

## MARYLAND ENACTS LAW BANNING SEXUAL ORIENTATION DISCRIMINATION; DELAWARE BILL ADVANCES AS GOVERNORS ISSUE EXECUTIVE ORDERS

The Maryland Senate's 32-14 vote on March 27 was promptly followed by an 88-50 vote in the House of Delegates on March 30, thus sending to Gov. Parris N. Glendening a measure that would ban discrimination on the basis of sexual orientation in public accommodations, housing and employment in the state of Maryland. Glendening signed the bill on April 20, bringing to 12 the number of states that now forbid sexual orientation discrimination by statute. The measure had bipartisan support and opposition; 5 Republican delegates joined with 83 Democrats to vote in favor, while 20 Democrats, mostly from rural areas, joined with 30 Republicans in opposition. House leaders worked hard and successfully to prevent any amendments to Senate Bill 205, to avoid the possibility of setting up a conference committee in which opponents might be able to kill the measure. *Washington Post*, March 31.

The bill amends the state's existing human rights laws to add "sexual orientation" to the list of prohibited grounds of discrimination. "Sexual orientation" is defined as "the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality."

The bill extends immunity under the human rights law or common law to employers who take "reasonable acts to verify the sexual orientation of any employee or applicant ... in response to a charged filed against the employer on the basis of sexual orientation." The bill exempts religious corporations, associations, educational institutions or societies from compliance with the employment provisions. The bill also expressly states that it "may not be construed to authorize or validate a marriage between two individuals of the same sex, may not be construed to require or prohibit an employer to offer health insurance benefits to unmarried domestic partners, does not mandate any public or private educational institution to promote any form of sexuality or sexual orientation or to include such matters in its curriculum; and is intended to ensure specific defined rights and not to endorse or confer legislative approval of any form of sexual behavior." Finally, the bill provides that it "does not apply to the Boy Scouts of America or the Girl Scouts of America with respect to the employment of individuals of a particular sexual orientation to per-

form work connected with the activities of those organizations." These provisions open an interesting window into the minds of the wavering legislators who had to be reassured on their particular concerns in order to get their votes on the bill. (It would make an interesting study to look at these "reservation" and "exemption" provisions in gay rights legislation across time, as they illustrate the hot issues at particular times in particular places.)

As originally filed, the bill would have also banned discrimination on the basis of gender identity. Having decided that this was one of the reasons why the bill failed to be enacted in the last session, the governor determined to eliminate the gender identity protection from the most recent version of the bill. The measure takes effect on October 1, 2001, and will make Maryland twelfth on the list of states banning sexual orientation discrimination, unless pending bills in other states become effective earlier!

Meanwhile, a similar proposal in neighboring Delaware was advancing, as the House voted on March 27 to approve a bill, House Bill 9, that systematically amends the Delaware code to add "sexual orientation" to every existing list of prohibited bases for discrimination. The types of discrimination covered under the bill include housing, employment, public works contracting, public accommodations, and insurance. The bill contains a substantial exemption from its employment provision for "religious corporations, associations or societies supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business income subject to taxation under Section 511(a) of the Internal Revenue Code of 1986." The bill also provides that it may not be construed to require extension of benefits to domestic partners, and defines "sexual orientation" as meaning "heterosexual, bisexual, or homosexual orientation, whether real or perceived."

The bill advanced in the wake of two pro-gay executive orders from Delaware governors. On December 14, outgoing Governor Thomas R. Carper signed an executive order forbidding state agencies from discriminating on the basis of race,

color, religious creed, ancestry, union membership, age, gender, marital status, sexual orientation, national origin, handicap or disability, and ordering the state's personnel office to promulgate guidelines prohibiting such discrimination. Not to be outdone, incoming Governor Ruth Ann Minner issued a new executive order on January 30, 2001, No. 10 of her administration, reaffirming the prior order and adding Vietnam Era veteran status to the list of categories of prohibited discrimination. Minner's order goes far beyond Carper's in a detailed mandate for the Governor's Equal Employment Opportunity Council, and deals extensively with state affirmative action issues. A.S.L.

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### LESBIAN/GAY LEGAL NEWS

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#### Nebraska Supreme Court Finds Sheriff's Actions "Outrageous" in Brandon Teena Case

The Nebraska Supreme Court unanimously ruled April 20 that former Richardson County Sheriff Charles B. Laux had acted outrageously in his dealings with Brandon Teena, sufficient to ground a claim for intentional infliction of emotional distress brought by Brandon's mother on behalf of the estate. *Brandon v. County of Richardson*, 261 Neb. 636. In an opinion by Chief Justice Hendry, the court sustained the trial court's ruling that the County was negligent in its dealings with Brandon by failing to provide protection after Brandon reported being beaten and raped by the two men who eventually killed him, but found that the trial court had improperly reduced the negligence damage award by allocating 85% of the blame for Brandon's murder on her murderers. The court reversed the trial court's finding that Brandon was contributorily negligent for his death, as well as the trial court's ruling that Laux's conduct was not sufficiently outrageous for the emotional distress claim. The court also reversed the trial court's award of nominal damages to Brandon's mother, the plaintiff, finding that the trial court erred in its failure to attribute any monetary value to JoAnn Brandon's loss of her daughter.

Born Teena Brandon, during adolescence Brandon experienced a "sexual identity crisis" (to quote Brandon's own description from the tape of his interview with Laux following the rapes) that led Brandon to reverse his names and assume a male identity and demeanor. Brandon's story is depicted with chilling realism in the feature film "Boys Don't Cry," in which Hilary Swank portrayed Brandon in a performance that won the best actress Academy Award in March 2000.

Brandon left Lincoln County in December 1993 to live in Richardson County as a man and

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began dating Lana Tisdell, who lived in Falls City. Brandon also became acquainted with John Lotter and Thomas Nissen. All of these new acquaintances apparently believed Brandon to be male, but when Lotter and Nissen began to suspect the truth, they started harassing Brandon, including an episode after a Christmas Party in which they pulled down Brandon's pants to check for genitalia. Discovering that Brandon was anatomically female, Lotter and Nissen drove Brandon to a remote location and beat and raped him, threatening to kill him if he told anybody about what they had done.

Brandon escaped and showed up at a friend's house, where an ambulance was called, and he was taken to the hospital, where the rape was confirmed and reported. Brandon reported the matter to the Falls City Police Department, and later that day Sheriff Laux and another officer conducted a lengthy interrogation of Brandon, which was captured on audio tape. As described in the court's opinion, it appears that Laux was profane and abusive in questioning Brandon, expressing great skepticism about Brandon's story and asking many irrelevant questions about Brandon's sexuality. Although Brandon had informed the police department about the threat to his life, the department did nothing to protect him, even though Brandon had identified his assailants who were still at large. Brandon then attempted to hide out at another friend's house, but Lotter and Nissen, discovering they were under investigation by the police, tracked Brandon down and murdered him and two friends who were with him on December 31. Lotter and Nissen were subsequently convicted of the murders.

JoAnn Brandon filed suit, represented by Lambda Legal Defense & Education Fund, alleging that the Police Department was negligent in its handling of the case, and that Laux was guilty of intentional infliction of emotional distress on Brandon. In addition to these claims asserted on behalf of Brandon's estate, JoAnn Brandon sued personally for the wrongful death of her daughter.

Trial Judge Orville L. Coady initially sought to get rid of the negligence case by ruling that the police had no duty to protect Brandon, but the Nebraska Supreme Court held that a negligence claim could be brought, finding that once Brandon had reported the crime and the threat on his life, the police department was in a special relationship with him that generated a duty of care for his safety. See *Brandon v. County of Richardson*, 566 N.W.2d 776 (Neb. 1997). On remand, the trial court found that the county was negligent, and that the injury to Brandon was worth about \$80,000, but that this should be reduced by 85% due to the fault of the murderers and one percent due to contributory negligence by Brandon. After hearing testimony and reviewing the audio tape of the interrogation, the trial court decided that bad as Laux's conduct was, it was insufficiently outrageous to merit a claim of intentional infliction of emotional distress, and further that the evidence

didn't show that Brandon had suffered severe emotional distress from Laux's mistreatment. Finally, the court awarded nominal damages to JoAnn Brandon, finding that she and Brandon had been "estranged" and Brandon was not providing any particular financial support to her; thus she had not sustained any real compensable injury by his loss.

Just about the only part of the trial court's opinion of which Chief Justice Hendry approved was the determination that the police department was negligent and that the sum of \$80,000 as measure of damages for negligence was sustainable based on the trial record. Hendry was otherwise intensely critical of the trial court's reasoning, finding, for example, that Nebraska law consistently refuses to reduce negligence damage awards based on the intentional acts of other wrongdoers. Furthermore, Hendry found no support in the record for the trial court's conclusion that Brandon bore some responsibility for his own murder due to lack of cooperation with the police. Hendry's review of the tape shows that Brandon was fully cooperative, answered even the most outrageous questions, and had acted appropriately in the circumstances.

