two mutual friends testified that a group of friends, including McIntyre and Morris, would play a game that involved "horseplay" and "slapping, grabbing and pinching" on the rear end, "but did not involve grabbing the crotch." McIntyre testified that the game involved "slapping on the side of the legs70 and 69sometimes ... in the crotch area."

McIntyre testified that "he sometimes has trouble reading" and did not intend to make a statement that he touched Morris "in a sexual way" and that he had felt "under pressure." to make the statement. According to the police, McIntyre said he was sorry for his actions, realized that he "had a problem," and that "he viewed Morris as his brother."

The panel rejected McIntyre's argument that the touching was part of a game, noting that the two incidents occurred when the two were alone. The panel, citing McIntyre's threat to Morris, found that there was "a sufficient basis for the trial court to infer that the contact was done for the purpose of arousing or gratifying McIntyre's sexual desire" and was thus unlawful. Missouri goes rather farther in policing sexual contact than some other jurisdictions, including among its sex crimes the touching of a fully clothed person's genitals. *Daniel R Schaffer*

Civil Litigation Notes

California — Second Parent Adoption — The California Supreme Court has agreed to hear an appeal in *Sharon S. v. Superior Court of San Diego County*, 113 Cal. Rptr. 2d 107, 93 Cal. App. 4th 218 (Cal. Ct. App., 4th Dist., Oct. 25, 2001, as modified on denial of rehearing, Nov. 21, 2001), in which the court of appeal cast doubt on the legal validity of all "second-parent adoptions" that took place prior to January 1, 2002, the date on which a new state law took effect specifically authorizing such proceedings in the context of registered domestic partners. The decision threatened thousands of adoptions approved over the past fifteen years, according to a press release issued on Jan. 30 by Lambda Legal Defense Fund. The effect of the grant of review is to de-publish the court of appeal opinion and suspend its effect as a precedent. Lambda is involved in the case, together with the ACLU of San Diego and Imperial Counties, the ACLU Foundation of Southern California, and the National Center for Lesbian Rights, in an amicus capacity.

New York — Grandparent Visitation — In *Morgan v. Grzesik*, NYLJ, Dec. 24, 2001 (N.Y.App.Div., 4th Dept., decided Nov. 9, 2001), the court rejected a constitutional challenge to N.Y. Dom. Rel. L. sec. 72, which authorizes grandparents to petition for child visitation. In an opinion by Justice Wisner for the unanimous panel, the court found that New York's statute is more narrowly drawn than the statute that the U.S. Supreme Court found unconstitutional as applied in *Troxel v. Granville*, 530 U.S. 57 (2000).

New York — Nontraditional Families — In *Carr v. Third Colony Corp.*, 2001 N.Y. Slip Op. 40400 (N.Y.City Civ. Ct., Nov. 9, 2001), a personal injury case, N.Y.C. Civil Court Judge Jack Battaglia relied on the N.Y. Court of Appeals decisions in *Braschi v. Stahl Associates*, 74 N.Y.2d 201 (1989) and *Matter of Jacob*, 86 N.Y.2d 651(1995), to support the point that a man living with his girlfriend and the girlfriend's children should be considered a "family" for purposes of measuring damages. The point came up in determining how the particular injury in this case would affect the plaintiff in the future, including his activities with the young twin boys of the woman with whom he was living. The defendant contended that the lack of a biological or legal relationship with the boys meant that the plaintiff's activities with them, which had been curtailed due to his injury, were purely voluntary and thus not relevant to the issue of damages.

D.C. Federal — Same-Sex Harassment — In *Davis v. Coastal International Security, Inc.*, 275 F.3d 1119 (D.C.Cir., Jan. 11, 2002), a unanimous panel of the D.C. Circuit reiterated the now well-established point that harassing conduct of a sexual nature does not constitute sex discrimination unless the motivation of the harassers has something to do with the sex or gender of the victim. In this case, a male security guard complained of harassment by two other male security guards. The district court determined that this was a grudge situation arising from the victim's having disciplined the other two when he was in a supervisory capacity over them. It had nothing to do with the victim's gender, even though the harassment included crotch-grabbing, kissing sounds, and lewd gestures and name-calling. Consequently, there was no violation of Title VII.

Florida — Taxpayer Challenge to D.P. Ordinance — In *Martin v. City of Gainesville*, 800 So.2d 687 (Fla. Dist. Ct. App., 1st Dist., Nov. 30, 2001), the court affirmed a ruling by the Alachua County Circuit Court that an individual taxpayer does not have standing to challenge the City of Gainesville's recently-enacted ordinance extending eligibility for employee benefits to domestic partners of municipal employees.

New York — Sexual Orientation Discrimination — In *Fotiades v. Beth Israel Medical Center*, NYLJ, Feb. 1, 2001, p.18, col. 1 (N.Y. Supreme Ct., N.Y. Co.), Justice Harold Tompkins granted summary judgment in favor of the employer in a case alleging sexual orientation discrimination in the termination of a physician. Dr. Fotiades claims that his work was praised and he was awarded a substantial salary increase on the first anniversary of his employment, before his sexual orientation became known in the workplace, but that as soon as it became known, the desirability of his assignments declined, he accrued criticism and was discharged. To judge by this opinion, the complaint was loaded up with non-viable causes of action, such as claims of constitutional violations (against a private hospital), state law discrimination claims (when the state law does not cover sexual orientation), breach of contract claim (where the written contract allowed the hospital to terminate unilaterally) and an emotional distress claim that apparently bore no relationship to the kind of factual backing necessary for such claims. Ultimately the case boiled down to the sexual orientation claim under the New York City Administrative Code. The court observed that the decision-maker on the discharge, the president of the hospital, did not know about the plaintiff's sexual orientation when he made the decision, so unlawful motivation was not present. In addition, in discharging Fotiades, the employer had cited two patient complaints, a dispute about his failure to perform a medical procedure that was ordered, and a problem getting along with a co-worker. Justice Tompkins opined that it was not the role of the court to decide whether Fotiades was a good employee, or even whether the grounds cited by the employer were sufficient to justify a discharge. The issue was whether Fotiades proved discrimination. Under the allocation of burdens common to employment discrimination claims, in the absence of direct evidence of discriminatory intent, it is up to the plaintiff to overcome the defendant's stated non-discriminatory grounds by showing that they are pretextual, and Tompkins found that Fotiades introduced no evidence relevant to that point.

North Carolina Federal — Religious Discrimination — In *Equal Employment Opportunity Commission v. News and Observer Publishing Co.*, 2001 WL 1720200 (U.S.Dist.Ct., E.D.N.C., Aug. 10, 2001), a very belatedly published opinion, Senior District Judge Fox rejected the EEOC's claim that the defendant newspaper discharged Timothy Wilkins, a sales supervisor, because of his anti-gay religious views. Wilkins was a Christian activist and "former homosexual" who claimed he was cured through faith and eagerly advanced the view that homosexuality can be "cured" through Christian faith, including in an article he published in the newspaper. A few weeks after the article was published, Wilkins was discharged for problems in getting along with his supervisor. The court found that the mere temporal proximity between the publication of the article and the discharge did not prove that Wilkins was fired for espousing his religious views, and that the company had articulated a non-discriminatory reason for the discharge which had not really been disproved by the EEOC.

Minnesota — First Amendment Rights — In *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D.Minn. 2001), U.S. District Judge Donovan Frank had preliminarily enjoined Woodbury High School's principal from forbidding Elliott Chambers from wearing a "Straight Pride" t-shirt to school. The *St. Paul Pioneer Press* reported on Jan. 17 that the preliminary injunction, issued last May, had been converted into a final order on Jan. 2 by agreement of the parties. According to the news report, Chambers, "currently a junior at Woodbury High, wore the sweatshirt to school Jan. 16, 2001, as an expression of 'preference for the traditional and wholesome way to approach sex . . which is God's plan,' his mother, Lana Chambers, said at the time." There was no indication in the article whether Chambers has continued to wear the t-shirt.

Pennsylvania — School Harassment — The Bergen County, N.J., *Record* reported Jan. 18 that Timothy Dahle, a "gay teenager" who had sued the Titusville, Pennsylvania, school district over anti-gay harassment he had suffered as a student, has achieved a $312,000 settlement of his damage claims. Dahle claimed that the harassment actually began in 1994, when he was in the sixth grade, and that when he was in the tenth grade, it had become so bad that he attempted suicide. The school district, refusing to admit it was at fault, claimed that Dahle was "belligerent" to other students and brought problems on himself. The identity of the court in which Dahle filed suit was not indicated in the article.

