DOMESTICALLY-PARTNERED DAD WINS CUSTODY APPEAL IN OREGON

The Court of Appeals of Oregon has awarded permanent custody of three minor children to their biological father, who is living with a same-sex domestic partner, reversing the ruling of the Circuit Court, which had granted custody to the children's paternal grandmother. *In re Strome*, 2003 WL 58528 (Jan 8). Based on intricate facts that led even the 5–4 majority to call this a "close case," the court ruled that the children's grandmother failed to overcome the statutory and constitutional presumption favoring legal (i.e., biological or adoptive) parents in custody disputes between parents and non-parents.

Garth Strome and his former wife had three children, aged 5, 3 and 1 at the time of their separation in 1995. While a petition to dissolve the couple's marriage was pending, the children were living with their mother. When Strome learned that his former wife had exposed the children to sexual and other abuse, Strome obtained temporary custody of the children, and moved into his mother's home. Prior to obtaining temporary custody of the children, Strome led a self-destructive life, according to the court's opinion, which related that he was a heavy drinker and drug user, prostituted himself for money and drugs, and talked about suicide. Even after he obtained temporary custody of his children and moved back into his mother's home, his behavior was evidently far from commendable. It was his own mother, with the help of Strome's two sisters, who was primarily responsible financially and emotionally for the children's care. Strome spent most days sleeping, and most nights using his computer. He had difficulty controlling his anger in front of the children, often calling them vile names, and took little interest in their schooling and general well being.

In 1997, things slowly began to turn around for Strome. He met Michael Chism, a truck driver fifteen years his senior with two children of his own. After developing a relationship that included regular visits to each other's home (sometimes with the children), Stome decided to move in with Chism in 1999, bringing his three children with him. At the same time, Strome had an epiphany that led him to stop yelling and swearing at his own children, and that improved his relationship with his children in general. Strome's mother was less than pleased with the move. The month after Strome and his children left, she obtained a temporary custody order. The police took the children back to their grandmother without Strome's knowledge. Strome succeeded in regaining custody several months later, and continued to have custody through the time of the Circuit Court hearing in 2000.

During the 10 months preceding the hearing, Strome's parenting was deemed "exemplary." According to the majority opinion by Justice Edmonds, "the uncontroverted evidence is that the children thrived in their home" with Strome and Chism. Strome became actively involved in all aspects of his children's lives, including education, extra-curricular activities, and home life. The children testified that they enjoyed living with their father and wanted to stay with him. Although Chism is an alcoholic, and even binged on one occasion after Strome and the children moved in, he subsequently sought treatment in a rehabilitation program, and otherwise participated meaningfully in the children's care.

Writing for the slim majority, Edmonds articulated the governing legal standard under Oregon law and the United States Supreme Court's 2000 ruling in *Troxel v. Granville*, 530 U.S. 57. Under *Troxel*, biological parents have a due process constitutional right to make decisions concerning the care custody and control of their children that "supervenes" a best interest of the child analysis in a custody dispute between a legal parent and non-parent. Therefore, in order to prevail in this action, the majority and minority both agreed that Strome's mother had to prove that Strome "cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm" in Strome's care. The majority and minority disagreed about how to apply this legal standard to the facts of the case.

The majority and minority alike seemed to agree that if custody were to be determined based on Strome's parenting and personal conduct from 1993 through 1999, his mother easily would have met her burden of proof, and would have been entitled to custody of the children. All the judges also seemed to agree that if custody were to be based solely on Strome's conduct during the ten months preceding the Circuit Court hearing, he would be entitled to retain custody of his children, since his parenting skills and his overall care of his children improved exponentially, less than perfect as they still may have been. The difficulty presented, and the crux of the difference between the majority and minority opinions, was best explained by Judge Edmonds in a footnote, succinctly stated: "In the final analysis, it appears that we and the dissent disagree about the weight to be given the evidence that father's parenting was exemplary for the ten-month period of time immediately before trial. That in itself may reflect a disagreement about whether it is possible for father to change. We believe that it is possible."

The majority discounted an expert report that compared the parenting skills of Strome and his mother, the relationship of the children with each, and their respective home environments. Although the expert concluded that Strome's mother would be the better and more stable parent for the children, the majority ruled that the comparison was legally inappropriate. According to Edmonds, the report was more akin to a "best interests of the child" assessment that should have been reserved for custody disputes between two parents, rather than an assessment between a parent and a non-parent. The appropriate assessment, and one that was presented by a second expert and adopted by the court, focused on Strome only, and determined that Strome did not pose an undue risk to his children.

In a particularly lengthy dissent, Chief Justice Deits took the position that Strome's past parenting would be the best indication of his future parenting, and that Strome ultimately posed an undue risk of psychological harm to the children that warranted custody being with Strome's mother. "We are obligated to make a determination about father's future performance as a parent and the future risk that the children will face in his custody. That determination must include not only father's most recent performance as a parent but also father's long-term history as a parent."

Perhaps the most striking aspect of both the majority and minority opinions is that neither placed any emphasis whatsoever on the fact that Strome was in a relationship and living with another man. None of the opinions referred to Strome as "gay" or "homosexual" or "bisexual" or made anything of his sexual orientation. Both opinions also stressed that Strome's children were doing well in their new home headed by a same-sex couple.

Strome was represented by Russell Lipetzky. His mother was represented by Helen T. Dziuba, Melissa P. Lande and Bryant Lovlien & Jarvis, P.C.
Ian Chesir-Teran

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu
Contributing Writers: Ian Chesir-Teran, Esq., New York City; Alan J. Jacobs, Esq., New York City; Steven Kolodny, Esq., New York City; Todd V. Lamb, Esq., New York City; Mark Major, Esq., New Jersey; Sharon McGowan, Esq., Cambridge, MA; Tara Scavo, Student, New York Law School '03; Daniel R Schaffer, New York City; Audrey E. Weinberger, New York Law School '05; Robert Wintemute, Esq., King's College, London, England.
Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net
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BELGIUM LEGISLATES SAME-SEX MARRIAGE

Belgium has become the world's second country to open up the institution of marriage to same-sex couples. By a 91–22 vote with nine abstentions on Jan. 30, the nation's House of Representatives approved a measure already passed in the Senate amending the marriage law to this effect. However, unlike the Netherlands, the first country to embrace same-sex marriage, the Belgians are not ready to allow same-sex partners to adopt children, although single gay people may adopt in Belgium. Also, the Belgian law is restricted to Belgian nationals, with the exception that Belgium will also perform same-sex marriages between persons whose own nations allow such marriages. Thus, a Belgian/Dutch couple could marry in either country. Belgium had previously passed laws allowing registration for same-sex partners accompanied by some legal rights, but the new measure introduces complete equality with opposite-sex couples, with the exceptions noted. It is likely that contiguity with the Netherlands had something to do with this outcome, especially given the free interchange of people between the two countries under the banner of the European Union. In reporting on this development, the Associated Press noted that in the Netherlands, where same-sex couples may adopt children, it is estimated that one in every 13 same-sex couples have done so. *Associated Press*, Jan. 30; *GayLive* (Belgium), Jan. 30; *Algemeen Dagblad* (Netherlands), Jan. 30. A.S.L.

LESBIAN/GAY LEGAL NEWS

9/11 Fund Special Master Awards Benefits to Surviving Lesbian Partner

In what may be an unprecedented step under federal law, Special Master Kenneth Feinberg, who is administering the September 11th Victim Compensation Fund established by the federal government, has awarded $557,390 in benefits to Peggy Neff, the surviving domestic partner of Sheila Hein, a civilian Army employee who died during the terrorist attack on the Pentagon on that date. Feinberg's award was made last fall, but first revealed by Lambda Legal Defense, which is representing Neff, late in January.

Feinberg had taken the position that because the Fund was established in order to award benefits that could be the subject of wrongful death suits against the airlines and airport security operations, only claimants who would have been able to bring such suits would be entitled to claim benefits. Neff and Hein had made wills, under which Neff was the executor and principal heir of Hein's estate. In addition, Hein's surviving legal relatives — her mother and sister — did not make any claim for compensation and supported Neff's claim.