Perhaps most significantly, however, Hendry found on behalf of the unanimous court that the gross incivility, vulgarity and skepticism with which Sheriff Laux treated Brandon while interrogating him shortly after he had been raped was so outrageous that it clearly supported the necessary finding to ground a tort claim of intentional infliction of emotional distress. Furthermore, since the trial court had missed the boat on this aspect of the claim, its conclusion on the other key aspect of the claim, that the conduct had not caused severe emotional distress, was also tainted. Hendry emphasized that the very outrageousness of the conduct would most probably give rise to a conclusion that Brandon suffered emotional distress as a result, especially given the context of the questioning and Brandon's fear for his life at that time. However, a finding of severe emotional distress requires a factual determination, so the matter had to be sent back to the trial court for further findings. (Hendry's opinion sends a pretty strong message, however, that if the trial court determines that the emotional distress was insufficiently severe to merit compensation, it will likely be reversed again.)

Finally, turning to JoAnn Brandon's claim, the court was clearly offended by the trial court's award of only nominal damages (essentially nothing) from the mother's loss of her child. That a child is an adult who has left home does not vitiate a parent's claim for damages for the wrongful death of her child, so long as they have a real parent-child relationship. The evidence showed that Brandon and his mother had a loving relationship, even though JoAnn did not understand Brandon's sexual identity situation. There was evidence that they had remained in touch with each other; that Brandon had telephoned his

mother frequently while living in Richardson County, and was planning to return to his mother's house in Lincoln County at the time of the murder. Under these circumstances, the court determined that the failure to award substantial damages to JoAnn was "shocking to the conscience" of the court.

In remanding the matter, the Supreme Court instructed that the trial court may not reduce the \$80,000 in damages for negligence, is to determine whether Brandon suffered emotional distress at Laux's hands and fix appropriate compensation for that, and is to determination an appropriate damage award on JoAnn Brandon's wrongful death claim.

David Buckel, Lambda staff attorney, is lead counsel in the case, assisted by Lambda staff attorney Marvin Peguese, former Lambda staff attorney Doni Gewirtzman, and local counsel Michael J. Hansen, Herbert J. Friedman, and John Stevens Berry. The case attracted amicus briefs on behalf of the Harry Benjamin International Gender Dysphoria Association, the Nebraska Association of Trial Attorneys, the American Civil Liberties Union of Nebraska and the ACLU Lesbian and Gay Rights Project, Parents of Murdered Children, Inc., the National Center for Victims of Crime, the Nebraska Domestic Violence Sexual Assault Coalition, and Gender Public Advocacy Coalition. A.S.L.

### Alaska Supreme Court Evades Lawsuit Challenging Anti-Gay Statute

By a 4-1 vote, the Alaska Supreme Court cited a lack of ripeness as grounds for rejecting a challenge by Jay Brause and Gene Dugan to an Alaska statute that forbids the state government from extending spousal benefit rights to same-sex couples. *Brause v. State of Alaska*, 2001 WL 379261.

Brause and Dugan filed suit in the Superior Court in Anchorage seeking the right to marry. They earned a positive initial decision by Superior Court Judge Peter A. Michalski, *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (not reported in P.2d.), but their case was rendered moot when the legislature placed a constitutional amendment on the ballot, which added Art. I, Sec. 25 to the state constitution, limiting marriage to same-sex couples. Switching to Plan B, Brause and Dugan renewed their cause before Judge Michalski, arguing that the state's failure to make the same benefits available to same-sex couples as are afforded married couples violates the state constitution, and specifically taking aim at Alaska Stat. 25.05.013(b), which provides, "A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."

Judge Michalski dismissed this claim "without prejudice to subsequent filings... where a particular right is at issue and being challenged — or a particular benefit." Michalski determined that because Brause and Dugan were not claiming that

they had personally been denied any particular right (other than the right to marry), they did not have standing to seek a general declaration that the statute was unconstitutional.

In an opinion by Justice Matthews, the Supreme Court agreed with Judge Michalski's conclusion, holding that a determination in the abstract that sec. 25.05.013(b) is unconstitutional would be merely an advisory opinion. Interestingly, the state's attorneys argued in opposition to the appeal that the statutory provision was merely symbolic and had not practical effect, as the state was not providing any benefits to same-sex partners at the present time.

Wrote Matthews, "The ripeness doctrine requires a plaintiff to claim that either a legal injury has been suffered or that one will be suffered in the future." After summarizing various sources on the federal ripeness doctrine (which the dissent points out is irrelevant, because Alaska courts have long held that the state has its own version of ripeness doctrine that is more expansive than the federal version), Matthews wrote: "In the present case Brause and Dugan claim on appeal that AS 25.05.013(b) denies them at least 115 separate rights which are afforded to people who are able to marry. These include, Brause and Dugan argue, 'the denial of health coverage, forms of insurance, equal participation in pension and retirement plans, as well as testamentary and property rights.' There is no doubt that at least in some circumstances married partners have rights that are denied unmarried domestic partners, and the subjects specifically identified by Brause and Dugan may be areas where inequality exists. But lacking in Brause and Dugan's brief is any assertion that they have been or in their current circumstances that they will be denied rights that area available to married partners."

Matthews seized upon the state's characterization of the statute as "purely symbolic," lacking "independent legal significance." The state argued that the plaintiffs should have to individually challenge each of the state policies that they claim violate their rights, rather than mount a frontal attack on the broad disqualifying provision of 25.05.013(b). The state cited as the proper way to proceed a recent case filed in Anchorage by a group of same-sex couples specifically seeking entitlement to health and pension benefits. The court agreed.

But Justice Bryner dissented strongly and at considerable length, arguing that the court's old decision in *Burgess Construction Co. v. Lindley*, 504 P.2d 1023 (Alaska 1972), interpreting the Workers Compensation Statute to require the payment of death benefits to a surviving opposite-sex domestic partner, showed that the statute in issue could be subject to a facial challenge by a same-sex couple, as to whom the statute would, on its face and totally predictably, discriminate as between unmarried opposite-sex couples and unmarried same-sex couples.

Actually, the court's decision is strange in a different sense. Since Judge Michalski gave the plaintiffs leave to amend to add some substantive information relative to the standing issue, it is hard to understand the court's position, since presumably the plaintiffs can come right back and file a new equality claim before Michalski. Not only does Justice Bryner fully show that the state is now following an inequitable path, but these determined plaintiffs are unlikely to be deterred by the need to come up with more specific allegations. They need only file some applications for joint benefits to obtain the necessary evidence.

The plaintiffs are represented by attorney Robert H. Wagstaff of Anchorage. A.S.L.

### Mississippi Supreme Court Rejects Lesbian Custody Appeal

In a unanimous decision released on April 12, the Mississippi Supreme Court rejected an appeal by Sharon Morris of the DeSoto County Chancery Court's decision awarding custody of her three children to Joey Morris, her ex-husband, refusing to allow her to visit with her children unless either Joey or an agreed third party is present, and granting Joey's divorce petition on grounds of habitual cruel and inhuman treatment. The custody decision was premised, at least in part, on her sexual orientation and cohabitation with another woman. *Morris v. Morris*, 2001 WL 361766.

Joey and Sharon married in 1981 in Tennessee and lived together until the end of 1998, at which time they were living in Southaven, Mississippi. They had three children, two girls and a boy, who were all pre-teens at the time of the breakup of the marriage. Sharon, a registered nurse, was the primary care giver for the children throughout the marriage. She is employed at a part-time job. Joey is employed full-time. By the court's account, the marriage was stormy, with each spouse having assaulted the other upon occasion. Sharon claimed that Joey forced himself on her sexually, and it appears from the court's version of the facts that she was not particularly sexually interested in him.

The court's opinion, by Justice Smith, also details Sharon's history of mental instability, although the court never surfaces the possibility that some of what it is reporting may have been related to Sharon's uneasiness in a heterosexual relationship. It appears that she occasionally physically abused herself, including scarring, and had been suicidal at times. She has been hospitalized at times for psychological problems, and takes medication for depression and anxiety. There is no indication that she has ever harmed her children, however.

Sharon became involved in a relationship with Ms. Brandy Schroyer, which became sexual sometime before her separation from Joey. Sharon told Joey about the relationship before she moved out of the house, and at the time of trial Sharon lived with Brandy and Brandy's two sons. She tes-

tified that she intended to remain in this relationship indefinitely, according to the court.

The chancery court determined that it was in the best interest of the children to be in Joey's custody, and granted him a divorce on grounds of habitual cruel and inhuman treatment. Writing for the Supreme Court, Justice Smith found that this finding was not erroneous in light of the trial record.