Florida — Transsexual Marriage & Adoption — The national press focused attention on the dispute between Michael and Linda Kantaras over Michael's parental status towards Linda's sons, one of whom he adopted shortly after they married, the other who was conceived through donor insemination during the marriage. The wrinkle in the case is that Michael is a female-to-male transsexual, who had transitioned in 1986 and was married to Linda in Seminole County, Florida, in 1989. (Michael's gender change was evidenced by a name change granted by a Texas judge after his operation.) Now that Michael and Linda are divorcing, Michael asserts parental rights towards the sons, in the ongoing divorce proceedings taking place before Pasco-Pinellas, Florida, Circuit Judge Gerard O'Brien, who told a reporter from the *Tampa Tribune* (Jan. 22) that this case "may be one of the first in the U.S." to consider this precise issue. Linda is arguing that the adoption of her older son was not valid, and that Michael should not have been listed as the father of the second son. (The sperm for that conception was donated by Michael's brother, so he is the child's genetic uncle.) As Judge O'Brien characterized the question before him to the reporter, "Should we recognize the medical definition of sex? The question is, does he become a man, can he marry, can he adopt? If the law says he's still a woman, he can't do any of those things." Linda is arguing that Michael remains a woman for legal purposes and should have no parental claims towards either boy.

Federal — Transsexual Prisoner Rights — Transsexual federal prisoner Dee Farmer's continuing litigation against corrections officers for alleged failure to provide appropriate medical treatment came to grief in the U.S. Court of Appeals for the 10th Circuit on Dec. 26 in *Farmer v. Perrill*, 275 F.3d 958, when the court found that the current claims were barred by the prior judgment against Famer in her Federal Tort Claims Act action against the government. A.S.L.

Criminal Litigation Notes

New York — Manslaughter — The *New York Daily News* reported on Jan. 30 that a Bronx jury convicted Louis Marino, 19, of manslaughter for stabbing to death Jamie Warful in a fight that seems to have been precipitated by Marino calling Warful "gay" during a Labor Day 1998 keg party at Edgewater Park. When Warful confronted Marino, Marino admitted calling him gay and grabbed Warful by the shirt collar, ripping as silver chain. A fight ensued during which Marino pulled out a knife a stabbed Warful, fatally. Sentencing is scheduled to take place Feb. 28; the maximum penalty would be 10 years in prison.

Nebraska — S&M Complications — Kidnaping or S&M scene gone bad? The *Omaha World Herald* reported on Jan. 19 that Roger Van, the apparently mild-mannered owner of the Nebraska Floral & Gifts flower shop, and a live-in employee, Jerry Marshall, were arrested on charges of sexually assaulting and torturing a 36–year-old man in the shop's basement in what the newspaper described as a "sadistic bondage rendezvous arranged over the Internet." According to the story, the victim and Van had corresponded over the Internet for several months to set up an S&M scene, and the man arrived in Wayne, Nebraska, on Dec. 7, hoping to initiate a bondage relationship with him. After two days, the man wanted to call the thing off, but Van refused, and alleged held him captive in the basement for nine days, subjecting him to various assaults. Marshall helped the man to escape. The victim then contacted the Nebraska State Patrol, which investigated and arrested the defendants. The victim did not require any hospitalization. The whole town is buzzing about the secret life of the local florist.

New York — Gay Scam — The *New York Post* reported Jan. 15 about the arrest of John Loan, a gay man charged with having stolen more than $3 million from his employer, Alliance Capital Management, initially to pay for medical care for his lover who was dying of AIDS, but after his lover's death to enable Loan to make large donations to various charities, including Gay Men's Health Crisis and the Lesbian and Gay Community Services Center in New York. Loan also reportedly established a foundation to support research on Down's Syndrome. According to the news report, Loan had been homeless when he was first placed in a low-level job at Alliance ten years ago, but went on to win the confidence of a company CEO and his wife, and was made the special-events officer at the investment company, in charge of arrangements for catered events. According to the charges against him, Loan set up his own catering company and submitted false invoices for work that was never done. This went unnoticed for four years until it was finally uncovered in an internal firm audit.

Florida — Pedophile Rabbi — Rabbi Jerrold Levy of Boca Raton, Florida, was sentenced to 6–1/2 years in prison by U.S. District Judge William Dimitrouleas of the U.S. District Court in Ft. Lauderdale on Dec. 28, for having sex with a teenage boy whom he met through the Internet. According to a report on the case by the *South Florida Sun-Sentinel* (Dec. 29), Levy had sex with the 14–year-old boy in his car after connecting with the boy in an online chat room. According to prosecutors, Rabbi Levy spent hours on-line cruising in chatrooms popular with teenage boys, under the screen name of CoachBoca. Since his arrest last April, he has been undergoing psychiatric treatment. He was apprehended in a sting operation stimulated by the father of a 16–year-old boy who found an email to his son soliciting sex by CoachBoca; the father then initiated an email correspondence with Levy, posing as a teenage boy, and assisted police in setting up the sting. Levy pled guilty to two counts of luring a minor over the

Internet and distributing child pornography, federal offenses that could have drawn a maximum sentence of up to 60 years. The newspaper report indicated that although Rabbi Levy was forced to resign his position as assistant rabbi at Temple Beth El, one of the largest synagogues in South Florida, many congregants remained supportive of him, and were critical of a prison sentence for a man who they characterized as "mentally ill." A.S.L.

Legislative Notes

Federal — Education & Domestic Partnership (D.C.) — On January 8, President George W. Bush signed into law an education reform bill intended to increase spending for literacy programs and upgrade the quality of American schools. But there were some provisions in the bill reflecting the ordinary, reflexive homophobia that frequently surfaces in federal legislation. Most notably, the bill bars federal financial assistance for any school that "discriminates" against organizations that bar gays from being members. What's homophobic about this provision is that it is totally superfluous, as federal courts have ruled that public schools may not discriminate against organizations on such a basis, but is nonetheless included so that various homophobic legislators can tell their constituents that they took steps to express support for the anti-gay policies of the Boy Scouts and other organizations. • • • Previously, Bush had signed into law on Dec. 21 a D.C. Appropriations bill that for the first time allows the District to fund domestic partnership benefits for partners of city employees, which the city counsel had voted in 1992. One of the consequences of the events of Sept. 11 appears to have been a slight softening of public opposition to benefits for same-sex partners, as news reports about surviving gay partners and their struggles for compensation have built public understanding of the issue.

New Jersey — Hate Crimes — New Jersey repaired the Hate Crimes Law that was struck down by the U.S. Supreme Court in *Apprendi v. State of New Jersey*, 530 U.S. 466 (2000). The Supreme Court had ruled that the statute violated the defendant's right to trial by jury in giving the judge sole authority to determine whether the crime was bias-motivated and thus eligible for an increase in sentencing. In the re-enacted measure, signed into law by Acting Governor John Bennett on January 11, this determination is made by the jury. The law includes sexual orientation among the bias categories for which penalty enhancement is authorized. *Newark Star-Ledger*, Jan. 12.

Florida — St. Petersberg — Sexual Orientation Discrimination — The city of St. Petersburg, Florida, has enacted an ordinance forbidding sexual orientation discrimination in housing, employment and public accommodations. The first vote in council was 7–1 in favor, the second vote required after a waiting period was 6–2 in favor. The council rejected an attempt to add "gender identity" to the proposed ordinance. Mayor Rick Baker, who had been opposed to the measure, indicated to the *St. Petersburg Times* (Jan.4) after the vote that he would not veto it, since there were sufficient votes to override a veto. The measure took effect on January 10 when the time within which the mayor could exercise a veto expired. *Daily Labor Report* No. 10, January 15, 2002, p. A–1.

California — San Francisco — Public Accommodations — As part of a general housecleaning of the city's police code, the San Francisco Board of Supervisors repealed a law that prohibited "sexual perverts" from loitering in places of public accommodation. The law, which dated from 1950, was aimed at prohibiting gay people from congregating in bars and restaurants, and was among the laws relied upon by police when they raided gay clubs and tried to shut them down. Supervisor Mark Leno, who sponsored the repeal, observed, "We now have a state law which prohibits discrimination on the basis of sexual orientation," so the police code provision was obsolete and certainly preempted. *San Francisco Chronicle*, Jan. 23.

California — Riverside County — Domestic Partnership — The Riverside County, California, Board of Supervisors voted Jan. 15 to extend eligibility for medical, dental and vision benefits to registered same-sex domestic partners of county employees. A state law in California established a domestic partnership registry, and subsequent legislation authorized local government units to extend benefits to registered partners at their discretion. The Riverside supervisors decided not to extend the benefits to seniors and opposite-sex domestic partners, which was an available option. *Riverside Press-Enterprise*, Jan. 16.