In awarding benefits, Feinberg treated Neff is equivalent to a surviving spouse in awarding the portion of the benefits intended to compensate for loss of future earnings. Neff's status as principal heir and executor clearly made her eligible for the portion of the award identified as compensation for the pain and suffering incurred by the deceased. However, Feinberg did not award Neff the portion of benefits that would normally be provided to surviving spouses and children for their emotional loss. In effect, he compromised the claim, but went further than one might have expected, especially in light of the general federal policy against any recognition of same-sex partners (embodied, inter alia, in the federal Defense of Marriage Act).

Several other claims are still pending before Feinberg from surviving same-sex partners, some of whom do not have the level of documentation and estate planning that was present in the case of Neff and Hein. *Gay City News*, Jan. 24. A.S.L.

Federal District Court Allows ADA Claim Against Intrusive Promotion Test to Proceed

A "management test" required for all persons seeking management positions at Rent-a-Center, Inc. inquired about sexual preferences and orientation, religious beliefs and practices, and medical conditions. A federal magistrate ruled that the plaintiffs, a class consisting of current and former employees of Rent-a-Center, Inc., could not include causes of action under the Americans with Disabilities Act, state privacy law, or certain Illinois statutes, in a suit against the employer and the company that devised the test. Allowance of the state claims in federal court hinges on the permissibility of a federal ADA claim. The district court reversed the magistrate's decision and allowed the ADA claim, a limited privacy action, and certain of the causes under state statute. *Karraker v. Rent-a-Center, Inc.*, 2003 WL 57363 (C.D. Ill. Jan. 8, 2003).

The magistrate's report had denied the plaintiffs' motion to add an ADA claim to their complaint. The plaintiffs alleged that the defendants violated the ADA's restrictions on medical examinations and inquiries for job applicants. The plaintiffs, according to the magistrate, must be qualified *individuals with disabilities* in order raise a claim under the ADA. However, the plaintiffs alleged that one need not have a disability to be "qualified" to bring an action challenging a practice forbidden by the Act.

The ADA prohibits discrimination against "a qualified individual with a disability … in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). "The prohibition against discrimination … shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). An employer may only ask applicants about their ability to perform job-related functions. After an offer of employment is extended, the employer may condition the offer on the results of a medical examination, so long as all entering employees are subject to such exams and the results are maintained as confidential and not used for unlawful discriminatory purposes. After employment has commenced, the employer may not inquire whether the employee has a disability unless the query is job-related or a business necessity. 42 U.S.C. § 12112(d)(2) to (4).

The ADA issue in this case is whether an individual must be a "qualified individual with a disability" in order to bring a claim that an employer made improper or unauthorized medical inquires. Although the Seventh Circuit, where Illinois lies, had not ruled on the issue, the Eighth, Ninth and Tenth Circuits had held that the plaintiff need not be disabled in order to claim a violation of these provisions. Unlike other sections of the ADA, which refer to "qualified individuals with a disability," section 12112(d) refers to "job applicants" and "employees," without reference to disability. Protecting only qualified individuals would defeat the usefulness of this section of the law, held the court, citing to *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176 (9th Cir. 1999). Congress intended that the employer curtail all questioning that would identify persons with disabilities. It makes no sense to require an employee to prove that he or she has a disability to prevent the employer from inquiring whether he or she has a disability.

One district court had held that only persons with disabilities could raise claims under this section, in *Varnagis v. City of Chicago*, 1997 WL 361150 (N.D. Ill. June 20, 1997). However, the court in the present case held that the plaintiffs need not be "qualified individuals with disabilities" in order to state a claim. Therefore, the ADA claim is admissible.

Because a federal claim is cognizable, a federal court may exercise its supplemental jurisdiction to hear state law claims. Specific to Illinois, claims under the Clinical Psychologist Licensing Act (administering the exam is an unlicensed practice of psychology) and the Mental Health and Developmental Disabilities Confidentiality Act (revelation of test results violates the act) were allowed to proceed.

Of more general interest is the court's holding on issues involving invasion of privacy. The court reviewed the four genres of invasion of privacy: (1) intrusion upon the seclusion of another, (2) ap-

propriation of the name or likeness of another, (3) publicity given to a private life, and (4) publicity placing a person in a false light. Of those four, the plaintiffs only raised sufficient allegations to make a claim under number 3, publicity given to a private life. The elements of the claim are: (a) publicity is given to the disclosure of private facts; (b) the facts are private and not public facts; and (c) the matter made public would be highly offensive to a reasonable person. *Wynne v. Loyola Univ.*, 741 N.E.2d 669 (Ill. App. 2000). The plaintiffs met these elements.

The court also decided issues of personal jurisdiction, dismissing one individual defendant but leaving the two companies as properly within the jurisdiction of an Illinois state court. *Alan J. Jacobs*

Lesbian Palimony Claim Rejected by California Appeals Court

A unanimous panel has approved a trial court ruling that a lesbian couple did not have an implied contract governing their property, in an unpublished decision, *Robertson v. Reinhart*, 2003 WL 122613 (Cal. Ct. App., 1st Dist., Jan. 8). The unanimous decision upheld the denial of a claim by Lynn Robertson that she was entitled to a share of the assets of Leal Reinhart, who was her domestic partner for six years.

Robertson and Reinhart began dating in 1993. Robertson moved in with Reinhart the next year, and they lived together until 1999. Reinhart, a sporting-goods sales representative who owned her own home in Albany, California and had a portfolio of investments, was older than Robertson, a real estate agent who had never gone to college. Reinhart encouraged her to go to college, and gave $20,000 to Robertson to assist with college expenses.

The women maintained separate bank accounts throughout their relationship, never opening any joint accounts, and both the Albany house and a vacation house that Reinhart bought remained solely in Reinhart's name. Robertson contributed hundreds of hours of work when both houses were being renovated, although the bulk of the work was done by building contractors. Except for the time when she was going to school, Robertson paid rent to Reinhart, and paid for her share of the phone bills and other expenses.

It was Reinhart who ended the relationship. Robertson sued, claiming that as they had lived as domestic partners for six years, the court should find an implied contract by which assets acquired during the relationship should be shared upon its dissolution. But the Alameda County Superior Court was unwilling to find such an implied contract.

The California courts were pioneers in establishing a legal theory of implied contracts between cohabitants. The key decision is *Marvin v. Marvin*, 18 Cal. 3d 660 (1976), which involved movie actor Lee Marvin and his live-in female partner, Michelle Triola. The two had held themselves out as being married, but never formally got married, since Marvin had never divorced his wife, from whom he was separated. However, in the lawsuit stemming from the breakup of their relationship, Triola claimed that they had an understanding that property acquired was to be treated in the same way that California law treats property acquired by a married couple. Most legal precedents at that time held that such an agreement would be unenforceable as a matter of public policy, but the California Supreme Court ruled that there was no reason why unmarried partners who were living together in a sexual relationship could not make a contract about their property, so long as sexual services was not the consideration for the contract. (That would make it an illegal prostitution contract.)

In 1988, a California appeals court in *Whorton v. Dillingham*, 202 Cal. App. Ed 447, applied *Marvin v. Marvin* to a same-sex couple, and found that the reasoning behind *Marvin* applied equally to same-sex couples.

In this case, Lynn Robertson was trying to use *Marvin* to get a property settlement from Leal Reinhart, but the courts were not willing to play along, finding that the women's situation was very distinguishable from *Marvin*. Most particularly, there was no merger of finances when they were living together, and no overt expression of agreement that they were going to treat their property the way a married couple would. From the evidence presented at trial, it appeared that Reinhart had been careful to maintain a separation of finances, and had actually made all her financial decisions pretty much independently of Robertson. Under these circumstances, the court was unwilling to find an implied-in-fact contract between the two women.

Robertson had also made an alternative argument, using *quantum meruit*. Pointing to the hundreds of hours of work she put in on the renovation of Reinhart's property, Robertson argued that she should be paid for the value of her contribution. Her argument was unsuccessful, however, the court finding that there is a presumption that parties living together in an emotionally interdependent relationship do things for each other without any expectation of payment. Quantum meruit applies to situations where somebody confers a benefit on somebody else under circumstances where fairness and justice call out for payment to avoid "unjust enrichment" of the recipient of the benefit. In the absence of an express or implied contract for Robertson to be paid for her work, the court found no evidence that she ever expected to be paid or that it would be unjust to treat her work as a gift she had conferred on her partner.