On appeal, Sharon had argued that the trial court erred in premising a finding of cruel and inhuman treatment on her relationship with Brandy, but the Supreme Court found that Mississippi precedents supported such a finding on these facts. Citing to *Robison v. Robison*, 722 So. 2d 601 (Miss. 1998), in which the court supported such a finding where a husband had engaged in a heterosexual extra-marital affair, Smith wrote: "As in the case before the Court at present, the chancellor in *Robison* declined to decide the case on grounds of adultery, and instead, used the extra-marital relationship to support the habitual cruel and inhuman treatment charge. In both *Robison* and in the present case, the parties were involved in open relationships with at least one third party. Both cases further incorporate other evidence, in addition to extra-marital affairs, to support the charge of habitual cruel and inhuman treatment. The husband in *Robison* neglected his family to the point that they could not afford groceries, and the wife's co-workers had to hold a food drive for her. As a result of her husband's neglect, criticism, and affairs, the wife in *Robison* was treated for depression and anxiety. The Court found that the husband's neglect, combined with his verbal and emotional abuse toward his wife which resulted in her needing treatment for depression, was sufficient to support a finding of habitual cruel and inhuman treatment. Similarly, in the case at bar, Joey testified that his wife's behavior and actions have caused him to seek counseling. Additionally, as a result of having to pay his wife's bills for her stays at various hospitals for her psychological problems, Joey was forced to file bankruptcy. Additionally, Joey has had problems collecting child support from Sharon." The court also noted one very old precedent, *Crutcher v. Crutcher*, 38 So. 337 (Miss. 1905), in which the court held that a homosexual affair by a spouse would qualify as cruel and inhuman treatment, but did not appear to place any particular weight on the old case.

In terms of the custody ruling, Sharon protested the court's resolution of the factor of parental morality against her on account of her relationship with Brandy. The chancellor had relied on *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999), for the proposition that "by engaging in a homosexual relationship with this Court finds to be violative of Mississippi statutes, and continuing in that relationship at this time, the Court finds that the element of moral fitness must be resolved against the natural mother." Wrote Smith, "This Court has clearly held that the chancellor

can consider a homosexual lifestyle as a factor relevant in the custody determination of the child, as long as it is not the sole factor. Sharon's extramarital affair with Brandy was not the only factor considered by the chancellor in making his determination that the best interest of the children was for them to be in the custody of the father." If one assumes that the court's opinion accurately depicts the parties and the nature of their relationship, this statement appears correct, inasmuch as Sharon presented a picture of a deeply troubled person who had engaged in self-destructive conduct. On the other hand, the supreme court upheld the chancellor's refusal to hear expert testimony from Sharon's therapist on her current mental condition, purportedly on the ground that the therapist was a social worker rather than a psychologist and thus was not qualified as an expert witness on her mental condition.

The opinion continues the Mississippi Supreme Court's course of hostility to lesbian or gay parents, although in light of the factual findings in this case, it would be difficult to fault the overall determination that the children's best interest was probably served by a custody award to their father. However, the court's refusal to allow testimony by the therapist, which appeared to contribute greatly to the chancellor's determination to restrict visitation by requiring it to take place either in Joey's presence or in the presence of an agreed-upon third party, is unfortunate in the circumstances. While Justice Smith opines that allowing the therapist's testimony would not have changed the outcome of the case, one suspects that had Sharon been able to present the testimony of a properly qualified expert on her current mental condition and ability to deal with the children without endangering them, a different outcome on the visitation question might have been achieved.

Sharon's case may also have been affected by difficulty with counsel. The court's recitation of the procedural history shows that her original counsel withdrew during the proceedings, and there was a period of several months in 1999 when she was unrepresented until securing the counsel of John V. Hunter, IV. The opinion lacks the usual recitation by the court of testimony by experts about the impact (or lack of same) of parental homosexuality on child development, so one suspects this is one of those unfortunate cases where unfamiliarity with these issues by counsel and lack of resources may have contributed to the outcome. A.S.L.

### **New Hampshire Supreme Court Rules Evidence of Defendant's Lesbian Relationship Had Prejudicial Effect on Jury**

The New Hampshire Supreme Court reversed and remanded the trial court's conviction of a woman found guilty of nine counts of felonious sexual assault against a minor girl, on the ground that the prosecutor prejudicially introduced evidence of

the defendant's lesbian relationship with the victim's mother. *State of New Hampshire v. Woodard*, 2001 WL 321993 (April 4).

In 1982, defendant Woodard was the victim's sixth grade teacher. Over the next two years, Woodard bestowed special favors upon her, spent much time with her, both in and out of school and became progressively more affectionate with her. Then, Woodard and her husband moved next door to the victim's home. After Woodard and her husband divorced, Woodard moved in with the victim and her divorced mother. While living there, Woodard sexually assaulted the victim a number of times. The mother became suspicious after reading love notes from Woodard to the child, and eventually, she told others of the suspicion. The child, after entering eighth grade, told Woodard to stop the assaults and began telling others, including her parents. No one told the police. Only a few years later, after the arrest of another teacher for an unrelated sexual assault, the child began sending Internet messages about the attacks, which eventually came to the attention of the police and Woodard was arrested.

At the trial, the State introduced evidence of a sexual relationship between the victim's mother and the defendant. Woodard objected on the basis of relevance. The State argued that it was relevant because it explained why the victim's mother did not force Woodard to move out, and why she didn't call the police when she suspected a sexual relationship between Woodard and her daughter. The State argued that the testimony was offered for that reason, and not to show homosexual propensity. In response, the defendant argued that the mother testified that the reason she did not inform the police was not because she was lovers with Woodard. Rather, it was because she was afraid that Woodard would leave and take her daughter with her. For that reason, Woodard argued, the evidence was either irrelevant or more prejudicial than probative. She moved for a mistrial, which was denied by the trial court.

Writing for the Supreme Court, Chief Justice Brock found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Since the relationship between the defendant and the victim's mother began almost two years after the last assault on the child, and even longer after discovery of the love notes, the probative value of the evidence was reduced. In addition, there were other explanations that the jury could have considered for why the mother did not inform the police. Other evidence showed the existence of emotional and financial ties between the two women. For example, the fact that the defendant provided financial assistance to a financially struggling woman, helped out with child care, and sometimes shared a bedroom with the mother (perhaps not by choice; the home had limited space). He stated that "the potential for the jury to be unfairly influenced by whatever bias they might have concerning homosexual conduct created the danger of prejudice," citing *United*

*States v. Gillespie*, 852 F.2d 475 (9th Cir., 1988). The court held that disclosure to the jury that the defendant was a lesbian could have caused them to conclude that she was more likely to have committed the assaults.

Justice Brock disagreed with the State's contention that the evidence was merely cumulative and its admission harmless, finding that the mother's testimony regarding their lesbian relationship was the only direct evidence presented of Woodard's engaging in a consensual gay relationship. The court considered other arguments of Woodard's relating to improper admission of testimony of prior assaults and denial of a bill of particulars, both of which were not relevant to her sexual orientation. Although the court disagreed with her as to those issues, Woodard's conviction was reversed for the reasons described above and the case was remanded to the trial court. *Elaine Chapnik*

### **Georgia Appeals Court Considers First Test of Extra-Territorial Effect for Vermont Civil Unions**

It is unlikely that anybody would have predicted that the first judicial test of the effect of a Vermont Civil Union in another state would involve a child visitation dispute in Georgia, but that is the context for a case recently accepted for review by the Georgia Court of Appeals in *Burns v. Freer*. Depending how the court rules, the case might also become a vehicle for a judicial appraisal of the constitutionality of the federal Defense of Marriage Act's "full faith and credit" provision, and its Georgia analogue.

Darian and Susan Burns were divorced in December 1995 after seven years of marriage, during which they had three sons. Susan met Debra Jean Freer through friends, moved to Atlanta, and last July observed a civil union ceremony with Debra in Vermont. Susan also legally changed her last name to Freer. When Darian, who had been granted custody of their three sons in 1998, learned about this, he cut off Susan's visitation rights, referring to a provision of the 1998 custody agreement that prohibited visitation and residence "by the children with either party during any time where such party cohabits with or has overnight stays with any adult to whom party is not married or to whom party is not related." In addition to preventing the children from visiting with Susan and Debra, Burns filed an action in Floyd County Superior Court, claiming she had violated the agreement and seeking a contempt ruling against her.

On January 30, Floyd County Superior Court Judge Larry Salmon, relying both on the federal Defense of Marriage Act and Georgia public policy as expressed in a state law banning recognition of same-sex marriages, held that an out-of-state civil union could not be deemed the equivalent of a marriage and ruled against Debra, although it did not hold her in contempt. Late in

April, the Georgia Court of Appeals accepted review of the case, which will be argued soon.

Susan is represented by Adrian Lanser of Cartersville, Georgia. The Southern Regional Office of Lambda Legal Defense Fund in Atlanta expects to participate in some capacity in the appeal. *Atlanta Constitution*, April 26; *Conservative News Service*, April 25. A.S.L.