Oregon — Portland — Domestic Partnership — The Portland, Oregon, Fire and Police Disability and Retirement Fund board of directors voted Jan. 15 to direct the City Council to draft an ordinance that would change the city charter to allow gay and lesbian partners of police and firefighters to be eligible to collect pension benefits should their partners be killed in the line of duty. Two Portland lawyers testified to the board that such a move would bring the city into compliance with the Oregon Court of Appeals ruling in *Tanner* (1998), which found that same-sex partners of public employees have a right to inclusion under state constitutional equal protection principles. *Portland Oregonian*, Jan. 16.

Virginia — Housing — In a triumph for anti-gay forces, the Virginia Housing Development Authority's board of directors rejected a plea from Governor Mark Warner to expand eligibility for home loans to same-sex couples. Virginia is the only state in the nation that restricts state-assisted home loans for joint purchases to married couples. After conducting a study of housing needs in Virginia, the staff of the authority recommended dropping the marriage requirement and essentially opening up state-assisted home loans to all comers. Anti-gay forces opposed the proposal, which was being considered at the Board's January meeting. Rejecting the governor's recommendation, the board instead indicated it would consider a proposal that would allow disabled and elderly persons as well as single parents and custodians of minor children to obtain loan assistance, but would not consider allowing same-sex couples to apply. The anti-gay Family Foundation had threatened to seek legislative action vetoing any same-sex couple eligibility. *Associated Press*, Jan. 24.

New York — Sexual Orientation Discrimination — It appears probable that the Sexual Orientation Non-Discrimination Act, pending in the New York State Legislature (and repeatedly approved by the Democratic-controlled Assembly) for many years, may finally come to a floor vote in the Senate this year with a good chance of passage. The imminence of this has led to a confrontation between transgender activists and the Empire State Pride Agenda, the state-wide lesbian and gay lobbying group, as the transgender activists seek an expansion of the bill to include gender identity together with sexual orientation, and ESPA articulates the fear that introducing this "new" issue now will derail the bill when it is finally close to passage. A.S.L.

Law & Society Notes

When Congress enacted a law establishing a program of long-term health care benefits for federal employees, it left open the option for the Office of Personnel Management to define eligibility so as to include domestic partners. President Clinton signed the law in 2000, and it went into effect in 2001. *Planet Out* reported on Dec. 21 that OPM Director Kay Cole James decided against exercising that option, leading to criticism from Human Rights Campaign and the Gay and Lesbian Medical Association. Pointing out that 34% of American employers with over 20,000 employees in their companies now offered health coverage for domestic partners, Winnie Stachelberg of HRC commented that the federal government was putting itself at a "competitive disadvantage" by not offering the benefits.

Another political first for gays: Acting Governor Jane Swift of Massachusetts, a Republican, announced that she had selected a gay staff member, Patrick C. Guerriero, to be her running mate for lieutenant governor in the upcoming state elections. The *New York Times* reported on Jan. 4 that several better known politicians had turned down Swift, and controversial figure who

may not win the nomination in upcoming primaries. Guerriero, the former mayor of Melrose and also a former state legislator, will also face primary opposition. If elected, he would be the highest ranking openly-gay elected statewide official in the United States.

And yet another first for gays: Mayor Michael Bloomberg of New York City appointed Verna Eggleston, an openly lesbian African-American woman who is the former executive director of the Hetrick-Martin Institute for Lesbian and Gay Youth, to be the commissioner of the New York City Human Resources Administration, the agency the administers the city's welfare and public assistance programs. Eggleston had resigned from Hetrick-Martin to work in Bloomberg's mayoral campaign.

For some reason, this story apparently surfaced first in the British press: On Jan. 19, the *Birmingham Post* reported that scientists at the Reproductive Genetics Institute in Chicago have come up with a way to manufacture "artificial sperm" from any cell drawn from a woman's body, which can then be used to fertilize another woman's egg. The upshot is that lesbian couples could have children who are genetically related to both women, with acquiring a sperm donation from a male donor (either anonymous or known). Although the motivation behind developing the technique of creating artificial sperm was to assist men who want to have children but cannot produce sperm due to radiotherapy or chemotherapy, the process, called haploidisation, may revolutionize the lesbian family! It has already proved successful in animal experiments, and there are predictions that the first human experiments may bear fruit in the months ahead.

A group of Wisconsin state employees has petitioned the state Department of Administration to remove from the state employee charity drive any organization that discriminates on the basis of sexual orientation, such as the Boy Scouts or the Salvation Army. Rep. Steve Nass, an anti-gay legislator from Whitewater, indicated he would ask the governor to direct the Department to reject the petition. At present, the Wisconsin Administrative code states that only organizations with non-discrimination policies covering race, color, religion, national origin, handicap, age and sex may participate in the state payroll charity program. Sexual orientation discrimination is prohibited by state law, but these administrative rules were devised before the gay rights law was passed. *Capital Times*, Jan. 16.

The Evangelical Lutheran Church in America has established a task force to conduct a study on homosexuality and make recommendations to the Church about whether to ordain openly gay ministers or allow performance of same-sex unions. The Rev. James Childs, a professor of ethics at Trinity Lutheran Seminary, will chair the task force, which is expected to conduct its work over five years beginning Feb. 1, 2002. At present, the Church has not adopted an official position on these issues. *Columbus Dispatch*, Jan. 18.

United Parcel Service is perturbed that a gay website is selling anatomically correct male dolls dressed in uniforms resembling those worn by UPS delivery personnel, according to a Jan. 31 article in the *Fulton County Daily Report*. UPS's trademark counsel, King & Spalding, sent letters to BeProud.com, the website, and Totem International Ltd., the manufacturer of the dolls, claiming trademark infringement. Totem promptly collapsed and agreed to cease manufacturing. BeProud.com sold out of its available inventory and reportedly has a waiting list of 300 folks who ordered UPS dolls. BeProud.com proprietor Audy C. Morgan III told a reporter that this was a parody item, intended solely for fun, and lamented his inability to fill outstanding orders. He also asserted that he would not give his customer list to UPS. Surprising that UPS does not want its deliverymen to be gay icons…

The American Academy of Pediatrics, the professional association for pediatric medicine practitioners, has gone on record in support of legal recognition for lesbian and gay families raising children. In particular, the AAP stated in a report accompanying the February issue of *Pediatrics*, its journal, that children deserve the security of two legally recognized parents, and thus the organization supports "second-parent" adoptions by same-sex partners of legal parents. *Lambda Legal Defense Fund* press release.

Responding to criticism from a state representative that it's same-sex only domestic partnership benefits plan discriminates against unmarried heterosexual couples, the University of Maine System trustees voted to extend the program to such individuals. *Bangor Daily News*, Jan. 30. Chancellor Don McDowell observed that the university had been a leader in the state in first extending benefits, but then had been left behind as other employers, both private and governmental, had adopted more inclusive benefits plans extending to unmarried heterosexual couples. "We felt it was difficult to provide a logical answer as to why we had one and not the other," he said.

Massachusetts voters will face a ballot question in November on whether to amend the state Constitution to limit marriage the union of a man and a woman, if an initial certification of signatures on petitions announced in December holds up. *Boston Globe*, Dec. 21.

The Miami-Dade County Commission voted to set a September referendum on repeal of the ban on sexual orientation discrimination that was recently adopted. The Commission's action followed upon certification of sufficient petition signatures; under Florida law, the Commission could do only one of two things: repeal the sexual orientation provision or set a referendum for a vote by the public on the question of repeal. *Miami Herald*, Jan. 30.

A student referendum at Southern Methodist University in Dallas, Texas, has resulted in an amendment to the student government constitution adding sexual orientation to the list of prohibited bases for discrimination. 85% of the students who voted supported the change, although only a tiny fraction of the student body bothered to vote. *Dallas Morning News*, Jan. 30. A.S.L.

International Notes

United Nations — The United Nations Committee on Non-Governmental Organizations voted on Jan. 23 against recommending that the International Lesbian and Gay Association be accorded consultative statutes to the Economic and Social Council. The decision is not binding on the council, but is merely an advisory recommendation. As predicted prior to the vote, the countries that maintain stiff sodomy laws or have a tradition of suppression of "difference" lined up to vote against the recommendation. The U.S. was among those who voted in favor, together with Germany, France, Romania, Chile and Bolivia.

Saudi Arabia — Sodomy remains a capital offense in some parts of the world. This fact was dramatically illustrated on new year's day when Saudi Arabia beheaded three men for engaging in sodomy. *Washington Blade*, Jan. 4. The *Blade* reported on Jan. 11 the remarks of a Saudi embassy official in Washington, claiming that the offense for which the men were beheaded was not consensual sodomy among adults but rather for seducing young boys.