Finally, the court rejected Robertson's contention that the trial judge was biased against her because she is a lesbian. The court of appeals found this argument difficult to fathom, inasmuch as Reinhart is also a lesbian. The court observed that when Robertson's trial attorney submitted a proposed statement of decision to the trial judge, it stated that "plaintiff's counsel is aware that the Court in this case is not homophobic." "Moreover," wrote Judge Gemello for the appellate panel, "Robertson does not offer evidence that the trial court was biased against her and biased in favor of Reinhart, also a lesbian."

The decision does not in any way cut back on the availability of the *Marvin* precedent for same-sex couples, but makes quite clear that an implied contract cannot be based solely on the fact that a couple has been living together. In order to find an implied contract, the court must find evidence based on their behavior and statements that they actually had some sort of agreement or understanding concerning the way their property was to be treated. In this case, the court found substantial evidence on the trial record to support the conclusion that these women had not such agreement. A.S.L.

Transgendered Teen In Foster Care Facility May Dress as She Desires

In an important ruling suggesting that transgendered persons may be protected from discrimination by the New York State Human Rights Law, even though an amendment to provide express protection failed in the state Senate in December when the Sexual Orientation Non-Discrimination Act was being debated, a state Supreme Court Justice, Louise Gruner Gans, ruled that a "Jean Doe" plaintiff who is a 17–year old biological male is entitled to dress as a girl while living in a New York City foster care facility for boys. *Matter of Jean Doe v. Bell*, NYLJ, 1/16/2003, p. 21, col. 4 (N.Y. Supreme Ct., N.Y. Co.).

Doe has been diagnosed by two competent medical professionals as having Gender Identity Disorder, a condition recognized in DSM-IV, the official manual of mental disorders published by the American Psychiatric Association. Although born male, she identifies and desires to dress as female. She has been in foster care since age 9. When this identity issue asserted itself, she was assigned to a foster care setting for lesbian, gay, bisexual and transgendered youth, in which she could dress as she desired without running afoul of any house rules, but she was discharged from two such foster care settings for misconduct, and was assigned to the all-boys Atlantic Transitional Foster Facility administered by New York City's Administration for Children's Services (ACS). In this facility, the administration required that she dress as a boy, enforcing a prohibition on any resident of the facility wearing dresses or skirts. ACS rejected all attempts by Doe to appeal this policy in her case, contending that because she had misbehaved in those settings where her manner of dress would be tolerated, she could not be heard to complain about the restrictions in the all-boys facility to which she was consigned for the duration of her minority.

Justice Gans found that Gender Identity Disorder easily qualifies as a disability under the broad definition of that concept in the Human Rights Law, Exec. L. Sec. 292(21). Justice Gans rejected Doe's argument that the Atlantic Transitional Center's no-dress rule is a direct violation of the statute, finding that it is neutral on its face and was not shown to have been adopted specifically to discriminate on the basis of gender identity. However, the court found that because Gender Identity Disorder is a disability, the Center had a duty of reasonable accommodation, and that allowing Doe to wear addresses could be such an accommodation.

The defendants' arguments against the duty of reasonable accommodation were three. First, they claimed they had no duty because they did not know that Doe had a disability. Justice Gans found this incredible, noting that the ACS was aware of the diagnoses that had been made. Second, ACS argued that it had already made reasonable accommodations by allowing Doe to wear blouses, make-up and augmented breasts, and that allowing any more pronounced feminine dress by Doe would endanger the safety of the facility, since some of the less mature or mentally stable boys housed there would engage in inappropriate and possibly dangerous behavior if provoked by the sight of another boy wearing a dress. Justice Gans found this argument unpersuasive as well, noting that Doe has been allowed to wear the blouses and make-up without evidence of disruptive or unsafe conditions at the facility.

Finally, Justice Gans rejected the argument that ACS's duty was satisfied when it sent Doe to the gay-friendly facilities where her cross-dressing was tolerated, and that it was Doe's fault if her misbehavior made it impossible for her to live in such facilities. According to Gans, a provide of residential housing has a duty not to discriminate and to accommodate persons with disabilities at all its facilities, not just designated facilities. "That Doe engaged in misconduct that led to her expulsion from the foster care facilities designed for gay, lesbian, bisexual and transgendered youth gives ACS no license to discriminate against her by denying her a reasonable accommodation. A.S.L.

NY Domestic Partners Pursue Transit Authority Benefits

On January 2, the *New York Law Journal* published New York County Supreme Court Justice Robert Lippman's preliminary rulings allowing suit against the New York City Transit Authority (TA) and Transport Workers Union (TWU) by an employee seeking health benefits coverage for his domestic partner. *Reilly v. Transport Workers Union*.

James Reilly and George Brennan were issued a Certificate of Domestic Partnership by the City of New York in 1999. In 2001, Reilly, a TA employee and TWU member, applied to have Brennan covered by his employee health benefits. The TWU - TA - MABSTOA Health Benefit Trust denied the application, on the ground that the Trustees had not authorized the provision of benefits for domestic partners. Reilly and Brennan brought suit against the TWU, the TA, the Trustees appointed by those organizations, and the Administrators of the Trust, alleging that the refusal to authorize such benefits violates the TA's internal Equal Employment Opportunity (EEO) policy, as well as sections of the NYC Administrative Code including the NYC Human Rights Law (NYCHRL) and the city's Domestic Partnership Ordinance.

The complaint seeks a judgement declaring that defendants are in violation of the Code and the NYCHRL, an injunction restraining defendants from further discriminatory acts, an order compelling them to authorize benefits for Brennan, appointment of a monitor to eradicate discriminatory practices by the Trustees, and attorneys fees and costs. Plaintiffs also moved for such relief, which the opinion treats as a motion for summary judgement. The TA, TA Trustees, and Administrators cross-moved for dismissal, contending that the TA is exempt from the provisions of the NYCHRL, that the NYCHRL does not require employers to provide benefits to employees' domestic partners, that the TA Trustees and Administrators cannot be held liable, and that the TA's nondiscrimination policy does not enhance plaintiffs' rights. The TWU and TWU Trustees, represented by separate counsel, contend that they are not appropriate parties to this action.

NYC Administrative Code s3–244(f) extends health benefits to registered domestic partners of City employees. Plaintiffs, noting that the TA is largely funded by, and all of its operations take place within, the City of New York, asked the court to "deem TA employees quasi-city employees entitled to" the same benefits. While "sympathetic to the challenges faced by nontraditional families," the court found that the TA is a public benefit corporation and can be considered neither a city agency nor a city contractor. Nor, at present, does State law require such public authorities to provide benefits to employees' partners.

The court then rejected defendants' contention that the TA is exempt from the NYCHRL. On its face, Public Authorities Law s1266(8) exempts the TA from municipal law. The court, however, cited federal and state decisions establishing that the TA is only exempt from local laws which interfere with the accomplishment of its purpose, and that compliance with local human rights laws will not interfere with the TA's purpose. The court also found that Reilly and Brennan's pleadings sufficiently state a disparate impact claim of discrimination prohibited under the NYCHRL. Plaintiffs concede that the TA policy is facially neutral. To establish disparate impact, plaintiffs must demonstrate that gay and lesbian employees are disproportionately burdened by the TA practice of denying health benefits to domestic partners, by "requisite statistical" evidence per the opinion.

Defendants' concern, that the TA's EEO policy as set forth in 1997 and 2002 letters from the TA President, not be held to enhance plaintiffs' rights, appeared misplaced. While it is unclear whether Reilly ever filed an administrative EEO complaint, the court focused on the facts that plaintiffs apparently neither assert breach of contract claims based on the policy, nor do they seek monetary damages or any remedies beyond those grounded in their NYCHRL disparate impact claim.