### Massachusetts Federal Court Allows Discrimination Claim to Proceed

U.S. District Judge Tauro (D. Mass.) ruled Feb. 20 in *Ianetta v. Putnam Investments, Inc.*, 2001 WL 263248, that a gay man alleging discrimination on the basis of sex premised on failure to conform to gender stereotypes may proceed in his Title VII claim. Rejecting the employer's argument that this was a garden-variety non-actionable sexual orientation claim improperly asserted under Title VII, Judge Tauro held that Lawrence Ianetta sufficiently alleged sex discrimination to withstand a motion to dismiss.

Ianetta began working for Putnam in 1996, and was reassigned to the trade control department in April 1998, where he came under the supervision of Gary Sullivan. Ianetta alleges that between December 1998 and February 1999, Sullivan twice called him a "faggot" and singled him out for adverse treatment based on Ianetta's failure to conform to gender stereotype. After Ianetta asked the company's human resources department for the company's policy concerning sexual orientation discrimination, he was given a "final warning" threatening termination for poor performance. After he filed a discrimination charge with the Mass. Commission Against Discrimination, alleging both sex and sexual orientation discrimination, he was terminated. After receiving a right-to-sue letter from MCAD, he filed his Title VII case, appending a state law charge as well.

Tauro rejected Putnam's argument that this sexual harassment claim must be dismissed, finding that although prior authority made clear that sexual orientation discrimination is not actionable under Title VII, there was support, at least in dicta, for the proposition that discrimination based on gender non-conformity could support a sex discrimination claim under Title VII. Tauro rejected Putnam's argument that Ianetta failed to exhaust administrative remedies, noting that he had included a sex discrimination allegation in his proceeding before MCAD. Tauro also rejected Putnam's argument that the retaliation claim was invalid. Putnam argued that a valid retaliation claim requires that somebody have been engaging in statutorily protected activity; in this case, Putnam was threatened with discharge after inquiring about the sexual orientation discrimination policy and after filing his charge with MCAD. Tauro found that since the charge before MCAD involved sex discrimination as well as sexual orientation discrimination, its filing was a protected activity under Title VII.

Matthew Cobb of Boston represents Ianetta. A.S.L.

### New Jersey Appellate Division Rejections Lesbian's Psychological Parent Claim

The New Jersey Appellate Division affirmed a decision by the Bergen County Superior Court rejecting a psychological parent claim by a lesbian seeking visitation with her former lover's adopted child. *A.F. v. D.L.P.D.*, 2001 WL 399696 (April 20). In a straightforward application of the *New Jersey Supreme Court's* decision in *V.C. v. M.J.B.*, 163 N.J. 200, 748 A. 2d 539 (2000), the court found that the appellant failed as a matter of law to satisfy several of the prongs of the psychological parent test, and thus was not entitled to a hearing to determine whether she had "bonded" with the child.

The plaintiff and the defendant began a romantic relationship in 1990, at which time the defendant was still married but her marriage was breaking up. Defendant moved her things to her mother's home until she acquired her own apartment in Bergen County, near her law office. She spent some nights in her own home, and some nights in plaintiff's home, which was in Union county. The plaintiff and defendant maintained separate homes but frequently slept over at each other's place. At defendant's request, the plaintiff concealed the nature of their relationship from the defendant's family, although the plaintiff's family was aware that they had a romantic relationship. By mid-1995, their romantic relationship had cooled off. Around that time, defendant traveled to China to adopt an infant girl. Defendant's law partner and plaintiff each kicked in \$5,000 loans to help finance the trip and adoption process, and defendant repaid these loans.

The plaintiff and the defendant differ sharply over the events of the next several years. Defendant maintains that she raised her daughter as a single mother, with the child usually spending her days at a day care center while defendant was at work. Plaintiff paints a somewhat different picture, claiming she had extensive contact and frequently helped to take care of the child. As their relationship cooled off, however, plaintiff had decreasing contact and it is undisputed that the child was never left overnight in the plaintiff's home. The child called the plaintiff "aunt" or "weestie," which was the child's attempt to pronounce, "Sweetie," an endearment that defendant used to refer to plaintiff during the earlier years of the child's life. By 1998 the friendship between the parties had weakened to the extent that the defendant was limiting the amount of time she and the child spent with the plaintiff, and in 1999 the parties had almost no social contact, leading the plaintiff to file this action seeking to establish regular visitation rights.

The plaintiff claimed that she had bonded with the child, and was entitled to be declared a psychological parent within the meaning of the *V.C.*

opinion. In that case, the New Jersey Supreme Court held that a co-parent could obtain visitation rights and even seek custody based on establishing the status of a psychological parent. The court established a four-prong test: that the legal parent consented to and fostered the relationship between the third party and the child; that the third party had lived with the child for some significant period of time; that the third party performed parental functions for the child to a significant degree; and that a parent-child bond was forged.

The trial judge granted summary judgment for the defendant and denied the plaintiff an opportunity for a hearing to determine whether there was a parent-child bond, having found based on those facts that were not controverted that plaintiff had clearly failed to establish several of the required factors. For example, the parties never lived together in the same home with the child, plaintiff had not performed parental duties to a significant degree, and the defendant had not taken any significant steps to foster a parental relationship. Indeed, by the time defendant returned from China with the newly-adopted child, the parties' romantic relationship was about over, and the court found that the pre-adoption relationship was not relevant to psychological parent test.

The Appellate Division found the trial court's reasoning to be correct, explaining at some length how the summary judgment record supported each conclusion and made a "bonding" hearing unnecessary, for even if the plaintiff could establish a parental bond, the *V.C.* precedent requires that all four tests be met, not just one.

The opinion by Justice Wecker concludes on an almost apologetic note: "We add only this additional comment. It may or may not be the case, as plaintiff contends, that defendant misled plaintiff at some point in their relationship with respect to defendant's intention of creating a future as a family. But the fact is they did not become a family. In reaching the conclusion that we do in this case, we intend no judgment upon the parties' conduct toward one another. We do not see our role as finding either party blameworthy or blameless in permitting this most unhappy situation to develop. Our role is solely to apply the law, as we understand it, to the facts as a reasonable fact finder could determine them to be, and it is on that basis that we have reached our conclusion."

The parties are represented by Bettina E. Munson (appellant) and Robin T. Wernick (appellee). A.S.L.

### Texas Appeals Court Upholds Texas Hate Crime Law in Sentencing of Homophobe.

In an important case supporting the constitutional validity of Texas' hate crimes law and its use to protect gays and lesbians, the Texas Court of Appeals in an unpublished opinion upheld the enhanced sentencing of a homophobe who attacked a man he presumed was gay by affirming the lower court's denial of a constitutional challenge. *Bren-*

*neman vs. Texas*, 2001 WL 333627 (April 5). This case is significant, as Texas' hate crimes law is non-specific as to which groups are protected against violence, requiring only "that the defendant intentionally select[s] the victim primarily because of the defendant's bias or prejudice against a group..." Readers may recall that a bill was proposed to the Texas Legislature to itemize particular protected groups which included sexual orientation, but the measure was killed at the insistence of former Governor (now President) G. W. Bush.

Victim Michael Arrington and his wife live in a downtown Houston neighborhood in which is located a gay bar. Late on an October evening, Arrington, while walking his dog, was attacked with a knife by appellant Roderick Brenneman. Shouting remarks such as "pervert" and "homosexual," Brenneman presumed Arrington was gay and cut him in several places and then stabbed him in the eye, resulting in its eventual loss. Police and EMS help was summoned by neighbors and Brenneman was arrested.

Brenneman was charged with the felony offense of aggravated assault. The indictment included an enhancement paragraph under the hate crime law, stating that the victim was selected primarily because of appellant's bias and prejudice against homosexuals. A jury found him guilty of the lesser-included offense of assault. At sentencing, Brenneman made a motion to quash the indictment on grounds that the hate crimes statute is unconstitutionally vague. Trial court denied the motion, found Brenneman guilty and applied the sentence enhancement.

Brenneman contended that the statute was unconstitutionally void for vagueness on its face, because it violates the due process clause of the Fourteenth Amendment by failing to provide fair notice of the forbidden conduct, thus creating the potential for arbitrary and selective enforcement because the statute is silent as to which groups are protected.

Writing for the Court of Appeals of Texas in Corpus Christi, Justice Yanez affirmed the lower court's decision to deny the motion, as Brenneman was unable to meet the standard by showing that the statute is unconstitutional as applied to him. Most salient (and ironic), the court found that Brenneman shot himself in the foot as he stated in his brief that he is "entitled to make a facial challenge...despite the fact the statute as applied to him did involve a legitimate and specific bias group (i.e. homosexuals)." The court interpreted this statement as an admission that the statute is not unconstitutionally vague as applied to Brenneman and thereby he waived his challenge. *K. Jacob Ruppert*

### Illinois Appellate Court Rejects Brutality-Enhancement of Murderous Gay-Basher's Prison Sentence

Finding that a gay-basher's life sentence was constitutionally infirm, the Illinois Appellate Court for the Fifth District reduced Richard Nitz's term of imprisonment to 5 years. See *People v. Nitz*, 2001 WL 337197 (March 28). Although the Court affirmed a number of the trial judge's rulings, the court of appeals found that the sentence had to be reduced pursuant to the Supreme Court's recent pronouncement in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge, and not the jury had found the defendant's behavior "exceptionally brutal and heinous."