Romania — The Romanian parliament took the final steps on Dec. 21 to repeal the criminal law on homosexual relations, according to a report in the *Washington Blade* on Jan. 4. Several eastern European countries have repealed sodomy laws preparatory to applying for membership in the European Community, which disfavors such laws.

Lichtenstein — The *Washington Blade* reported on Jan. 11 that the parliament of Lichtenstein, one of the world's smallest countries, voted to approve a draft law forbidding sexual orientation discrimination. The bill was modeled on one that is pending before the Swiss parliament.

Spain — The Spanish government has announced that homosexuals persecuted during the Franco regime earlier in the 20th century will have their criminal records destroyed and may be compensated, pending a ruling on the question by the Spanish parliament. According to a news report in the *Daily Telegraph* (Dec. 28), homosexuals were singled out for internal exile from their home cities, internment in special detention centers, and subjected to loboto-

mies and electric shock treatment to attempt to "cure" their sexual deviation. (This actually sounds a lot like what some gay Americans suffered during the 1950s at the hands of the psychiatric profession in this country. When will the APA vote compensation?)

United Kingdom — According to press reports from England, the Blair Government is planning to propose that transsexuals be allowed to marry in their preferred gender. The government will propose that transsexuals be issued new birth certificates upon sex reassignment, responding to comments from the Court of Appeal last year that the government had "failed to recognise the increasing concerns and changing attitudes across Western Europe." An internal report suggests that changes should be allowed on passports, drivers licenses, medical cards and national insurance documents to indicate changes in gender. *The Independent* (Jan. 22) quoted Tim Boswell, a Conservative MP for Daventry, as a proponent of the changes: "Transsexual people deserve to have their legitimate interests recognized. After all, it is not their fault that the law doesn't recognize them." ••• In addition, there were press reports that the government is planning to introduce a criminal law reform that will narrow the definition of sexual activity subject to prosecution. Under current laws, British gays are still subject to possible prosecution for kissing in public or for "cottaging" (i.e., cruising and anonymous sex in public restrooms). The proposed reform would substitute for existing prohibitions an offence defined as "sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in public places." Of course, it would remain to be seen how courts would construe such ambiguous language. *Daily Mail*, Jan. 29. ••• The *Times of London* reported on Jan. 28 that the government is planning to change the rules governing who can register the death of an individual, to take account of same-sex couples and unmarried heterosexual couples. At present, only a legal relative can register a death. According to the newspaper report, these changes "are intended to meet complaints from some people that the present law causes deep hurt and distress when people are mourning the death of a loved one."

South Africa — The *Washington Blade* (Jan. 18) published a report from South Africa that military personnel with same-sex partners will be eligible for benefits the same as spouses receive.

United Kingdom — The British Trades Union Congress has called for a law reform that would give equal pension rights to unmarried partners, including same-sex couples, according to a report in *The Times of London* on Jan. 29. Brendan Barker, TUC deputy general secretary, was quoted as follows: "Lesbian and gay workers pay the same pension contributions as other staff. Fairness requires that they are given the same treatment."

Canada — In a study released on Jan. 29, the Law Commission of Canada, an independent government-funded commission that advises the Parliament on law reform issues, said that restrictions on same-sex marriage are discriminatory and should eventually be abandoned by the government. "There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in the light of current understandings of the state's interests in marriage," said the report, which recommended establishing registration schemes for same-sex couples as a first step, and then by stages proceeding to complete equality. In a news report about the study, the *Globe and Mail* (Jan. 30) noted that Quebec and Nova Scotia have enacted civil unions for same-sex couples, and the federal government has enacted a law reform ensuring equal treatment for same-sex couples with respect to a variety of government policies and benefits.

East Timor — For some time, East Timor was noted as one of the few nations that bars sexual orientation discrimination in its constitution, but no longer. Actually, the constitution containing the sexual orientation provision was merely a tentatively approved draft for the country, which will not become autonomously independent until May 20, 2002. According to SX, a gay newspaper in Sydney, Australia, the Constituent Assembly of East Timor voted recently to remove sexual orientation from the draft, after a debate in which one member of the Assembly called homosexuality "an illness" and "an anomaly" and said that protecting gays from discrimination would lead to "social chaos." Another claimed that the only gays in East Timor are foreigners. East Timor is now a UN protectorate. Our thanks to Sydney attorney David Buchanan for forwarding this news report.

India — The *Times of India* reported on Jan. 10 that two of the world's most prominent openly-gay judges, Justice Michael Kirby of the Supreme Court of Australia, and Justice Edwin Cameron of the Supreme Court of Appeal of South Africa, had visited India on a mission to sensitize Indians to the legitimate rights of sexual minorities. The two judges met with legal groups in India to encourage efforts to repeal laws against consensual gay sex and to secure equality of treatment for gays.

Norway — The European press made much of Norwegian Finance Minister Per-Kristian Foss's "marriage" ceremony with his same-sex partner, Jan Erik Knarbakk, and the subsequent occurrence that Foss served as acting prime minister while the prime minister and the foreign minister were both out of the country on diplomatic trips. The *Express* (Jan. 26) referred to Foss as "the first married homosexual to head a government." Knarbakk is a publishing executive. The men were united in a ceremony at the Norwegian Embassy in Stockholm, Sweden, on January 4, under a 1993 law that creates a registered partnership system for same-sex couples, carrying all but a few of the rights and duties of marriage. *Associated Press*, Jan. 15.

Afghanistan — The Moslem fundamentalist Taliban regime in Afghanistan was known for its fierce oppression of homosexuality, including prescribing the death penalty for consensual sodomy between adults. But gays in post-Taliban Afghanistan may be no better off, according to a report carried in the *Daily Mail* on Jan. 25. Chief Justice Fazul Hadi Shinwari of the new interim government has indicated that he expects the new government to apply the same strict penalties for sexual offenses that were applied by the previous regime, including having adulterers of both sexes whipped or stoned to death, and crushing sodomites to death. Consumption of alcohol will earn the offender 80 lashes. Judge Shinwari conceded that the Taliban had been unduly oppressive, but noted that their extreme punishments had succeeded in sharply reducing crime.

Canada — The British Columbia (Canada) Human Rights Tribunal ordered the Vancouver Rape Relief and Women's Shelter to pay $7,500 in damages to Kimberly Nixon, a transsexual, who was denied a position as a rape counselor due to her gender identity. The Jan. 18 ruling was said to be the largest damage award yet made by that tribunal in any case. Nixon had sex-change surgery in 1990, and sought out a position at the center, she said, because she had suffered physical and emotional abuse in the past from a male lover. The rape-crisis center protested the award, pointing out that it was a nonprofit, charitable organization that would have difficulty making the payment while maintaining services. *New York Post*, Jan. 21; *Winnipeg Free Press*, Jan. 19. A.S.L.

Philanthropist Starts Law-School Based Center for Sexual Orientation Law

The UCLA School of Law has announced the establishment of the Charles R. Williams Project on Sexual Orientation Law, building on funding provided by Charles R. Williams, a philanthropist, educator and businessman. The Project will function as a "think tank" dedicated to the field of sexual orientation law and public policy. Professor William B. Rubenstein of UCLA will be the first Director of the Project, and Professor R. Bradley Sears of UCLA will be the Administrative Director. The Project will holding a half-day conference to mark its opening on February 8 with a series of panel discussions followed by a gala opening reception. The conference is described as the First Annual Update on Sexual Orientation Law, with panels on litigation, legal scholarship, and legislative ac-

tivity. The event is free and open to the public, but RSVP's are requested to 310–825–0971 or events@law.ucla.edu. A.S.L.

Professional Notes

We reported last fall about the efforts of historian George Painter to get the Oregon Board of Medical Examiners to right a historic wrong by posthumously restoring the medical license of Dr. Harry Start, which had been revoked early in the 20th century after Start was convicted of consensual sodomy. As of our report in the October 2001 issue of *Law Notes*, the Medical Examiners had unanimously rejected Painter's request, finding that at the time it had acted, the Board's actions appeared to be legal and appropriate in the context of the time. Painter recently notified us that his attempt to get the Board to reconsider its decision has been fruitless, contrary to his experience with the Multnomah County Bar Association, which had acted expeditiously to posthumously reinstate Edward McAllister, a gay lawyer who had been expelled as a result of the same "sex scandal" that had ensnared Dr. Start.