At the stage of deciding the various cross-motions, the court declined to delve deeply into contentions that the defendants were not "appropriate" parties, or that they could not be held liable for unlawful discrimination in violation of the Administrative Code. The court reasoned that the defendants were necessary parties as contemplated by the CPLR, and, particularly where a declaratory judgement was sought, due process required their presence. *Mark Major*

Civil Litigation Notes

California — In a decision that seems to have drawn more notice in the foreign press than in the United States, movie actor Tom Cruise won a $10 million settlement of his defamation action against Chad Slater, a man who makes gay wrestling and sex movies under the pseudonym of Kyle Bradford. Cruise had originally sued Slater for $100 million in Los Angeles Superior Court after Slater told a French magazine that he had been in a sexual relationship with Cruise. Slater defaulted on the law suit, stating that he would file for bankruptcy if Cruise continued the suit, according to a report by Agence France-Press that appeared in Canada in the *National Post* on January 16. Cruise announced that any money he receives from Slater in fulfilment of the judgment will be donated to charity. Cruise had previously sued Michael Davis, who had claimed that he had a videotape depicting Cruise engaged in homosexual sex, but the suit was dropped when Davis recanted his story and admitted he did not have such a tape.

California — Most same-sex harassment cases brought under Title VII involve allegations that male supervisors or co-workers are harassing male employees. *Smith v. County of Humboldt*, 2003 WL 147769 (N.D. Cal. Jan. 15, 2003), provides the unusual circumstances of a same-sex harassment case involving women. Mary Smith claimed that a co-worker, Denise Grimes, had created such a hostile environment for her through unwanted sexual harassment during their probationary training period that Smith had been forced to quit. The court determined that Smith's allegations fell short of the rather high standard the courts have erected in determining whether particular co-employee conduct has created such a hostile environment that Title VII's ban on sex

discrimination has been violated. District Judge Illston explained that Smith had failed to present evidence tending to show that the conduct she found objectionable was motivated by her sex; she asserted her belief that Grimes was a lesbian, but there was no other evidence presented other than Smith's deposition testimony that Grimes "wore her hair in a way that could have been considered a lesbian-type hairstyle and exhibited actions that I took to be of a homosexual nature." Wrote Illston: "these bald assertions, which are supported by nothing more than Ms. Smith's speculation about lesbian fashion, are insufficient to establish that Ms. Grimes was a lesbian or that her actions toward Ms. Smith were motivated by sexual desire." Indeed, Grimes filed a declaration under oath stating that she "is not homosexual and was not attracted to Ms. Smith." Illston also found that Smith's allegations did not show severe or pervasive conduct sufficient to create an actionable claim, and that the employer's reaction to Smith's complaints — changing the location of the two women's assigned work stations to alleviate the alleged problem — was sufficient under the circumstances to shield the county from liability.

Kentucky & Texas — On Jan. 22, the ACLU Lesbian and Gay Rights Project filed lawsuits in federal courts in Kentucky and Texas challenging the actions of public school officials blocking students from forming gay/straight alliances at their schools. The lawsuits invoke the Equal Access Act, a federal statute that forbids schools that receive federal financial assistance from discriminatory content-based treatment of student clubs, and the First Amendment right of free speech and association. (Litigation at the college and university level has firmly established that refusal of public universities to allow gay student groups to meet on campus violates the First Amendment.) In Kentucky, the Boyd County Board of Education actually voted to suspend all students clubs in an effort to bar a group of students from establishing a gay/straight alliance at the high school. In Klein, an affluent suburb of Houston, Texas, students have twice submitted applications to form a gay/straight alliance at Klein High School, and authorities have refused to respond to the applications.

Massachusetts — In a last-ditch effort to get their anti-marriage state constitutional amendment before the voters, proponents sued Thomas Birmingham, President of the Commonwealth Senate, who had successfully maneuvered last summer to keep the measure off the ballot, even though it had enough signatures to require the legislature to consider it, by calling the meeting for that purpose and then adjourning it before a vote could be taken. If the legislature did not reconvene to consider the measure before the end of December, it was dead, and the plaintiffs in *Pawlick v. Birmingham*, 780 N.E. 2d 466, 438 Mass. 1010 (Dec. 30, 2002), were determined to keep their effort alive. But a single justice of the court rejected their suit, and on December 30 the Supreme Judicial Court unanimously confirmed the action of the single justice, finding that Birmingham could not be sued to compel him to reconvene the legislature. Under Massachusetts law, in order to get the measure on the general ballot, the proponents would need a positive vote from at least 20 percent of the state legislators, and they seemed likely to get that many votes if it were to come to a vote. *Associated Press*, Dec. 30.

Michigan — In the continuing saga of Linda Mack's suit against the city of Detroit for employment discrimination on the basis of sex and sexual orientation, the Michigan Court of Appeals ruled, on remand from the state's Supreme Court, that the city of Detroit did not have legislative authority to create a charter provision on discrimination providing a cause of action against the city by its employees. *Mack v. City of Detroit*, 2002 WL 31874853 (Dec. 20, 2002). The main holding of the Supreme Court in the prior case was similarly that the city's charter provision forbidding sexual orientation discrimination could not afford a cause of action against the city by its employees, on grounds of state law preemption and sovereign immunity.

Minnesota — In *SOB, Inc. v. County of Benton*, 2003 WL 162825 (Jan. 24, 2003), the U.S. Court of Appeals for the 8th Circuit upheld a decision by the U.S. District Court in Minnesota rejecting a 1st Amendment challenge to a county ordinance that was apparently enacted in response to the opening of an alcohol-free cabaret club that presented nude dancers. The ordinance generally prohibited "public indecency," which was defined to include any situation where a person "knowingly or intentionally in a public setting or place appears in a state of nudity." Upon this enactment, the dancers at plaintiff's establishment had to cover their breasts and genitals with pasties and g-strings, and the owner brought suit to get the ordinance declared unconstitutional. As the 8th Circuit found in attempting to write a decision, the state of the law in this area is not exactly clear and well-organized, but the court ultimately concluded that under existing Supreme Court precedent the ordinance was lawful, inasmuch as the local law enforcement officials disavowed any attempt to arrest people for legitimate theater performances that might include incidental nudity. Perhaps the case was simplified because the evidence showed that this rural county did not have any establishments presenting serious live theater productions! The trial judge had agreed to issue an injunction against anybody being arrested for violation of the ordinance, but this was quashed by the Appeals Court upon its finding that the ordinance was constitutional.

Missouri — In a case arising from Missouri, the U.S. Court of Appeals for the 8th Circuit ruled that a transsexual's failure to request leave under the Family and Medical Leave Act waived her subsequent right to sue under that statute. *Sanders v. May Department Stores Company*, 2003 WL 61112 (Jan. 9, 2003). According to the facts recited in Circuit Judge Smith's opinion, Sanders, born male, began working for Mays as a financial analyst in 1984. In March 1998, Sanders notified May that she suffered from gender dysphoria and was planning to have gender reassignment surgery in a few months. She planned to quit her job, since she was expecting to relocate to another state after the surgery. There were communications between Sanders and May about the manner of her leaving, during which May suggested to Sanders that she might qualify for leave under the Family and Medical Leave Act, but she declined to apply for such leave because she did not want to provide the required documentation to establish that her condition fell within the range of eligible conditions for such coverage. However, subsequent to her surgery, her plans changed and she sought her old job back. Mays had filled the position by then, but later offered her another job, which she accepted. However, she did not work out to May's satisfaction in that job and was fired. she sued in federal court claiming a violation of the FMLA, under which an employee who takes medical leave is entitled to reinstatement. The district court and the 8th Circuit panel accepted May's argument that since this was not an FMLA leave, as Sanders had declined to apply for such, the FMLA reinstatement requirements did not apply to her case.

New York — William Downey, a retired businessman who is a former student at the Seminary of the Immaculate Conception in Huntington, N.Y., has filed a lawsuit against the Roman Catholic Diocese of Rockville Centre, Long Island, N.Y., who claims that he was wrongfully expelled from the Seminary after he threatened to publicize his complaints that the seminary was a hotbed of pro-gay teachings, contrary to the tenets of the Roman Catholic faith. He charges that professors distributed "lewd and pro-homosexual materials," including a pamphlet advertising books that affirmed gay and lesbian Christians. " For our seminary to teach notions that run contrary to authentic Catholic theology, in fact to teach a condemned heresy that permits one who molests children to sleep at night, has created the conditions under which the sex scandal is a natural byproduct," charged Downey at a press conference in his lawyer's office after the filing of the suit in New York Supreme Court in Mineola. Downey is seeking $2 million in damages on claims of fraud and breach of contract. *Newsday*, Jan. 21.