Richard Nitz was convicted and sentenced to death for the murder of Michael Miley, a gay man whom Nitz had beaten with a baseball bat until barely conscious, placed in the trunk of his car, shot in the head and then ultimately decapitated so as to dispose of the body more easily. In 1996, the Illinois Supreme Court overturned Nitz's conviction because the trial court had failed to conduct a fitness hearing for Nitz so as to determine the effect of Tranxene, which he had taken during the trial to quell anxiety, on his competency. On remand, the State prosecuted Nitz again for three counts of first degree murder, but this time did not seek the death penalty. The jury convicted Nitz on one of the three counts, finding that Nitz was aware of the fact that shooting Miley created a strong probability of death or great bodily harm. When determining Nitz's sentence, the trial judge found that this particular first-degree murder was accompanied by brutal and heinous behavior indicative of wanton cruelty, and sentenced Nitz to life imprisonment.

Nitz appealed his conviction on numerous grounds. First, he insisted that the trial judge effectively denied Nitz the opportunity to testify by permitting the state to use his testimony from the first trial to impeach him. Justice Kuehn, writing for the court, rejected the defendant's argument, finding that he was not deprived of the right to testify, but rather he was "simply not afforded the luxury of doing so without challenge from earlier sworn testimony that might have proven to be inconsistent."

Second, Nitz questioned the propriety of the jury deliberations by submitting an affidavit from a juror which suggested that the jury had held the defendant's refusal to testify against him, was negatively influenced by his prior (overturned) conviction, and that one particular juror had changed her vote from acquittal to conviction due to peer pressure from the other jurors. The court dismissed this challenge, and instead "adhere[d] to the longstanding rule of law that the testimony of jurors will not be received to establish their own mistake or misconduct, to prove that of their fellows while in the jury room, or to otherwise impeach their own verdict."

The court then rejected Nitz's third assignment of error, which had claimed that he should have been entitled to demonstrate that others in the area where the crime occurred harbored the same hatred for homosexuals that he did. The court found that, in the absence of evidence from which one might reasonably infer that a specific individual might have committed the crime, defendant's arguments were irrelevant: "Unfortunately, there is a wealth of bigotry and hatred in this world. Proof of other homophobia lacks relevancy, for it does not tend to prove that someone else rather than Nitz committed the crime." Nitz's argument that he was entitled to an instruction on second degree murder was also struck down by the court. The trial judge properly found that the defendant had not been seriously provoked, according to the appellate court, which based its affirmance ruling, in part, on the overwhelming violence exerted by the defendant upon the victim, which further demonstrated that the incident was not the result of "mutual quarrel or combat." The trial judge also did not abuse his discretion when he discounted defendant's evidence in mitigation, including his mental limitations and history of prior abuse, and ruled that the defendant should be sentenced to life imprisonment because he lacked sufficient rehabilitative potential. The appellate court also affirmed other evidentiary rulings contested by the defendant regarding the impeachment of witnesses offered by the state.

Finally, the court tackled the question of whether the court acted beyond its constitutional authority when it sentenced the defendant to a term of life. The statute under which Nitz was convicted provided for a maximum sentence of sixty months, but if the "murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty," then "the court may sentence the defendant to a term of natural life imprisonment." Relying on *Apprendi v. New Jersey*, the court found that this finding of "brutal and heinous behavior" had the effect of increasing the sentence beyond the statutory maximum of sixty months, and therefore was an element of the offense that had to be tried to and found by the jury. Because the jury had not returned a verdict regarding this specific element, but rather the judge had made the determination as a factual finding during sentencing, the court found that Nitz's sentence of life imprisonment was unconstitutional. Therefore, his sentence was reduced to sixty months, or five years incarceration. *Sharon McGowan*

### 1st Circuit Rules on Fee Award in Gay Police Case

The U.S. Court of Appeals for the 1st Circuit has affirmed an award of over \$160,000 in legal fees to four attorneys who successfully represented the Gay Officers Action League (GOAL) and several individual plaintiffs in their suit against the Commonwealth of Puerto Rico to strike down as unconstitutional a police department regulation

(Regulation 29) that subjected officers who associated with homosexuals to official discipline. *Gay Officers Action League v. Commonwealth of Puerto Rico*, 2001 WL 391772 (April 23).

In 1995, the plaintiffs sued the Commonwealth for damages and equitable relief under 42 U.S.C. section 1983 for allegedly violating their constitutional rights by forbidding them from participating in an impromptu rally, subjecting them to excessive force, conducting an unlawful search of a gay bar and illegally videotaping a gay pride parade. A year later, GOAL amended its complaint to allege that Regulation 29 violated the plaintiffs' First Amendment rights. Although District Court Judge Hector Laffitte granted the Commonwealth's summary judgment motion concerning the claims related to the rally, the use of excessive force, the search and the videotaping, he entered a judgment declaring Regulation 29 unconstitutional and permanently enjoining the Commonwealth from punishing any police officer for associating with homosexuals.

The Commonwealth tried various ways to side step the district court's decision — including motions to alter the judgment and vacate the injunction, and even attempts to rewrite Regulation 29 to call for disciplinary action against officers who "relate to or associate with persons of dubious reputation" (a group defined to include "anyone who engages in conduct that departs from the community's moral standards") — all of which were rejected by the district court. When the Commonwealth elected not to appeal the district court's final judgment, Judge Laffitte ruled that the plaintiffs were prevailing parties under federal fee-shifting statutes (42 U.S.C. sec. 1988) and were entitled to \$202,000 in attorneys fees and \$13,787 in legal expenses. The award was based on evidence submitted by plaintiffs' counsel, which included time and expense records relating only to work performed on that portion of the lawsuit dealing with Regulation 29.

On appeal, the Commonwealth argued first and foremost that the plaintiffs were not "prevailing parties" under federal law because they only obtained equitable relief against the Commonwealth, and because Regulation 29 "was an anachronism" that the Puerto Rico Police Department never enforced and actually intended "to scrap" long before the plaintiffs filed their lawsuit. Calling the Commonwealth's argument "self-serving" and noting that "actions speak louder than words," the First Circuit, in an opinion by Chief Judge Selya, unanimously rejected the Commonwealth's position. Selya explained that although an award of equitable relief does not automatically confer prevailing party status on a plaintiff for purposes of fee-shifting under federal law, here "the court's declaration that Regulation 29 was unconstitutional clearly benefitted both the plaintiffs and the public as a whole. Writing off the plaintiffs' victory as de minimus would ignore that reality...A fee award therefore was due."

The Commonwealth also challenged the amount of the award, arguing among other things that the plaintiffs overstuffed the litigation. According to the Commonwealth, the constitutionality of Regulation 29 was "simple and straightforward" and one lawyer for the plaintiffs would have sufficed. The court of appeals concluded that the district court was in the best position to weigh the plaintiffs' staffing needs, and had not abused its discretion in ruling that it was reasonable for the plaintiffs to staff four attorneys to litigate the constitutionality of Regulation 29. This is particularly so, Judge Selya noted, in light of the Commonwealth's tactics in litigating the issue before the district court. "[The Commonwealth] mounted a Stalingrad defense of Regulation 29, battling from rock to rock and tree to tree. After setting such a militant tone and forcing the plaintiffs to respond in kind, it seems disingenuous for the Commonwealth to castigate the plaintiffs for putting too many troops into the field," the court noted.

The 1st Circuit concluded that the district court's ruling concerning the award of legal fees and expenses was for the most part "unimpugnable," but nonetheless contained a miscalculation of approximately \$40,000. Rather than remanding the case for further proceedings, and risking the possibility of generating additional litigation, the appellate court sua sponte modified the award to \$163,100.86 and otherwise affirmed the district court's decision.

The four attorneys who represented the prevailing plaintiffs in the underlying lawsuit were Judith Berkan, Colleen Meenan and Lambda Legal Defense attorneys Suzanne Goldberg and Ruth Harlow. The decision is a reminder to plaintiff civil rights counsel to maintain meticulous time records, and a lesson to defendants not to presume that equitable relief does not come at a high financial cost. *Ian Chesir-Teran*

### 9th Circuit Finds Title VII Inapplicable to Homophobic Harassment Case

In the latest battle over whether Title VII, the federal gender discrimination statute, covers harassment based on sexual orientation, the U.S. Court of Appeals for the 9th Circuit ruled on March 29 that a man who was physically and emotionally abused by homophobic coworkers has no recourse under that law. Ironically, the defendant was out of luck because he worked in an all male environment and therefore couldn't show — by pointing to women who had not been harassed — that gender was the motivating factor. *Rene v. MGM Grand Hotel*, 2001 WL 300595.