Lambda Legal Defense Fund has announced the appointment of Gregory Nevins as a staff attorney in its regional office in Atlanta. Nevins, a Tennessee native, was previously employed as a deputy city attorney in San Francisco, where he wrote the city's amicus brief supporting a right-to-sue for wrongful death for the surviving lesbian partner of a woman who was killed by attack dogs. Before his city job, Nevins worked in the San Francisco office of Morrison & Foerster. He is a 1989 graduate of Harvard Law School.

Gay legal observers mourned the Jan. 1 death of Eugene Nickerson, a U.S. District Judge in Brooklyn who issued two important rulings finding the Clinton's Administration's "don't ask, don't tell" military policy to be unconstitutional. Nickerson, a Democrat, was nominated for the U.S. District Court in Brooklyn in 1977 after having served as the Nassau County Executive, the first Democrat in history to be elected to that position. Unfortunately, Nickerson's ruling on the military issue was reversed by the 2nd Circuit Court of Appeals. He was 83. *New York Times*, Jan. 3.

Maggie L. McIntosh, a Democrat who is the new majority leader of the Maryland State House of Delegates, pulled a surprise by coming out as a lesbian during a speech to the Women's Law Center of Maryland in October. She later told the *Baltimore Sun* (Jan. 15) that she was moved to do this after she had returned to her hometown in Kansas and discovered a childhood friend who was gay. The speech concerned the recently enacted sexual orientation discrimination law. McIntosh is now the first and only openly gay member of the Maryland legislature.

It is interesting to note the extent to which the mainstream bar is focusing attention on sex-law issues. The Florida Bar is holding an all-day CLE program in Tampa on February 13 titled "Sex, Laws & Government," devoted entirely to Adult Entertainment Law. The panel topics listed in the brochure announcing the program would sound familiar to anybody who participated in the fierce debate in New York City over the Giuliani Administration's adult zoning ordinance, whose passage threatened drastically to reduce the number of businesses in the city providing sexually-oriented goods and services, and to relocate those remaining to remote areas. (In the event, many of the businesses figured out how to reconfigure their spaces and inventories to avoid having to move, and the city government experienced difficulties in enforcement due to imprecisions in the ordinance and overreaching in the enforcement process, earning some reprimands from the courts.) Anyone interested in participating in this program should check the Florida Bar's website for details at www.flabar.org.

Lambda Legal Defense Fund announced that Mona Noriega became regional director of Lambda's Midwest Regional Office, in Chicago, in January. Prior to joining Lambda, Noriega was founding co-chair of an organization seeking to bring the Gay Games to Chicago in 2006, and was assistant publisher of *Windy City Times*, Chicago's gay newspaper. A.S.L.

AIDS & RELATED LEGAL NOTES

Dental Hygienist Dismissed for HIV+ Status Is Not "Qualified Individual" Under ADA; Summary Judgment for Employer Affirmed by 11th Circuit

Spencer Waddell worked as a licensed dental hygienist from early 1996 until October 1997. In September 1997, he was tested for HIV and found to be carrying the virus. His employer, Valley Forge Dental Associates, was notified, and Mr. Waddell was given a leave of absence, then offered a clerical job that would not require physical contact with patients. The clerical position would earn him half the salary of his previous job. He refused the transfer, and brought this suit under the Americans with Disabilities Act and other statutes. *Waddell v. Valley Forge Dental Associates, Inc.*, 2001 WL 1643531 (11th Cir. Dec. 21).

In the U.S. district court (N.D. Georgia), both Waddell and Valley Forge asked for summary judgment, which was granted in favor of Valley Forge, leading to an appeal by Waddell. The case focused not on whether HIV+ status is a disability under 42 U.S.C. §§ 12102 (the "major life activities" test), but rather on whether an HIV+ dental hygienist fails to meet legitimate "qualification standards" under 42 U.S.C. §§ 12113(a), thereby providing a defense to any charge of disability discrimination. Specifically, under 42 U.S.C. §§ 12113(b), does a dental hygienist with HIV, per se, "pose a direct threat to the health or safety of other individuals in the workplace" so that summary judgment in favor of the employer is justifiable? Both the district court and the three-judge appellate panel answer "yes."

The 11th Circuit looked to the Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), for its guiding principles. The Supreme Court said "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate the risk." A court must assess the disease's nature, duration, severity, and probability of transmission. The assessment must be based on "objective, scientific information."

According to the opinion for the court by Circuit Judge Birch, the 11th Circuit takes a strict view of the existence of significant risk. If a disease inevitably leads to death, then there is a significant risk if (1) a certain event may happen, and (2) that event can transmit the disease. *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (en banc). "Death itself makes the risk 'significant'… Evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk," wrote the court in *Onishea*. It is not a "'somebody has to die first' standard."

Dental hygienists, the court found, use sharp instruments in close proximity to their own skin, and sometimes cut their own skin. Cuts may also be caused by a patient who bites the hygienist's hand. In the ordinary course of cleaning teeth, the instruments induce bleeding in the mouth of the patient. It is possible, therefore, that blood from a cut in a hygienist's finger may come in contact with an oral cut, abrasion, open wound, or mucous membrane in the patient's mouth. Since death, according to the court, is the inevitable result of HIV infection, the risk factor is significant. "None of Waddell's medical experts … appear to dispute that transmission could happen, even though … such an event never before has occurred." As a matter of law, summary judgment is justified, ruled the court. As a risk to his workplace, Mr. Waddell is not a "qualified individual" under the Americans with Disabilities Act.

The court declined to decide whether the status of being HIV+ can be a disability under the ADA, in other words, whether it substantially limits major life activities such as having sexual relationships, planning one's life, and caring for oneself. Such decisions will be made on a case-by-case basis, *Bragdon v. Abbott*, 524 U.S. 624 (1998), but need not be decided here because Mr. Waddell fails the "qualified individual" test. *Alan J. Jacobs*

Rejecting ADA Claim, Court Finds HIV+ Plaintiff Failed to Plead Substantial Limitation of Any Major Life Activity

In a case whose impact may have been superceded by the subsequent decision, in *Toyota Motor Manufacturing, Kentucky, Inc.. v. Williams*, 2002 WL 15402 (U.S. Supreme Ct., Jan. 8) (reported above), the U.S. District Court in Dallas, Texas, granted summary judgment to the defendants in a case where an HIV+ plaintiff sued his employer under the Americans with Disabilities Act (ADA) for failing to provide reasonable accommodation, finding that the plaintiff does not have a disability under the law. *Blanks v. Southwestern Bell Communications, Inc.*, 2001 WL 1636359 (N.D. Tex.. Dec 18).

Albenjamin Blanks was a 9–year employee at Southwestern Bell Communications (SWB) when he went on short term medical leave in 1996 due to depression and job-related stress. During this period he was diagnosed HIV+ and began treatment. Although he returned to work, his doctors recommended that he not return to his prior position as customer service representative because of the high level of stress involved with dealing with irate members of the public. He wanted to become an "internal" customer service representative, who would deal only with the needs of other SWB employees, but SWB would not agree. After several months of discussions about an appropriate position, SWB offered him a position of clerk, which he had once held, but which paid about $100 per week less than his position as a customer service rep. Though he accepted this position, he resigned two weeks later, stating in his letter of resignation that he could not support his family on the salary he was earning as a clerk.

Blanks filed a disability discrimination claim with the Texas Commission on Human Rights. He claimed that his demotion effected a constructive dismissal. Blanks did not disclose the nature of his disability in his complaint, which was denied by the Commission. A "right to sue letter" was issued, and Blanks filed the instant suit.

SWB sought summary judgment on two grounds. First, the firm was never formally notified of the nature of his disability, only that Blanks would be unable to return to his former position. This, SWB argued, meant that Blanks failed a necessary condition precedent to suit. Second, SWB argued that Blanks' asymptomatic HIV is not a "disability" sufficient to trigger protection under the ADA. The district court judge disagreed with the first argument, finding that informal notice of his HIV status which Blanks provided along the way to one of his supervisors during the period of discussions about a new position for him was sufficient notice to the firm. However, the court granted summary judgment on the second, because Blanks never articulated what tasks it was that he would not be able to perform as a result of his asymptomatic HIV.

In order for a plaintiff to prevail in an employment discrimination suit under the ADA, it must be shown 1) that the plaintiff had a disability, 2) was qualified for the job in question, and 3) that an adverse employment decision was made solely on the basis of the disability. A "disability" is a physical or mental impairment that "substantially limits70 one or more "major life activities" of a claimant. Major life activities are those "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing learning and working." Whether an impairment substantially limits a major life activity would depend on its nature and severity and its duration or expected duration.