Pennsylvania - Pittsburgh — An ongoing lawsuit concerning domestic partnership benefits at the University of Pittsburgh has again turned nasty, according to a Jan. 24 report in the school's student newspaper, *Pitt News*, which states that the school administration has now asked the court to rule that the city's equal rights ordinance invalid, as a violation of the Pennsylvania Home Rule Act and Human Relations Act. At a previous stage, the parties had agreed to take the litigation off the active docket while the University appointed a committee to study the issue of domestic

partner benefits and make a report to the administration. The committee issued its report, which concluded that "to move unilaterally to offer domestic partner health insurance benefits now would not be prudent." Issuance of the report drew sharp criticism from the plaintiffs, one lawyer calling the committee process "a complete and utter failure." Expecting the litigation to heat up again, the University apparently moved preemptively to file a motion for a permanent injunction, claiming that the city of Pittsburgh lacks legislative authority to enact a ban on sexual orientation discrimination.

Texas — Let it never be said that Texas (or any other U.S. jurisdiction, for that matter) has adopted user-friendly procedures for prisoners who have legal complaints about their treatment behind bars. In *Crain v. Prasifka*, 2003 WL 194709 (Tex. App. - Corpus Christi, Jan. 30), a gay prisoner in the McConnell Unit in Bee County who began serving his sentence there on September 25, 2000, repeatedly requested that he be placed in a protective custody status out of fear that he would be assaulted in the general prisoner population. His request was denied and, he alleges, he was housed together with an inmate who had a history of sexual misconduct and assault. Predictably, Crain was repeatedly sexually assaulted by his cellmate over a period of several days, during which Crain sent a letter to the warden about the assaults, in which he alleged that prison officials were guilty of deliberate indifference to his wellbeing. Finally, Crain was taken to the infirmary and moved to another cell. He filed a formal step 1 grievance. He received a written response about a month later, indicating that due to the nature of his grievance, a copy of his grievance was being sent to "the Administrator of Offender Grievance Program at Internal Affairs Division." On the back of the form, in fine print, was a statement that if he was dissatisfied with the step 1 response, he could submit a step 2 grievance. Crain, assuming that forwarding of his grievance was all he had to do, never formally filed a step 2 grievance. Big mistake! When Crain ultimately attempted to sue the prison officials, his complaint was dismissed with prejudice by the Bee County District Court, on the ground that he had failed to file a step 2 grievance. On appeal, the court of appeals affirmed, except for the "with prejudice," noting that a dismissal for failure to exhaust internal prison remedies is not a decision on the merits of the complaint. A.S.L.

Criminal Litigation Notes

California — Riverside County Superior Court Judge Patrick Magers stirred up criticism from gay rights activists when he dismissed a hate-crime allegation against David Leal Martinez and Dorian Lee Gutierrez, charged in the murder of Jeffery Owens. Prosecutors had argued that Owens was targeted by members of a Hispanic gang because he was gay, but Judge Magers found based on the evidence up to this point in the case that the fight in which Owens died had nothing to do with his sexual orientation. He said on Jan. 21 that the assault was "more of a mutual combat situation" and that evidence of an anti-gay motivation was lacking from the prosecution's initial case. *Riverside Press-Enterprise*, Jan. 23.

Georgia — Following the precedent of its 1998 decision holding the state sodomy law to be an unconstitutional violation of privacy rights, the Georgia Supreme Court ruled on Jan. 13 that the state's fornication law was similarly unconstitutional. The unanimous decision in *In re J.M.*, 2003 WL 79330, reversed the delinquency adjudication of 16–year-old J.M., who was found to have unlawfully had consensual sex with his 16–year-old girlfriend in her bedroom. The juvenile court adjudicated him a delinquent based on his violation of the fornication law, OCGA sec. 16–6–18. Age 16 is the age of consent for lawful sex in Georgia, but the right to engage in heterosexual intercourse was limited to married couples due to the fornication law. (Ironically, homosexuals could legally have sex in Georgia because of the 1998 decision, but their unmarried heterosexual counterparts could not. Even more ironic is that the 1998 decision involved a heterosexual couple appealing a sodomy law conviction.) Chief Justice Fletcher's opinion for the court rejected the state's patently ridiculous argument that the privacy of the home did not apply to fornication because only one of the fornicators was in his or her home. The court then rejected all the justifications the state advanced for this invasion of privacy, finding none of them applicable.

Kansas — The *Kansas City Star* reported on Jan. 23 that the Kansas Court of Appeals had rejected an appeal of a sodomy conviction in an unpublished decision filed on December 6 in *State of Kansas v. Rowe*, which is listed in a table of cases published at 59 P.3d 1061. Robert T. Rowe was arrested together with his sexual partner, another man, in the Shawnee Mission Park restroom, and charged with criminal sodomy. Kansas is one of the handful of states which still maintains a sodomy law applicable only to same-sex conduct. Rowe and his partner were engaged in oral sex when apprehended by a police officer. A Johnson County District Judge sentenced him to 120 days in jail and he appealed. The court of appeals rejected his argument that the statute unconstitutionally discriminates on the basis of sexual orientation, finding that only rationality review would apply to such a claim and that the state had a rational basis, founded in public health, in attempting to deter oral sodomy between same-sex partners. A concurring judge opined that the case might have presented more of a challenge had Rowe premised his argument on sex discrimination rather than sexual orientation discrimination, according to the newspaper account.

Michigan — The Michigan Court of Appeals has affirmed prison sentences for Darryl L. McFall and Terrance K. Christian, who were tried together on charges of assaulting, robbing and carjacking a gay man. *People v. Christian*, 2003 WL 178293 (Mich. App., Jan. 24, 2003); *People v. McFall*, 2003 WL 178807 (Mich. App., Jan. 24, 2003) (both unpublished). It appears that Christian was the main actor, having been convicted of assault with intent to do great bodily harm less than murder, unarmed robbery, and carjacking, while McFall was convicted of unarmed robbery, the evidence being that he was mainly aiding and abetting Christian. One of the grounds on which both men sought to appeal their convictions was that the prosecutor, having elicited testimony from the victim about his sexual orientation, then apparently sought to depict the incident as a hate crime when, in fact, there was no evidence during the trial that either of the defendants knew that the victim was gay. In both appeals, the court agreed with the defendants that there was no evidence concerning their knowledge of the victim's sexual orientation, but observed: "However, viewed in context of the complete closing argument, the prosecutor's remark did not affect defendant's substantive rights. The prosecutor's comment occurred during a lengthy discussion of the evidence, was isolated, and was not so inflammatory that defendant was prejudiced. Moreover, the trial court instructed the jury that the lawyers' comments were not evidence and that the jury should not be influenced by sympathy or prejudice. The instructions were sufficient to cure any prejudice."

Texas — The U.S. Supreme Court announced that oral argument on the Texas sodomy law challenge, Lawrence v. Texas, will be held March 26. Our prior report on the grant of certiorari, echoing press releases from gay rights groups, brought some comments from readers pointing out that the national situation concerning the continuing existence of sodomy laws was rather more complicated than we had presented. Although trial level courts have pronounced against the constitutionality of sodomy laws in Michigan and Puerto Rico, those laws are still officially in effect. In addition, several states with sodomy laws that do not distinguish based on the gender of the participants nonetheless exempt married heterosexual couples from prosecution, either by statute or court decision. All of this arcane learning might be rendered interesting history, though, depending on how the Supreme Court rules in the Texas case. ••• Lambda Legal Defense, which is litigating the *Lawrence* case, has been holding a series of town meetings around the country to bring forth individual testimony about the impact of sodomy laws on the laws of individuals — even those who are not necessarily prosecuted directly under those laws. A.S.L.

Legislative Notes

California — The Modesto Board of Education voted 4–3 on Jan. 13 to extend to teachers, administrators and support staff the opportunity to pur-

chase medical, dental, vision, cancer or life insurance for domestic partners under the aegis of the California Public Employees' Retirement System. The Modesto board thus joins about 138 governmental agencies in California that have affirmatively accepted the state's invitation to make such benefits available to their employees. *Modesto Bee*, Jan. 14. ••• In Long Beach, collective bargaining between the Long Beach Unified School District and unions representing its employees has resulted in tentative agreements that will include domestic partnership benefits. *Long Beach Press-Telegram*, Jan. 17.