Medina Rene, an openly gay man, was employed by the MGM Grand Hotel in Las Vegas. His assignment: to act as a butler to high-profile guests on the hotel's 29th floor. All of the employees in that exclusive domain were male. Rene provided extensive evidence that for two years his supervisor, Tang Lam, and several of his co-workers

engaged in actions that created a hostile work environment. Those actions included grabbing his crotch, poking his anus, forcing him to look at pictures of men having sex, whistling at him and blowing him kisses, and calling him "sweetheart" and "muneca" (Spanish for "doll"). He complained to superiors but received no help. In 1997, he filed a complaint in federal district court, alleging sexual harassment in violation of Title VII. MGM moved for summary judgment on the ground that any harassment Rene experienced was not due to his sex but his sexual orientation. The district court judge, Philip M. Pro, agreed with MGM. Rene appealed.

The Ninth Circuit, in an opinion by Judge Procter Hug (joined by Judge M. Margaret McKeown) affirmed. It based its decision largely on its reading of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1988), in which the Supreme Court rejected the view, previously espoused by some federal courts, that Title VII only applied to mixed-gender harassment cases. Discrimination (including workplace harassment) violates Title VII, according to the *Oncale* court, as long as it occurs "because of sex" — regardless of the genders of those involved. In the male-male context, the methods of establishing such discrimination, according to the Court, include: 1) proof that the harasser was motivated by sexual desire; 2) proof that "... the harasser [was] motivated by general hostility to the presence of [men] in the workplace," or 3) "direct comparative evidence about how the allege harasser treated members of both sexes in a mixed-sex workplace."

Judge Hug, treating the Supreme Court's examples as a complete list, disposed of the three possibilities in turn. First, Rene cannot prove that his harassers were motivated by sexual desire, since, the court observed, they were evidencing distaste for homosexuality. (Judge Hug has, apparently, never read Freud.) Second, Rene cannot prove general hostility to men in the workplace, since many of the men on the floor were not harassed. Third — and this is the catch 29 — Rene can't show that he was treated differently from women on the 29th floor, because there were no women on the 29th floor.

The court then went on to quote Rene's repeated statements to investigators that he was harassed because he's gay; to Judge Hug, those statements prove that the harassment wasn't gender-based.

The third member of the panel, Judge Dorothy Nelson, dissented. Accusing the court of "gloss[ing] over" the similarities between *Rene* and *Oncale*, she recounted the facts of the Supreme Court case, in which "an offshore oil platform [worker] was forcibly subjected to sex-related, humiliating actions against him" by male co-workers, "physically assaulted in a sexual manner," and threatened with rape. According to Judge Nelson, "The major difference between [the two cases] is that, unlike *Oncale*, Rene is openly gay ...." Although, she conceded, "gay-

baiting insults and teasing are not actionable under Title VII, ... a line is crossed when the abuse is physical and sexual." Here, according to Judge Nelson, the attack was motivated by defendants' feelings about Rene "as a man." Unlike the majority, Judge Nelson displayed an appreciation of the vast range of possible human interactions: "Rene's attackers may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming their own heterosexuality, or any combination of a myriad of factors, the determination of which falls far beyond the competence of any court. Enforcing Title VII in the mixed-gender context does not involve determining which pleasure center in the attackers' brains was stimulated by the attacks, nor should it in this case."

As for Rene's statement that he was abused because of his sexual orientation, Judge Nelson saw no reason to let that control the court's decision: "The subjective belief of the victim of sexual harassment that there is a non-sex-related reason for the harassment is immaterial."

At least one judge on the Ninth Circuit Court of Appeals has asked that the case be reheard en banc (which requires the votes of a majority of the court's active judges). *Fred A. Bernstein*

[Editor's Note: On April 23, the U.S. Supreme Court denied certiorari in *Spearman v. Ford Motor Co.*, 231 F3d 1080 (7th Cir. 2000), a similar ruling by the U.S. Court of Appeals for the 7th Circuit. The 7th Circuit held that a man who suffered harassment because he was perceived by other employees as being gay was not protected by Title VII's ban on harassment because of sex. A.S.L.]

### Illinois Federal Court Rejects Sexual Orientation Discrimination Claims Against Transit Agency

In *Paquet v. Pace*, 2001 WL 321078 (N.D.Ill., Mar. 30, 2001), U.S. District Judge Gottschall, granting the Defendant Transit Authority's Motion for Summary Judgment, allowed Plaintiff John Paquet to amend his complaint to include a potential claim of disparate treatment under 42 U.S.C. Sec. 1983 because of a denial of his application for a promotion. Paquet, a self-identified gay man, sued his employer, the Suburban Bus Division of the Regional Transportation Authority, and Joseph DiJohn, the former Executive Director and highest ranking employee of Pace, in his official capacity.

Paquet's complaint made two separate claims under section 1983: that defendants retaliated against him in violation of the First Amendment when he engaged in certain speech concerning homosexuality and homosexual rights, and that the defendants violated the Equal Protection Clause of the 14th Amendment by intentionally discriminating against him based on his status as a homosexual.

Paquet had worked at Pace since 1985. From 1994 to mid-1997, he was the Section Manager of the New Technology Section, which focused on

the development and implementation of the Transit Vehicle Management System (TVMS). After the TVMS project was canceled, Paquet's position was almost eliminated, but he was transferred instead to another department, Operations Planning. Subsequent to this move and to determining that Paquet's managerial position could not be maintained, Pace reduced Paquet's grade level from 9 to 8 because he was no longer supervising employees. At about the same time, Pace discovered suspicious e-mail messages sent only to a few Pace employees, including Paquet and his immediate superior, William Reynolds, that advocated directing disruptive behavior at Pace and its high-level employees. An investigation ensued and Paquet was instructed to meet with Pace's Director of Human Resources, Margaret Fugiel. This meeting was heated and Paquet received a written reprimand as a result.

Paquet believed that his homosexuality played a part in his demotion, the investigation of the e-mails, and his subsequent reprimand. In reference to his claim that he was subject to a hostile work environment, Paquet sent a memo requesting that Pace adopt a policy of providing insurance benefits to same-sex domestic partners in March 1997. However, there were at least some Pace employees who knew of his homosexuality even before this memo was sent. Moreover, during his tenure at Pace, Paquet testified that he heard derogatory jokes regarding homosexuals or the use of derogatory terms describing homosexuals about 6 or 12 times, but none were directed at Paquet.

Later, during a training session on sexual harassment, Paquet insisted that the instructor acknowledge that a local ordinance prohibited Pace from discriminating on the basis of sexual orientation. The instructor, unfamiliar with the ordinance, conferred with Pace's general counsel who told him not to discuss the issue because Paquet was, at that time, involved in litigation with Pace over the ordinance. The last factor that Paquet alleged contributed to a hostile work environment was that he was subjected to a monthly newsletter which carried a regular column by a doctor who was the head of an organization that actively advocates that homosexuals suffer from mental illness which could be cured as well as other equally offensive positions, but the newsletter never addressed any homosexual issues.

Regarding his 1st Amendment claim, Paquet alleged that Pace retaliated against him for advocating extending benefits to homosexual domestic partners, for objecting to Pace's inclusion of a cap on benefits for AIDS-related illnesses, for advocating equal protection for homosexuals as a class of persons, and for objecting to the newsletter which contained an article written by a doctor with contrary views on homosexuality.

Judge Gottschall determined that section 1983 prohibits state actors from depriving persons of any rights, privileges, or immunities secure by the Constitution, including the First and Fourteenth

Amendments, but that Title VII does not protect against discrimination "based solely upon a person's sexual preference or orientation," and that such a classification was subject only to a rational basis review under *Romer v. Evans*, 517 U.S. 620 (1996). The court held that even if it gave Paquet the benefit of the Title VII procedural framework used for cases where the plaintiff does not present direct evidence of discriminatory intent, he could not avoid summary judgment.

The court reasoned that Paquet complained of only a single adverse employment action, his demotion, which in and of itself was not enough to counterbalance Pace's explanation that it had transferred him instead of firing him outright when his department was eliminated. Paquet argued that there was another person at Pace who did not supervise other employees who was not demoted when Paquet was transferred. However, the court found that this was insufficient evidence to prove that Pace's reasons for the transfer and demotion were pretextual.

Next, in a prima facie case of hostile work environment discrimination, a plaintiff must show that: 1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; 2) the harassment was based on sex; 3) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and 4) there is a basis for employer liability. Moreover, the Seventh Circuit held that the court must consider all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance.

Because Paquet only offered 6 or 12 incidents of derogatory comments and jokes which were not directed at him, his demotion and the fact that a contributor to Pace's monthly newsletter held beliefs that homosexuals were mentally ill, the court held that Paquet had proffered evidence so insufficient that no reasonable jury could find that Paquet was subject to a hostile work environment because of his sexual orientation.