Because the court found that Blanks made no showing at all of any inability to perform one or more major life functions, his claim failed. The court found that even if Blanks's meager submissions were read to suggest that his inability to cope with the stress of being a customer service representative should be considered as an offer of proof that HIV substantially limited the major life activity of working, that submission would be insufficient to support a reasonable jury verdict in his favor. While the courts had previously ruled that HIV would impair the major life activity of reproduction, this would be of no relevance in Blanks's situation, because the record showed that Blanks and his wife had already decided not to have any more children before the events in question took place, and the couple had already taken permanent steps to effect their decision.

Further, prior case law had determined that the inability to work would be considered disabling only if the inability involved a broad class of jobs, not one particular kind of job. Blanks never made such a broad claim, just that his reaction to stress rendered him unable to cope with dealing with the public in the prior customer service job. The court stated that his inability to perform a particular job did not render him disabled within the meaning of the ADA, and that the offer of a job which paid $100 a week less was sufficiently in the range of relief that the company could be required to offer an employee in his situation, even if he were found to be disabled. *Steven Kolodny*

HIV+ Grandmother Loses Visitation Dispute

In *Crockett v. Pastore*, 2002 WL 78698 (Jan. 29), the Connecticut Supreme Court reversed a decision by the New Haven Superior Court that had ordered child visitation rights for an HIV+ grandmother, finding that the trial record did not present the prerequisites for third-party visitation concurrently established by the court in *Roth v. Weston*, 259 Conn. (Jan. 29, 2002), a case in which the court adjusted the prerequisites in order to bring Connecticut law into compliance with the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000).

Regina Crockett's daughter bore the subject child early in 1995. She was not married to the child's father, Nicholas Pastore, and indeed at the time of the birth they were not living together and Pastore did not know he was the father. When she was four months old, the child was committed to the department of children and families and placed in a foster care setting; her mother's parental rights were subsequently terminated. In December of that year, after a paternity test established his relationship with the child, Pastore signed an acknowledgment of paternity and petitioned for visitation, which was granted in July 1997. Meanwhile, Regina Crockett had been visiting with the child throughout the foster placement. On October 22, 1997, Pastore was awarded sole custody of the child, and has refused to allow Regina Crockett to visit since that time. Crockett sued Pastore to obtain visitation rights.

The Superior Court adjudicated the claim in Crockett's favor, ordering visiting during the day one Saturday each month, and Pastore appealed. One of Pastore's points of opposition to the visitation petition was that both Crockett and her fianc, are HIV+ and have past histories of drug abuse. The trial judge found that Crockett had successfully overcome her drug-using past through rehabilitation and maintaining a drug and alcohol-free lifestyle since September 1995. The trial judge also found that Crockett's HIV+ status was no bar to visitation, as she was currently healthy, and cited studies showing the lack of danger of HIV transmission through casual contact in family settings.

The Supreme Court, in an opinion by Justice Katz, reversed the award of visitation, but Regina Crockett's HIV-status had no part in the decision. The problem was that the 2000 decision in *Troxel* cast serious doubt on the constitutionality of Connecticut's statute authorizing third-party visitation, unless the court cut back the application of the statute. In the companion case noted above, the court established the proposition that third party visitation would only be awarded where the plaintiff could show they had established a parental-type relation-

ship with the child such that the child would suffer real harm if deprived of the visitation. Reviewing the record in this case, Justice Katz could find no evidence to support the conclusion that Regina had a parental-type relationship with the child, despite her regular visitation during the child's foster placement for the first two years of its life. A.S.L.

HIV+ Plaintiff Who Fails to Engage in Interactive Process on Accommodation Loses ADA Claim

U.S. District Judge Bucklo ruled in *Edwards v. United Air Lines, Inc.*, 2002 WL 122322 (N.D. Ill., Jan. 29), that an HIV+ cabin serviceman who went "incommunicado" after his first request for medical leave was denied and was subsequently discharged cannot maintain an action under the Americans With Disabilities Act, having failed to meet his burden of engaging in an interactive process with the employer to determine how his disability could be reasonably accommodated. Judge Bucklo granted summary judgment for the employer on claims of discrimination both in terms of employment and in the discharge.

Ronald Edwards transferred to United's Chicago operation at O'Hare International Airport in May 1999. In June, he told his supervisor, Pat Puleo, that he was not feeling well, and applied for a shift change. He did not tell Puleo at that time that he was HIV+. Decisions on shift changes were dictated by the terms of a collective bargaining agreement. While his request for the shift change was pending, Edwards stopped reporting to work and requested an extended medical leave; the collective bargaining contract authorizes up to two years of such leave in appropriate cases. Puleo requested that Edwards see the company physician, Dr. Robert McGuffin. After examining Edwards, McGuffin reported that he was not too ill to work, and his request for leave was denied. But Edwards did not report back to work. His shift change request was granted, and posted in the workplace, but he did not see it because he was not there. Puleo's repeated attempts to phone him at home were unsuccessful. Finally, when he had not put in an appearance at work for more than two months or made any contact with his supervisors, Edwards was discharged. He then filed suit under the ADA, claiming that he was discriminated against regarding the shift change, the request for medical leave, and the discharge.

Judge Bucklo found none of Edwards' claims to be substantiated. Under the ADA, an employee who requests an accommodation is supposed to participate with the employer in an interactive process to determine what accommodation could work for both parties. In this case, Edwards never presented any information to refute Dr. McGuffin's conclusions that he was not ill enough to merit a medical leave, was initially not forthcoming with anybody at the company about his HIV status and its medical consequences, and essentially dropped out of sight. Furthermore, his request for shift change was granted reasonably quickly, pursuant to the procedures spelled out in the labor contract. "I assign to Mr. Edwards the responsibility for the breakdown in the interactive process," wrote the judge, "thus relieving UAL of liability for failure to reasonably accommodate."

Bucklo was similarly dismissive of Edwards' wrongful discharge claim. Edwards presented evidence of two other employees with extended absences who were not discharged, but rather subjected to progressive discipline, and argued that the company's failure to use progressive discipline in his case created an inconsistency supporting his claim of discrimination. Judge Bucklo found these other cases to be materially distinguishable, and noted particularly Edwards' extended absence without any communication with the company. Concluding that Edwards had failed to make out a prima facie case of improper discharge, the court expressly refrained from discussing whether UAL's "legitimate reason for discharging him (violation of attendance rules) was pretextual." A.S.L.

Experts Battle Over Source of Plaintiff's HIV

A federal district court in Texas ruled Dec. 18 that a jury should determine whether the plaintiff phlebotomist contracted HIV as a result of being stuck by a defectively designed hypodermic needle, as she claims, or by some other means. *Dossey v. Becton Dickinson & Co.*, 2001 WL 1636440 (N.D.Tex.).

Three years ago, Elizabeth Dossey was accidentally stuck by the needle when drawing blood from a patient known to have HIV. Six weeks later, she also tested positive for the virus. Dossey sued the needle's manufacturer alleging that, but for the needle's improper design, she would not have contracted HIV. The manufacturer countered with an expert in genotype testing who testified that the strain of HIV contracted by the plaintiff was different from strain that infected the patient. Defense counsel suggested that Dossey actually contracted the virus from unprotected sex with an intravenous drug user. Dossey employed her own expert, whose testimony sought to undercut the reliability of genotype testing for matching strains of the virus..

District Judge Buchmeyer found that this created "a classic question for the jury." The court, however, granted summary judgment to the Defendant on all of Dossey's remaining claims. Her wrongful death claim failed, because she is not yet dead. And Dossey's daughter was found to have no emotional distress claim, because she was not a witness to the needle stick. *T.J. Tu*

California Appeal Court Revives Hemophiliacs' HIV Transmission Suit Against Makers of Clotting Medication

Twelve years after being diagnosed with HIV, a question of fact exists as to whether two hemophiliac plaintiffs knew that the manufacturers of factor concentrates wrongfully caused their infection. According to the California Court of Appeal, Second District, the question of when HIV+ hemophiliacs reasonably should have discovered the wrongdoing of manufacturers of blood factors in failing to take proper steps to screen factor products for HIV, is an issue of fact for a jury to decide. *Smith v. Bayer Corporation*, 2001 WL 1660064 (December 28, 2001).

On April 13, 1998, approximately twelve years after being diagnosed with HIV, Todd Smith and Stephen Dowling, together with their respective spouses, filed suit against various manufacturers of factor concentrates used to treat hemophilia, alleging fraud, failure to warn, negligent manufacture, violation of safety regulations, conspiracy to conceal information, intentional failure to screen and test donors, failure to warn of dangerous product, and intentional and negligent failure to recall a defective product.