Colorado — A civil union bill was introduced in the Colorado legislature on January 13 by Rep. Tom Plant, who said the measure was drafted to affect approximately 500 legal rights presently enjoyed by married couples under state law. A spokesperson for the conservative anti-gay group Focus on the Family said that the organization, which is based in Colorado Springs, would fight the bill "tooth and nail." It is worth noting that although Colorado repealed its criminal laws on consensual sodomy decades ago, the state does not bar sexual orientation discrimination. *365Gay.com*, Jan. 14, 2003.

Florida - Key West — The Key West, Florida, City Commission voted on Jan. 6 to add "gender identity and expression" to the city's ordinance banning discrimination in employment, public accommodations and housing. When approved by the mayor, the new law would make Key West the first Florida municipality to extend protection against discrimination to transgendered persons. *Miami Herald*, Dec. 30; *Washington Blade*, Jan. 17.

Illinois - Springfield — The City Council in Springfield voted 8–1 on Jan. 7 in favor of an ordinance banning sexual orientation discrimination in housing, employment and credit. *Washington Blade*, Jan. 10.

New Mexico — Law Cruces — On Jan. 6, the Las Cruces, New Mexico, City Council voted to add "sexual orientation" to the city's discrimination complaint policy, which means that any city employee who believes they have suffered discrimination on account of sexual orientation may file a complaint with the city's Equal Employment Office. The ban on discrimination covers city workers, applicants for city positions, and participants and beneficiaries of city services. Reporting on the vote, the *Las Cruces Sun News* (Jan. 9) noted that Dona Ana County and New Mexico State University already had such provisions in their discrimination policies. A local gay activist told the newspaper that the new governor, Bill Richardson, had committed to expanding state non-discrimination policies to cover sexual orientation, and to making same-sex partner benefits available to state employees, but Richardson has not made public announcements along these lines yet.

Virginia — Both racism and homophobia were blamed when the Virginia House and Senate court committees voted to deny a second term in office to Newport News Circuit Judge Verbena M. Askew, an African American woman who had been the subject of sexual harassment charges by a female subordinate. The sexual harassment charge had been settled by a payment to the plaintiff by the City of Hampton, Virginia. Republican leaders denied that Askew was being subjected to critical scrutiny because of her race or sexual orientation, but nonetheless voted to block her reappointment, claiming she had not adequately disclosed the facts about the case during the committee review process. They also cited some complaints by lawyers about Judge Askew's demeanor and work habits. During the hearings, Brenda Collins, Askew's accuser, reportedly held the committee members spellbound with a tale of attempted seduction and alleged retaliation when Collins refused to reciprocate Askew's attentions. Democrats on the committee cried foul, arguing that the case against Askew was not proved and that bias was at work in the vote against her. *Virginian-Pilot and Ledger-Star*, Norfolk, VA, Jan. 23. A.S.L.

Law & Society Notes

Collective bargaining negotiations at the Associated Press appear to have stalled over the issue of domestic partnership benefits. The Newspaper Guild/CWA Local 31222, representing about 1700 US-based AP newsroom workers, has continued to bargain since the prior agreement expired on Nov. 30, 2002, but said that management has firmly rejected its demand for domestic partnership benefits, and has refused to provide any explanation. Ironically, many of the newspapers that subscribe to AP and reprint its news dispatches and features offer DP benefits to their own employees. *Editor and Publisher*, Jan. 21, 2003.

Judy Yudof, the president of the United Synagogues of America, the federation of synagogues belonging to the Conservative Movement of American Judaism, requested that the movement's Law Community once again take up the issue of same-sex unions and ordination of openly gay people. According to an *Associated Press* story that ran in many newspapers on January 4, Yudof is not advocating a particular outcome on those questions (as to which the law committee has ruled negatively in the past, most recently in 1992, with active dissents), but stated that answers are needed on questions that haven't been addressed for several years. "I've just felt there is some concern out there — in the lay world at least — about the status of homosexuals within our movement," she said. "There are some people who feel uncomfortable about putting a restriction upon someone who admits to being a homosexual." The United Synagogue consists of approximately 800 congregations in North America.

The Presbyterian Church (USA) received a petition calling for an unprecedented national denominational meeting to consider discipline against churches that are defying a ban on openly gay ministers, but then several signers of the petition withdrew their signatures in reaction to negative publicity. According to an Associated Press report, the special assembly called for by the petition would have been the first ever held by the 214–year-old denomination. *Akron Beacon Journal*, Jan. 28. A.S.L.

European Human Rights Court Takes Austria To Task Over Unequal Age of Consent

In decisions released in Strasbourg on January 9, a 7 member panel of the European Court of Human Rights chided Austria for having delayed in repealing an unequal age of consent for gay sex, and for having failed to provide redress for individuals who had been convicted under the law in recent years. *L. and V. v. Austria*, *S.L. v. Austria*, http://www.echr. Coe.int/ Eng /Press/ 2003/jan/L&VvAustriaandSLvAustriajudse.htm (press release); http:// www.echr. Coe. int/ hudoc.htm (Access HUDOC, Title = L., Respondent = Austria, Search) (this will bring up both judgments).

The applicants in the first case, referred to in the court opinion as L. and V., were each convicted of having had sex with teenage boys. In both cases, it would have been legal for them to have had sex with girls of the same age, as the age of consent for heterosexual sex in Austria was 14 (while only boys who were 18 or older could consent to have sex with men). The applicant in the second case, a 17–year-old boy referred to as S.L., complained that the unequal age of consent laws had prevented him from establishing relationships with older men to whom he was attracted, and thus improperly interfered with his private life.

Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, member nations of the European Union are committed to respect for private life and human dignity, and are also bound by equality requirements. In recent years, the European Court has made clear that discrimination on account of sexual orientation can be held to violate the equality requirement. In 1995, the Austrian parliament was presented with a proposal to equalize the ages of consent for heterosexual and homosexual sex, but the repeal was voted down amid a moralistic legislative debate devaluing homosexual sex. By last summer, reacting to more recent developments, the Austrian parliament had come its senses and realized it was out of step with the rest of Europe, including most notably Great Britain, where after much struggle an equalization was achieved by the Blair Government, so the ages of consent had been equalized.

But, amazingly, the courts and the government had refused petitions from men convicted under the prior law to repeal their convictions and compensate them for the violation of their rights, so an

appeal to the European Court was instituted. The significance of the appeal, even though the cases might have seemed moot due to the recent Austrian law reform, was to establish as a matter of European-wide law that gay people may not be subjected to unequal rules on sexual expression, a precedent that will be useful in future, especially as more countries from Eastern Europe, some with histories of repressive laws against homosexuality, apply for full membership in the Union.

The European court panel focused on two factors that undermined the government's argument that the differential age of consent was necessary "to protect the sexual development of male adolescents," which was the argument advanced by the Austrian government in this case. One was "recent research according to which sexual orientation is usually established before puberty in both boys and girls," and the other was that "the majority of member States of the Council of Europe have recognised equal ages of consent." The court also noted that Austria only imposes the higher age of consent on adolescent men, not adolescent women, introducing yet another equality issue.

Wrote the European Court: "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour." The court awarded monetary damages to all the applicants, amount to 15,000 Euros to each of the convicted men and 5,000 Euros to the adolescent applicant, as well as various amounts to defray their litigation costs.

In both cases, the attorney for the applicants was Helmut Graupner, a prominent gay rights attorney practicing in Vienna. A.S.L.

Other International Notes

European Union — The Parliament of Europe voted 277–269 (14 abstentions) in support of a report calling upon the 15 member states to give domestic partners (both same-sex and opposite-sex) the same legal rights as married couples. The report does not call for opening up legal marriage to same-sex partners, as an amendment to that effect was defeated. The vote is not binding on member states. *Zenit.org*, Jan. 17.