As to a 1st Amendment claim, the court found that a plaintiff must demonstrate that the speech touches upon matters of public concern and that the speech was a substantial or motivating factor in the defendant's actions. With regard to the second prong, a plaintiff cannot prevail unless he establishes that the defendant would not have taken the challenged action but for the constitutionally protected conduct. If a plaintiff meets the burden of establishing these two requirements, then the defendant may demonstrate, by a preponderance of the evidence, that it would have made the same decisions even if the plaintiff had not engaged in the protected speech. Here, Paquet only alleged



one action that gave the court pause in ruling against him, his removal from the training session. However, in light of Paquet's deposition in which he admitted that he not only wanted the instructor to discuss sexual orientation issues, but wanted him to admit that sexual orientation was a protected class under the local ordinance, and that the ordinance protected Pace employees, the court found that Paquet had insisted on disrupting the class in order to have the Pace instructor make admissions in Paquet's favor.

The Court further determined that under the balancing test propounded by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), a public employer does not violate an employee's 1st Amendment rights by subjecting the employee to an adverse action if the speech inflicts an injury on the government's efficiency interests that outweighs the employee's interest in the speech. Looking at the significance of Paquet's disruption of the training session to further his own litigious ends, the court held that no reasonable juror could possibly have concluded that Paquet's interest in that manner of speech outweighed Pace's interest in continuing the training session in an orderly manner. *Leo Wong*

### Navy Lieutenant Sentenced to Two Years for Consensual Sodomy

In an unpublished opinion, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed a court-martial sentence against Dr. Michael Baker. Lt. Baker argued that the sentence of dismissal, two years confinement, forfeiture of all pay and allowances, and placement at the bottom of the lineal list is inappropriately severe given that he "was only prosecuted for a single DUI and for being gay." *United States v. Baker*, 2000 WL 33250671 (July 24).

Baker plead guilty to and was convicted of driving under the influence, consensual sodomy with an enlisted man, soliciting another enlisted man to engage in sodomy, and wrongfully fraternizing with enlisted men. The appellate court rejected Baker's argument that his guilty pleas to fraternizing (drinking, dining, and giving \$300 to an enlisted man) and solicitation (offering a "blow job") were improvident and should be overturned due to his intoxication and "rampant alcoholism." (As a fan of television police dramas, one wonders about any pre-trial representations by the prosecution to induce Baker to plead guilty.) Baker's challenge to the constitutionality of 125 UCMJ, the anti-sodomy article, was disposed of by reference to the 1992 courts-martial of Henderson and Fagg. The court held that prosecution testimony of misconduct with which Baker was not charged was properly admitted, to show the aggravating circumstances Baker used "in luring an unsuspecting Sailor into" a compromising sexual situation.

During the trial, the military judge warned the JAGC defense counsel to be "circumspect about

interrupting argument." Thus the defense counsel did not object to the trial counsel's improper comment on Baker's right against self-incrimination, "plainly lamenting the fact that the appellant made an unsworn statement ... and thereby shielded himself from damaging cross-examination." The appellate court found this to be an obvious error, but held that the judge below had cured this by instructing the court to disregard the trial counsel's inference, and advising the members that unsworn statements are authorized.

Chief Judge DeCicco, writing for a three-judge panel, strongly disagreed with Baker's contention that his sentence was unduly severe, or that he was prosecuted due to his sexual orientation. In addition to its concern for unsuspecting enlisted service members enticed into homosexual activity, the court was apparently moved by the fact that Baker was acquitted at court-martial of forcible sodomy but had been convicted in a state court of felony false imprisonment. (Loss of lineal position as a court-martial punishment was deleted by Executive Order in 1999.)

By comparison, a very cursory WWW search yields the 1997 court-martial of an Army Captain who was cleared of rape, indecent assault, and obstruction of justice charges but plead guilty to engaging in heterosexual consensual sodomy and adultery with a 20 year old trainee just three weeks after receiving training on avoiding sexual contact with subordinates. The Captain also plead to two counts of conduct unbecoming an officer and failing to obey a lawful general order, and was sentenced to dismissal, four months imprisonment, and two months probation. (AP) *Mark Major*

### Federal Court Finds Connecticut Sex Offender Law Flawed

Connecticut's sex offender registration law (also known as the state's version of Megan's Law) violates due process because it fails to distinguish between non-dangerous and dangerous sex offenders and affords registrants no opportunity to be heard prior to inclusion in the database. *Doe v. Lee*, 132 F.Supp.2d 57 (U.S. Dist. Ct., D. Conn., March 31, 2001). Doe, a purportedly non-dangerous sex offender, brought due process and *ex post facto* challenges to the statute.

Connecticut's sex offender registration law requires all persons convicted of sex offences to register with a Statewide database, available on the internet. The database lists all convicted sex offenders without reference to whether the individual is dangerous. In addition, the Connecticut legislature failed to include a mechanism in the law for non-dangerous sex offenders to challenge their inclusion in the database.

The plaintiff, Doe, claimed that the law violated his due process rights, because the implication of being registered in the database, which does not differentiate between dangerous and

non-dangerous sex offenders, is that Doe is dangerous. Essentially, Doe claims that because of the undifferentiated nature of the database, non-dangerous sex offenders are stigmatized by their inclusion with dangerous sex offenders. Doe claimed that as a result, his legal status as a non-dangerous sex offender has been altered. Doe further claims that the registration database violates due process because the State provided no procedure to determine whether Doe is currently dangerous prior to including him in the database.

Doe further challenged the law, as applied to him, on *ex post facto* grounds, because the registration requirement was imposed after Doe committed his crime. Doe claimed that inclusion in the database was an additional punishment not available at the time of his original conviction.

Judge Chatigny, on cross-motions for summary judgment, agreed with Doe that Connecticut's Megan's Law violated his due process rights. The court found that by including Doe in a database with dangerous sex offenders, Doe's legal status was altered and therefore he satisfied the stigma-plus test necessary to establish a protected liberty interest under the Due Process Clause. In addition, the court found that the State failed to include a mechanism for non-dangerous sex offenders to be excluded from the database. Based on this, the court granted summary judgment to Doe on his Due Process claims.

However, the court granted summary judgment to the State on Doe's *ex post facto* claims, finding that the law was not punitive in fact, and thus did not retroactively impose an additional punishment on Doe. *Todd V. Lamb*

### Calling Public Figure A "Pansy" Not Defamatory, Says Connecticut Court

James Hallas spotted Charles J. Mozzochi in the lobby of the South Glastonbury, Connecticut, post office on January 15, 1999. Although Hallas had no business to conduct at the post office, he got out of his car, entered the lobby, and, in addition to another accusation, called Mozzochi a "pansy." A scuffle ensued. Mozzochi brought an action against Hallas for defamation and infliction of emotional distress. *Mozzochi v. Hallas*, 2001 WL 293258 (Conn. Super. Ct. March 13).

Mozzochi, the plaintiff, was a public figure. He had sought office several years before, often addressed the Town Council, and had written numerous letters to the Glastonbury Citizen newspaper, which published at least 50 of them. The newspaper was owned by Hallas, the defendant.

The court ruled that Mozzochi could not collect damages for defamation unless the statement was made with "actual malice," i.e., the statement was made "with actual knowledge that it was false, or with reckless disregard of whether it was false." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual malice must be proven with "clear and convincing evidence." Mozzochi contended that Hallas, by referring to him as a

“pansy,” was alleging that he was homosexual. Hallas, however, insisted that the term “pansy” merely meant that Mozzochi “was a weakling or coward.” The court decided that Mozzochi “failed to prove actual malice by clear and convincing evidence” because Hallas’s “choice of definition ‘fits easily within the breathing space that gives life to the First Amendment’” (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984)). Therefore, no defamation had occurred, nor had Hallas inflicted actionable emotional distress upon Mozzochi, because that claim arose out of “the same act of protected speech.”

The court did not address whether, if Hallas had intended to accuse Mozzochi of homosexuality, that would have been actionable. State courts are divided over whether a false imputation of homosexuality is still a per se defamation, as it was commonly treated in the days prior to sodomy law reform. *Alan J. Jacobs*

### Federal Appeals Court Finds Privacy Protection for Transsexual Prisoner

A panel of the U.S. Court of Appeals for the 2nd Circuit vacated summary judgments and remanded a case where Dana Kimberly D’Villa, a transsexual inmate, had her HIV and transsexual status disclosed by a corrections officer and the warden resulting in harassment and attacks by other inmates. *Powell v. Schriver*, 2001 WL 332617 (April 3).