On motion for summary judgment, the trial court dismissed plaintiffs' claims, finding that California's one year statute of limitations had run prior to commencement of the lawsuit. On appeal, the plaintiffs argued that under California's discovery rule, they did not discover defendants' wrongdoing until at least September 30, 1993. It was undisputed that plaintiffs knew at or about the time they were diagnosed with HIV that the factor concentrates they had used for treatment of hemophilia were the likely cause of their infection. However, plaintiffs claimed that from 1986 to 1993, they had no reason to suspect any alleged wrongdoing on the part of defendants.

On September 30, 1993, a federal class action called the *Wadleigh* class action was commenced on behalf of hemophiliacs against the factor manufacturers. Plaintiffs claimed that it was not until after commencement of the *Wadleigh* class action that they discovered facts regarding the practices of plasma collectors and manufacturers to create a reasonable suspicion of wrongdoing.

Under California law, the commencement of the *Wadleigh* class action tolled the statute of limitations with respect to Smith and Dowling's claims. The *Wadleigh* class action was never certified and an order dismissing the action was issued in 1996. Several months after the *Wadleigh* action was dismissed, a second class action was commenced and dismissed in 1997. Accordingly, between September 30, 1993 (the day the *Wadleigh* action was commenced) and April 13, 1998 (the day plaintiffs commenced their action), only 363 days elapsed on the stat-

ute of limitations. Based on this, if plaintiffs can establish that they did not know of defendants' wrongdoing prior to September 28, 1993, their action would be timely under California's discovery rule.

The court of appeal, in an opinion by Judge Kitching, held that plaintiffs' knowledge of the source of their HIV infection did not equate to knowledge of defendants' wrongdoing. Plaintiffs argued that it was their belief, until 1993, that they had been innocent victims of the HIV epidemic during times when little was known about prevention and transmission of the disease. Based on this, the court held that issues of fact concerning when plaintiffs reasonably should have known of defendants' wrongdoing precluded summary judgment.

However, the court discredited the plaintiffs' argument that the statute of limitations was tolled until well after 1993 when conclusive evidence established that HIV was the cause of AIDS. The court held that plaintiffs' injury was the infection with HIV and not the connection between HIV and AIDS.

The court reversed the trial court's dismissal of the case, and remanded the matter for a jury trial on when plaintiffs reasonably should have known of defendants' wrongdoing. *Todd V. Lamb*

Future Spouse Is "Reasonably Foreseeable" Victim of HIV Transmission

The Supreme Court of Tennessee ruled on Dec. 20 that a physician owes a duty to any potential future spouse and child to warn an individual of their potential exposure to HIV. *Estate of Amos v. Vanderbilt University*, 62 S.W.3d 133.

In 1984, Julie Story received HIV+ blood during surgery at Vanderbilt University Medical Center (Vanderbilt), one year before development of the HIV antibody screen. Vanderbilt did not attempt to warn all blood recipients that they may have been exposed to HIV. In 1989 Story married Ronald Amos, then gave birth to a daughter who died of an AIDS-related illness. Reinstating a damage award to Mr. Amos, the court held that Vanderbilt owed him, as a foreseeable victim, a duty to warn Mrs. Amos of the exposure. The court also held that expert medical or scientific proof of emotional injuries is required only for "stand-alone" claims of mental anguish, but not where multiple types of damages are claimed. Past NLGLA co-chair Abby Rubenfeld represented the plaintiffs in Nashville. *Mark Major*

AIDS Phobia Suit Survives Summary Judgment Motion

In *DiPierro v. Franzone*, NYLJ, 1/29/02 (N.Y. Supreme Ct., Suffolk Co., Tanenbaum, J.), the court denied defendants' motion for summary judgment in opposition to an AIDS phobia claim brought by a housekeeper who suffered a needlestick injury while disposing of trash in the defendants' home. The court found that material factual issues remained in dispute.

While cleaning the home of Andrew and Mary Ann Franzone on June 27, 1997, the plaintiff claims she sustained a puncture wound to her right index finger while carrying a kitchen garbage bag. She determined that a hypodermic needle was in the garbage bag. Apparently, Mrs. Franzone had used the hypodermic needle to administer medication to herself. The plaintiff went to a hospital, was tested, and has received prophylactic treatment. She claims that the Franzones have not been adequately forthcoming about Mrs. Franzone's health status, and that she has suffered severe emotional distress.

In moving for summary judgment on her claim, the Franzone submitted documentation that Mrs. Franzone has tested negative for HIV, and argued that the evidence shows the plaintiff has not contracted HIV and that her fears of contracting AIDS were unreasonable, irrational and speculative. In reply (but without making a formal motion), the plaintiff argued that she should receive partial summary judgment against the Franzones due to her suffering from the AIDS medications she has been taking.

Under New York precedents, an AIDS phobia claimant has to show that as a result of the defendants' negligence the plaintiff suffered an injury through which HIV could be transmitted and that HIV was actually or probably present when the injury occurred.

Justice Tanenbaum did not engage in any detailed analysis, beyond recounting the factual allegations of the parties, summarizing the applicable 2nd Department precedent (based on *Montalbano v. Tri-Mac Enterprises*, 236 A.D. 2d 374, 652 N.Y.S.2d 780 (2nd Dept. 1997)), and stating conclusorily that "substantial questions of fact exist surrounding the incident sufficient to defeat the applications seeking summary judgment." A.S.L.

AIDS Litigation Notes

Oklahoma — Negligence — An Oklahoma City jury awarded $1.4 million to Anthony Northcutt on his claim that negligence by a government-operated clinic was responsible for his HIV infection. This is a somewhat strange story. Northcutt went to the clinic to be tested for HIV, and was told he had tested positive. This sent him into a spiral of suicidal conduct, including alcoholism and unprotected sex with HIV+ men. Ultimately, he learned that his initial test result was negative, and that his HIV infection was due to the unprotected sex he had after learning that incorrect result. In his lawsuit, Northcutt claimed that the negligence of the clinic in telling him he was positive, and in not offering any counseling on the dangers of reinfection with different strains of HIV, led him to assume he could now have sex with HIV+ men without exposing himself to any additional risk, and thus the clinic is responsible for his subsequent infection. The defendants argued, of course, that Northcutt's own negligence was the cause of his subsequent infection. The Oklahoma City-County Board of Health, the named defendant, is covered by a state law limiting liability in such cases to $100,000, but is considering an appeal. The attorney who represented the county, Rick Healy, told the *National Law Journal* (Jan. 28), "I'm impressed with my citizens here. We are a Republican state, buckle of the Bible belt, a bunch of Southern Baptist Bible thumpers and a gay guy got a fair shot. That says something, I guess." Northcutt is represented by Jerry Duncan and Robert Magrini, both of Oklahoma City. *Northcutt v. City-County Board of Health*, No. CJ–98–4016–66 (Okla. Co. Dist. Ct.).

New York — Entitlements — In a parting slap at the alleged dilatory conduct of the N.Y.C. Giuliani Administration in providing services to people with AIDS, a five-judge panel of the N.Y. Appellate Division, First Department, upheld a contempt order in *Hanna v. Turner*, 2001 WL 1658160 (Dec. 27), finding that the city had failed to comply with a prior court order requiring that homeless people with AIDS be afforded suitable housing with same-day placement.

Virginia — Parental Rights — In *Jones v. Petersburg Dept. of Social Services*, 2002 WL 15807 (Va. Ct. App., Jan. 8), the court affirmed a decision by the circuit court terminating parental rights of Lord I. Jones, who is described as HIV+. In a companion case, *Wilson v. Petersburg Dept. of Social Services*, 2002 WL 15808 (Va. Ct. App., Jan. 8), parental rights were also terminated for Chaz A. Jones, also described as HIV+. The Jones's also have drug dependency problems. The court concluded it would not be in the best interest of their children to be placed with either or both together.

California — AIDS Ride Controversy — The *Los Angeles Times* reported on Jan. 15 that Los Angeles County Superior Court Judge David P. Yaffe had denied enforcement to a non-compete clause in contracts between Pallotta Teamworks and various charities that have been the intended or advertised recipients of moneys raised in AIDS Rides organized by Pallotta. A dispute arose when several of those charities, dissatisfied with various aspects of the Pallotta operation, joined with others to promote their own AIDS Ride fundraiser under the name AIDS/LifeCycle. As a result of Yaffe's ruling, there may be two AIDS rides between L.A. and San Francisco this year, benefitting different lists of AIDS and gay community charities.