Australia/New Zealand — The New Zealand High Court has rejected the appeal of a gay male sperm donor from Sydney, Australia, attempting to enforce an agreement he had with a lesbian couple now living in Auckland, under which he would be entitled to maintain a relationship with the child born from his sperm donation. The Family Court had ruled that the man's wish to have access to the child was not contemplated by the Guardianship Act 1968, which provides that a sperm donor has no legal rights to a child conceived through donor insemination. Two of the High Court judges called for some legislative reconsideration of the issue, arguing that the statute had been framed without reference to its possible impact in gay situations. In this case there had been a detailed written agreement between the sperm donor and the lesbian couple, including providing regular visitation for the donor, but the friendship "broke down" and the mothers blocked further visitation. *New Zealand Herald*, Jan. 31, 2003.

Canada — According to a report in the *Washington Blade* on Jan. 17, Justice Allan Stewart of the Vancouver Supreme Court has rejected a ruling by the British Columbia Human Rights Tribunal, which had found that the North Vancouver School District discriminated against student Azmi Jubran when it failed to stop schoolmates who had teased and taunted Jubran with homophobic epithets. Jubran told the tribunal that he is not gay, but was routinely called "faggot," "homo" and "gay." Jubran's classmates testified that they did not regard him as being gay but were just taunting him. Justice Stewart found the tribunal decision was fatally flawed, since Jubran's sexual orientation was not the basis of the harassment against him.

Canada — The *National Post* reported on Jan. 29 that Statistics Canada, the nation's census agency, is taking a national survey to determine the number of Canadian adults who self-identify as gay or lesbian. In preliminary tests, the agency determined that many people would not answer a general census question about their sexual orientation, but would be forthcoming if they were told that the information was needed for a specific purpose. In this case, the agency believes that it needs this information to assist in the enforcement of laws against discrimination on the basis of sexual orientation (which are in place throughout Canada at both the state and federal levels), and in connection with public health policy making. The question will be asked in a national survey as part of the Canadian Community Health Study, which contacts 130,000 Canadians every two years to gather data.

Egypt — The *New York Times* (Jan. 14) reported that the crack-down against gay men in Egypt is continuing, now using the internet. Law enforcement officials posing as gay men are reportedly cruising on-line and then arresting the men who make dates with them.

South Africa - An execution-style slaying of eight men and wounding of two others in a Cape Town gay massage parlor led to a manhunt by police in South Africa, seeking four suspects. A police spokesman said that most of the victims were found shot dead with their hands tied and throats slit. Although prostitution is supposedly common in the neighborhood where this business is located, police identified the premises as a massage parlor, not a brothel (as had been reported in some news accounts. While some speculated that this was a hate crime, others posited that it had to do with gang wars or drugs. *New Zealand Herald*, Jan. 22.

Spain — Jose Maria Mendiluce, the Green Party's candidate for mayor of Madrid, recently came out as gay in an interview with a gay-oriented magazine. Although indicating that he thought this revelation may put an end to his political career, Mendiluce stated, "The gay community can count on me to defend our rights together." If elected, Mendiluce would be the third openly-gay mayor of a major European city, joining Bertrand Delanoe of Paris and Klaus Wowereit of Berlin. *Washington Blade*, Jan. 10.

United Kingdom — The *London Sunday Times* (Jan. 5) reported that Sir Adrian Fulford, an openly gay lawyer, has been appointed to the High Court, and is to be Britain's representative at the International Criminal Court, which will try alleged war criminals for crimes against humanity. A spokesman for the gay rights group OutRage!, praising the appointment — the first of an openly-gay lawyer to such a significant judicial office in Britain — stated: "It would be reasonable to assume that other High Court judges are gay, but they would not want it advertised because they fear it would hinder their chances of promotion." Fulford, who has been a practicing lawyer since 1978, came out in an article in *Gay Times* ten years ago, stating that he did not want to be like other gay barristers who were forced to shun gay colleagues for fear of guilt by association. A.S.L.

Professional Notes

Mary Dunlap, whose impassioned advocacy of gay rights and human rights made her a leader of the lesbian and gay legal movement, died from cancer on Jan. 17. Dunlap was a co-founder of Equal Rights Advocates, the San Francisco group that generated the National Center for Lesbian Rights. She was most likely the first openly-lesbian attorney to argue a case before the United States Supreme Court, representing the Gay Olympics organization in its ultimately unsuccessful attempt to keep its name over the legal challenge of the U.S. Olympic Committee. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). A few years later, as keynote speaker at the annual Lesbian & Gay Law Association of Greater New York dinner at Tavern-on-the-Green, Dunlap conducted a live auction of the formal wear that she wore on the occasion of her Supreme Court argument, to benefit LeGaL's educational and charitable activities. She taught lesbian and gay law courses at several law schools in the San Francisco Bay area. In recent years, having retired from law practice, she had served since 1996 as director of San Francisco's Office of Citizen Complaints, the agency charged as a watchdog over the police department, and was widely credited with taking a moribund, much-criticized office and turning it around, also putting an end to a suc-

cession of short-termed, unsuccessful directors. Her loss at age 54 leaves an extraordinary void in the heart of the movement. She is survived by her partner of 18 years, Maureen Mason, and her sister Helen. *San Francisco Chronicle*, Jan. 22.

Eugene M. Harrington, an openly-gay law professor at Thurgood Marshall School of Law of Texas Southern University in Houston, died from AIDS at age 62 on Dec. 29. Harrington was an activist gay rights leader for many years, having run unsuccessfully as an openly-gay candidate for the Houston City Council and having been founder or co-founder of several gay rights and AIDS organizations in Texas. He was the senior member of the TMSL faculty at the time of his death, and had won teacher-of-the-year awards many times. A native of New York, Harrington was a graduate of St. Johns University Law School and also earned an LL.M. degree from UC-Berkeley.

Suzanne Goldberg, assistant professor and Director of the Women's Rights Litigation Clinic at Rutgers Law School in Newark is the winner of this year's scholarly paper contest sponsored by the Association of American Law Schools. The peer-reviewed competition drew 56 entries and was judged by a specially-constituted committee chaired by Dean Mary Kay Kane of the University of California, Hastings, Law School. Goldberg, who formerly served as a staff attorney at Lambda Legal Defense & Education Fund for nine years, presented her paper at a special symposium at the AALS Annual Meeting in Washington, D.C., on January 4. Her paper, titled "Equality Without Tiers," will be published later this year in the University of Miami Law Review.

The Association of the Bar of the City of New York sent LeGaL member *Jay Weiser* as its spokesperson to urge the New York State Bar Association House of Delegates to approve a resolution supporting same-sex marriage, or at least same-sex civil unions. Although the City Bar Association had approved the recommendations, they proved quite controversial at the State Bar, whose membership is described as "eclectic" and includes some members who have threatened to resign if the Association does anything to encourage the conferral of family rights on gay partners. On January 24 the House voted to postpone further discussion of the issue until its fall meeting in November. *New York Law Journal*, Jan. 27.

One of the early founders of the modern gay rights movement, *Morris Kight*, died in Los Angeles on Jan. 19 at age 83. Until last year, he had served for more than two decades as a member of the Los Angeles County Human Rights Commission. Kight was credited as a key organizer of the first lesbian and gay pride parade in Los Angeles in 1970, marking the first anniversary of the Stonewall Rebellion, and was a co-founder of the Gay and Lesbian Community Service Center of Los Angeles, which established the pattern for major community centers in other cities combining recreational and socializing space with offices for gay community social service agencies. He was also a founder of L.A.'s Stonewall Democratic Club, and also put together an extraordinary gay-themed art collection which he arranged to be donated to the One Institute at the University of Southern California. Kight is survived by his partner of 25 years, Roy Zucheran, two daughters, two grandchildren, and two great-grandchildren. *Los Angeles Times*, Jan. 20.

Openly-lesbian California Superior Court Judge *Diana R. Hall* is facing charges of six criminal violations as a result of an alleged Dec. 21 altercation with her domestic partner followed by a drunken driving arrest. If she is convicted or pleads guilty on any of the felony counts, Hall would lose her judicial position. Her attorney announced that she would fight all by the drunk-driving charges, which are misdemeanors. *Washington Blade*, Jan. 24.

David B. Cruz, a professor at the University of Southern California Law School, is the first Visiting Scholar at the The Williams Project of the University of California at Los Angeles Law School. The Williams Project is an endowed center program at UCLA specifically focused on issues of sexuality and law, which is under the director of Prof. William B. Rubenstein. Cruz is a graduate of NYU Law School, and has been a member of the USC law faculty since 1996. ••• The Williams Project is presenting a Sexual Orientation Law Update on Feb. 7, from 1 to 5:30 pm, at UCLA Law School. At the close of the program, participants will celebrate the opening of the Williams Project Reading Room & Collection in the Darling Law Library Tower with a gala reception. For information, inquire at: WilliamsProject@law.ucla.edu, or call 310–267–4382. A.S.L.

AIDS & RELATED LEGAL NOTES

Forced Drug Holiday Did Not Violate HIV+ Prisoner's Rights

Two short-term interruptions in providing a prison inmate with his HIV medication is insufficient to support the prisoner's claim that prison officials violated the Eighth Amendment's prohibition against cruel and unusual punishment, according to the U.S. Court of Appeals for the 2nd Circuit. . *Smith v. Carpenter*, 2003 WL 115223 (Jan.14, 2003).

Willie Smith was incarcerated at the Camp Pharsalia Correctional Facility in upstate New York. Throughout his incarceration, Smith was provided with medical treatment for HIV including a drug-therapy program consisting of Saquinavir, Combivir and Bactrim.

On two separate occasions, Smith's drug-therapy program was interrupted for short periods of time. First, in October 1998, Smith ran out of medication and the prison failed to refill his prescriptions for seven days. Second, in January 1999, Smith's HIV medications were confiscated during a random search of his living quarters. The medications were replaced five days later when Smith was transferred to a different facility.

Smith had been instructed that he should adhere strictly to his prescribed dosage regime and not take any "drug holidays." He was concerned that the lapses in treatment could result in his HIV infection becoming resistant to his prescribed drugs.

Defendants' medical expert, at Department of Correctional Services doctor, testified at trial that missing HIV medication can be potentially harmful in some situations, possibly leading to viral mutation and drug resistance. However, there was no conclusive evidence that the two short-term interruptions had caused actual harm to Smith.

The jury was asked whether Smith proved by a preponderance of the evidence that he suffered from a serious medical need and, if so, whether the prison's conduct amounted to deliberate indifference to that need. The jury returned a verdict in favor of the defendants, finding that the lapses in treatment were not serious. Smith moved for a new trial, arguing that his HIV+ status alone demonstrated "serious medical need" for 8th Amendment purposes. Judge Norman A. Mordue of the Northern District of New York disagreed, and held that the jury's verdict was reasonable because Smith had failed to prove that the two short term interruptions in his drug-therapy program had placed his health in substantial jeopardy.

On appeal, Smith argued that he was not required to show "actual" harm, but only "potential" harm from the interruption of his drug-therapy.

The Second Circuit noted that not every lapse in medical treatment will rise to the level of a violation of the 8th Amendment. Further, society itself does not expect prisoners to have unqualified access to medical care. In an opinion by Circuit Judge Chester Straub, the court agreed with Smith that HIV is a serious medical condition requiring medical treatment. However, the court noted that, except for the two short-term interruptions, Smith had received consistent and regular medical treatment for his condition. Where regular medical treatment is provided for a prisoner with a serious medical condition, the 2nd Circuit held that the "actual medical consequences that flow form the alleged denial of care will be highly relevant to the question of whether the denial of treatment subjected the prisoner to a significant risk of medical harm.70 Accordingly, the court affirmed Judge Mordue and held that the jury was entitled to weigh the absence of adverse effects in evaluat-

ing the objective sufficiency of Smith's claim. *Todd V. Lamb*

Federal Court Finds No 8th Amendment Violation in Death of HIV+ Prisoner

Maritza Ribera failed to persuade Judge Jay A. Garcia- Gregory of the U.S. District Court in Puerto Rico that conditions contributing to the death of her son, Amaury Seise Pubill, while incarcerated at Bayamon Correctional Complex, violated his 8th Amendment rights. *Rivera v. Alvarado*, 2003 WL 141991 (Jan. 9, 2003). Pubill had been incarcerated since 1992 when he was discovered to be suffering from hepatitis C during the summer of 1996. Several months later, he also tested HIV+, and rapdily developed serious symptoms. Ribera alleged that her son did not receive any follow-up or special treatment following either diagnosis. He reported sick on November 30, 1996, at which time an attending physician diagnosed him as having AIDS and being acutely sick. the next day, he was transferred to a regional hospital, arriving shortly after midnight, at which time medical personnel administered medication and took x-rays, but he died a day later. The court found, with respect to the two co-defendants whose motions to dismiss were before it, that neither had been deliberately indifferent to Pubill's serious medical needs. Once again, emphasis is placed on the high standard the Supreme Court has erected in 8th Amendment claims arising from defective medical care for prisoners; it is not enough to show that medical care was negligent, unless there is evidence that the individual charged defendants knew of the serious condition and reacted to it with deliberate indifference. So long as any sort of treatment is rendered, an 8th Amendment claim is likely to fail under current standards. A.S.L.

Bush Nominee for HIV Advisory Commission Withdraws Under Fire

President George W. Bush has been busy stacking his Presidential Advisory Commission on HIV and AIDS with social conservatives, but one appointment went so far right that adverse political and media comment led to a quick withdrawal. Jerry Thacker, a marketing consultant who had publicly characterized AIDS as a "gay plague" and homosexuality as a "deathstyle" quickly withdrew his name in response to adverse comment. *San Francisco Chronicle*, Jan. 24. ••• Bush surprised AIDS activists by announcing a major new initiative to combat AIDS in Africa and the Caribbean during his state of the union message on Jan. 28, but there was some skepticism about the follow-up, since Bush has announced many fine-sounding initiatives, only to have them sabotaged at the legislative or appropriations stage. Whether this one is substantive or merely public relations is yet to be seen. Bush promised expenditures of $15 billion on international AIDS efforts, $10 billion of which would be "new money," although subsequent news reports indicated that this would come to only $700 million in the first year, far short of what experts claim is needed to make a real dent in the problem in Africa. A few days after the speech, the White House announced that Bush would be including in his proposed budget for the next fiscal year a significant boost in spending for domestic AIDS efforts as well. Again, one reserves judgment until details are forthcoming. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Berkowitz, Philip M., and Devjani Mishra, *Employment Law Issues: The Sexual Orientation Non-Discrimination Act*, New York Law Journal, Jan. 9, 2003.

Karlan, Pamela S., *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473 (2002).

Keiter, Mitchell, *The Mauled Verdict: The* Knoller *Case Shows Why Res Judicata Should Protect Partial Convictions as Well as Acquittals*, 33 McGeorge L. Rev. 493 (2002).

Rich, William J., *Taking "Privileges and Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 Minn. L. Rev. 153 (Nov. 2002).

Specially Noted:

In its Jan. 30 issue, the *American Lawyer* included a special feature article about Chicago-based Jenner & Block, described as an extraordinarily gay-friendly law firm. Among other things, Jenner has a diversity committee that publishes a quarterly newsletter, with one of the quarterly issues each year devoted to the firm's gay-related pro bono work and the activities and interests of its openly lesbian and gay attorneys. Jenner is co-counsel with Lambda Legal Defense in the pending U.S. Supreme Court Texas sodomy case. A former Jenner associate, Pat Logue, heads Lambda's Chicago office.

Student Articles:

Comment, *Government Subsidies of Controversial Art: Dung, the Virgin Mary, and Rudy Giuliani*, 11 Temple Pol. & Civ. Rts. L. Rev. 221 (Fall 2001).

Comment, *The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy Are Still Different Under the First Amendment*, 12 Seton Hall Const. L. J. 471 (Sp/Su 2003).

Van Arsdel, Kristina G., Burdine v. Johnson*: The Fifth Circuit Wakes Up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to the Test*, 39 Houston L. Rev. 835 (2002).

AIDS & RELATED LEGAL ISSUES:

Rollins, Joe, *Aids, Law, and the Rhetoric of Sexuality*, 36 L. & Society 161 (2002).

Student Articles:

Ferreira, Lissett, *Access to Affordable HIV/AIDS Drugs: The Human Rights Obligations of Multinational Pharmaceutical Corporations*, 71 Fordham L. Rev. 1133 (Dec. 2002).

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e mail.