Tennessee — Workers Compensation — In *Thompson v. Vivra Renal Care, Inc.*, 2001 WL 1704243 (Dec. 11, 2001), the Special Workers'

Compensation Appeals Panel of the Supreme Court of Tennessee sustained an administrative determination that Regina Ann Thompson, a licensed practical nurse, had sustained a permanent 15% disability as a result of suffering a needle-stick injury while attending to an HIV+/ HBV+ patient and subsequently been misinformed that she had, as a result, become HIV+. There was medical evidence that this sequence of events caused her to become severely depressed and squeamish at the sight of blood and in the use of needles, a severe problem for somebody whose occupation is licensed practical nurse. On appeal, the employer argued that "the mental injuries are compensable only if they can be traced to an identifiable, stressful, work-related event producing a sudden mental stimulus such as fright, shock or excessive unexpected anxiety." Sounds like this case.... Anyway, the appeals panel disagreed with the employer's contention that the medical evidence did not establish a permanent disability, and sustained the award of benefits.

California - Dementia Defense — A Person With AIDS convicted of drunk driving and sentenced to two years in prison by Los Angeles County Superior Court Judge Wade D. Olson did not find much sympathy from a panel of the California Court of Appeal, 2nd District, Division 4, in its Dec. 26 ruling on his appeal. *People v. Barajas*, 2001 WL 1649409 (not officially published). Barajas pled guilty to the drunk driving charges, and his attorney submitted a sentencing memorandum stating that Barajas has AIDS, Kaposi's sarcoma, and HIV-associated dementia, and his defiance of traffic regulations shows he "used bad judgment" but had placed no other drivers at risk. Barajas argued that the trial court unduly emphasize the fact that he had fled fro police, and that his conduct may have been beyond his control due to the effects of his AIDS condition. The appeals court wasn't buying these arguments, however, finding that the sentence of two years, to a facility where Barajas could receive proper treatment, seemed appropriate under the circumstances, which include some wildly erratic driving.

New York — Negligence — New York Supreme Court, Monroe County, erred in setting aside a defendant's jury verdict in *Blackmon v. Strong Memorial Hospital*, 2001 WL 1647037 (N.Y.App. Div., 4th Dept., Dec. 21, 2001). Blackmon, the estate administrator of the late Shelley Wheeler, alleged that the hospital was negligent in not advising Wheeler of risks of HIV in 1992, prior to performing blood transfusions preparatory for a marrow transplant procedure. The hospital claimed that such advice would have been given under its normal policies at that time, even though the standard of care was not to give such warnings because the risk of infection was too remote. The court concluded that a jury could find for the defendant based on the trial record. A.S.L.

AIDS Law & Society Notes

The *Washington Post* reported on Jan. 23 that the Bush Administration will name former U.S. Rep. Dr. Tom Coburn, a Republican from Oklahoma, and former Secretary of Health and Human Services Dr. Louis Sullivan, to be co-chairs of the White House's AIDS Advisory Council. Coburn, a physician, was at first seen as an adversary by AIDS activists and lobbying groups, due to his extremely conservative political orientation. Although he continued to take many conservative positions on AIDS issues in Congress, he ended up working with AIDS lobbying groups on important legislation, including the annual re-authorizations of the Ryan White Care Act. Sullivan served during the presidential administration of President George H. W. Bush, and was the target of protest activities by AIDS activists when he spoke at major AIDS conferences. Both men are very knowledgeable about AIDS issues but bring a distinctly conservative slant to the topic. Coburn, in particular, is known as a fervent advocate of abstinence education as the main vehicle for preventing AIDS among school-age youth.

The *Wall Street Journal* reported on Feb. 1 that GlaxoSmithKline PLC, a British pharmaceutical company with operations in the U.S., has announced that it will soon begin human trials in the U.S. of a vaccine to prevent HIV infection. The same article indicated that Merck & Co, a U.S. pharmaceutical firm, also expects to launch human trials of an HIV vaccine this year. Glaxo reported that its experimental vaccine has proven successful in preclinical trials using rhesus monkeys.

Providing additional evidence about the failure of AIDS education efforts to sustain long-term behavioral change, public health officials in St. Louis, Missouri, announced that after several years of decline, during 2001 the number of new AIDS cases among white males in the city and county had increased by 70 percent. The Health Department's AIDS Surveillance Coordinator, Sheila Grigsby, stated that this reflected national trends, which have seen an increase in new diagnoses among gay white men nationwide. At the same time, new cases among black men also continue to rise, by 17% in St. Louis last year. This trend of new AIDS diagnoses is partly due to the failure of new AIDS treatments to remain effective over the long term, as the virus develops resistance over time, thus leading to the development of symptoms that qualify for a reclassification of an individual from HIV-infected to full-blown AIDS. *St. Louis Post-Dispatch*, Jan. 25. A.S.L.

AIDS International Notes

India — A panel of judges from the Supreme Court of India has found that the question whether HIV causes AIDS is not capable of being determined judicially. The issue arose upon an application by a group seeking to block the administration of HIV-related drugs in government facilities, on the ground that such medications were highly toxic and that HIV had not been proven to be the cause of AIDS. Justices R. C. Lahoti and Brijesh Kumar said it was up to the government to take account of the petitioners' arguments in making its decisions on AIDS-related policies. *Times of India*, Jan. 26.

South Africa — Rejecting the policies of President Thabo Mbeki, provincial leaders in some parts of South Africa are taking steps to make HIV medications available to pregnant women in their provinces to avoid transmission at birth. The first such to be announced was KwaZulu-Natal Province, where the nationalist Inkatha Freedom Party holds political sway. Government studies show that as many as one-third of the adults in the province are HIV+. *Los Angeles Times*, Jan. 22. But the Health Minister of the province, Zweli Mkhize, indicated that the program could not be implemented as quickly as governor Lionel Mtshali had requested, due to the lack of systems for distribution and administration of the drugs. *Charlotte Observer*, Jan. 24. The *Wall Street Journal* reported on Jan. 30 that the international organization Doctors Without Borders has defied the South African government by importing Brazilian-made generic AIDS medications for use in a clinic in Khayelitsha township, near Capetown. ••• On Jan. 12, *The Guardian* reported that the Health Minister of Northern Cape Province, Dipuo Peters, had ordered that hospitals in the province not use anti-HIV medications to treat rape victims. The order responded to a report that a public hospital had administered such medications to a 9–month-old child who had reportedly been raped. The Minister's basis for the order was that HIV medications are highly toxic and have not been proven to prevent AIDS.

United Kingdom — Great Britain's Public Health Laboratory Service has estimated that the number of newly diagnosed HIV-infections in England over the past five years showed an increase of almost 50%, and predicted that by 2005 there may be 34,000 people living with HIV infection in that country. For the third consecutive year, new diagnoses among heterosexuals have exceeded those among gay men. The success of new medications is shown by a decline in the number of AIDS-related deaths, from 1718 in 1995 to 416 in 2000, the last year for which relatively complete data are available. *The Guardian*, Feb. 1. Still incomplete data from 2001 showed that 1095 gay or bisexual men were diagnosed HIV+, while 1758

heterosexuals were found to be infected. *The Independent*, Feb. 1. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

PUBLICATIONS ANNOUNCEMENT - SOLICITATION OF MANUSCRIPTS

New Series: Sexual Diversity and the Law. Praeger Publishers has announced a new series of books focusing on legal issues implicating sexual orientation or sexual/gender identity. This series will examine issues impacting lesbian, gay, bisexual, and transgendered individuals, including discussions of the law on marriage, family, employment, immigration, human rights, etc., in both the national and the international context. The series will include works that focus on the law of a particular country as well as works on comparative or international law. The editorial board for the series includes: Kathleen Lahey, Professor of Law and Women's Studies, Faculty of Law, Queens University; David Richards, Edwin D. Webb Professor, New York University Law School; Kees Waaldjik, Senior Lecturer, E.M. Meijers Institute for Legal Studies, Faculty of Law, University of Leiden, Netherlands; Stephen Whittle, Senior Lecturer in Law, Manchester Metropolitan University, U.K.; Robert Wintemute, Reader in Law, Director of the LLB in English and French Law, Kings College School of Law, University of London, U.K. Individuals with a proposal for a book-length manuscript should send it to: Mark Strasser, Series Editor, Trustees Professor of Law, Capital University Law School, 303 East Broad St., Columbus OH, 43215; mstrasser@law.capital.edu.

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Specially Noted:

Lambda Legal Defense & Education Fund, Inc., and the Gay Lesbian Straight Education Network (GLSEN) have collaborated on a publication titled "A Guide to Effective Statewide Laws/Policies Preventing Discrimination Against LGBT Students in K–12 Schools." • • • In its Dec. 2001 issue, *California Lawyer*, the magazine published by the California Daily Journal, devoted its continuing legal education department to a discussion of Sexual Orientation bias in the legal profession, at page 37.

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EDITOR'S NOTE:

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