On December 31, 1991, Albion Correctional Facility officer Jeffrey Lynch disclosed to inmates and prison staffers that D’Villa was HIV+ and that she was a transsexual. In 1993 D’Villa sued Lynch as well as the warden, Sunny Schriber. In April 1995 D’Villa died of AIDS and Wayne Powell, her executor, continued the case. D’Villa claimed that she was “ostracized and harassed by fellow inmates” and twice attacked, suffering physical injuries, after Lynch’s disclosure. She claimed that her Fifth, Eighth and Fourteenth Amendment rights were violated along with violations of State statutes protecting the confidentiality of a person’s HIV status and prohibiting “degrading treatment” of inmates.

Magistrate Judge Leslie G. Foschio dismissed most of D’Villa’s claims, leaving the jury to consider whether Lynch, by divulging D’Villa’s HIV status and transsexualism, had violated her right to privacy. Schriber faced the allegation that, by not properly training Lynch, she was responsible for the disclosures and subsequent attacks. The jury found for Lynch and against Schriber, awarding D’Villa \$5,000 in compensatory damages and \$25,000 in punitive damages. The trial court set aside the verdicts on the basis that Schriber had qualified immunity and that the finding of liability was inconsistent with Lynch’s favorable finding. D’Villa appealed the district court’s actions.

In 1999, a Second Circuit Appeals Court panel affirmed the judgment in Schriber’s favor regarding the State privacy claim, and vacated the find-

ing as it related to D’Villa’s Eighth Amendment claim. The case was remanded to the district court. On remand, District Judge Foschio granted summary judgment in favor of Schriber and Lynch. In its opinion, the district court found that the jury believed that Lynch never disclosed D’Villa’s status or “that it was commonly known that D’Villa was both HIV positive and a transsexual.” Foschio also cited that the D’Villa presented no new evidence on retrial. D’Villa again appealed.

Writing for the panel in D’Villa’s current appeal, Judge Calabresi found that even if the jury believed that Lynch had not violated State statutes, it was not relevant to D’Villa’s Eighth Amendment claim. This was due to the section applying to HIV status and not to a person’s transsexualism. The panel found that D’Villa’s need for medical treatment may have made it hard for her to conceal her HIV status, but would not have “exposed her transsexualism to public view.” The jury in Schriber’s case was told that she could be liable for failing to properly train Lynch, causing the disclosure of D’Villa’s HIV status and transsexualism. “Given these instructions, the jury’s verdict against Schriber on the privacy claim cannot be read except as entailing that Lynch made the statements as D’Villa alleged and that what Lynch said disclosed secrets.” The panel further found that “the district court abused its discretion in treating the jury’s verdict on D’Villa’s privacy claim as requiring that summary judgment be granted against her Eighth Amendment claim,” and remanded the case “for further proceedings not inconsistent with this order.” See the May 1999 issue of *Lesbian/ Gay Law Notes* for an earlier report on this case. *Daniel R Schaffer*

### Federal Court Dismisses Police Officer’s Hostile Environment Sexual Harassment Claim Based on Perceived Sexual Orientation

U.S. District Judge Carr (N.D. Ohio) dismissed a rather unusual sexual harassment hostile environment claim based on perceived sexual orientation in *Pollard v. City of Northwood*, 2001 WL 336971 (March 19). Police officer Brian Pollard claimed that he was subjected to a hostile environment because others on the force perceived him as being gay due to his friendship with an openly-gay police officer, Sergeant Douglas Marshall. Pollard also based his hostile environment claim on Marshall’s unduly familiar language with him. Many of Pollard’s allegations were strongly controverted by various police officers named as individual defendants in his case.

Pollard began working as a police officer in Northwood on May 12, 1997. Sergeant Marshall was one of those who participated in the interview process, and he became one of Pollard’s supervisors. Pollard alleges that Marshall was excessively friendly, offering to help him move from Cincinnati and to let him live in Marshall’s house. Pollard also claims that Marshall used sexually

explicit language around him, and led other officers to believe that Pollard was friendly with him. Pollard claims that he was subjected to various kinds of shunning behavior by other officers who may have perceived him as being gay due to Marshall’s attitude towards Pollard. Pollard’s problems relating to other officers were exacerbated, according to him, when he reported that another officer had blown off a difficult matter due to the paperwork involved. (The officer in question, according to Pollard, subsequently referred to Pollard as a “piece of shit” and a “fucking faggot.”)

Ultimately, Pollard developed various psychological problems that required mental health treatment and the use of anti-depressants. He went on a medical leave and subsequently was discharged when he was found to be unfit to resume duty. He filed a discrimination claim with the EEOC, which was the subject of a newspaper article in which a Police Department employee discussed information from Pollard’s medical records. He subsequently filed a retaliation claim as well.

In this lawsuit, Pollard included claims of defamation and violation of the confidentiality of his medical records as well as claims arising under Title VII (sex discrimination) and the Family and Medical Leave Act. Pollard also alleged a violation of the ADA based on the refusal to reinstate him to duty after his medical leave.

Ruling on the city’s motion for summary judgment, Judge Carr found that Pollard’s allegations did not rise to the level of hostile environment sexual harassment, noting that many of his allegations were sharply controverted under oath by various named defendants in their depositions. Much of Pollard’s deposition testimony appeared to be based on his inferences and suppositions rather than any solid, admissible evidence. As to the claim that Marshall was subjecting him to sexual harassment, Pollard conceded that Marshall had never overtly solicited him for sex. Carr asserted that these allegations could not be considered actionable without crossing the line set by the Supreme Court in its sexual harassment cases, in which it stated that Title VII does not establish a workplace civility code. Furthermore, Carr found that the police department had a non-discriminatory basis for refusing to reinstate him, in light of his own doctor’s diagnoses of Pollard’s emotional problems.

On the other hand, Carr found that the allegations of defamation and violation of privacy rights in Pollard’s employment medical records did state a valid claim, and refused to grant summary judgment as to those claims. In the newspaper article about Pollard’s EEOC complaint, a police department employee was quoted as characterizing him in ways that definitely case aspersions on his reputation in a manner not supported by the record, and revealing details of Pollard’s employee medical records that are protected from disclosure under the ADA. A.S.L.

### Teen's Consent to Gay Sex With Adult Employee May Reduce Employer's Tort Liability

The Tennessee Court of Appeals ruled April 5 that the former employer of a 16-year-old boy who alleges that an adult coworker induced him to have gay sex on the job may defend itself from tort liability on the grounds that the boy consented, at least to the extent of reducing the employer's liability, if any. *Doe v. Mama Taori's Premium Pizza*, 2001 WL 327906 (Tenn.Ct.App.).

In 1998, the boy, whose anonymity was respected by the court, told his mother that he and a coworker, 32-year-old Christopher Abson, had sex while working at Mama Taori's pizzeria. The boy claimed that Abson had first given him a joint laced with a "knock out drug." Abson was subsequently arrested and later plead guilty to three counts of statutory rape and one count of contributing to the delinquency of a minor. In a civil suit against Abson and Mama Taori's, the boy and his parents are seeking damages of \$8 million for various statutory violations and torts. In its defense, Mama Taori asserted that the boy had consented and was therefore partly responsible. The boy's attorneys sought to strike Mama Taori's defense, arguing that the boy's consent is no defense to a civil action just as it is no defense to statutory rape.

Judge Koch affirmed the lower court's denial of the motion to strike, explaining that "one who consents to what is done cannot complain of it." The court noted that the Tennessee legislature has said that minors may consent to sexual conduct if they are over thirteen years old and if their partner is less than four years older. Moreover, Tennessee courts make a rebuttable presumption that minors over the age of 15 have capacity. Homosexual conduct was rendered legal in 1996 when Tennessee's sodomy law was struck down. The court also found that the plaintiffs' argument "blurs the substantive differences between criminal and civil proceedings."

Although consent is not a complete defense, the court held that it may be considered in allocating fault under Tennessee's comparative liability scheme. On remand, the plaintiffs can rebut the presumption of capacity by showing immaturity or intoxication. The boy began working part-time at Mama Taori's in 1997. Not long after, he first told his mother that Abson had made sexual advances toward him on the job. Although Mama Taori's management was informed that Abson was acting "suspiciously," they did not pursue the complaint. Instead, Mama Taori's planned to promote and transfer Abson to another branch of the restaurant in a neighboring town. After learning of Abson's imminent departure, the boy requested that he also be transferred to the other restaurant. His request was denied. Days after Abson was transferred, the boy told his parents about their prior sexual encounter. After Abson's arrest, police uncovered that he was previously convicted on rape charges under a different name. *T.J. Tu*

### Civil Litigation Notes

Gay & Lesbian Advocates & Defenders, New England's public-interest lesbian and gay rights law firm, filed suit April 11 in Suffolk County, Massachusetts, Superior Court, seeking a declaratory judgment that same-sex couples in Massachusetts are entitled to marriage licenses on the same basis as opposite-sex couples. The action, styled *Goodridge v. Department of Public Health*, No. 01-1647-A., was filed on behalf of seven same-sex couples, whose lives together are recited in detail in the complaint (copies of which can be obtained on GLAD's website, at www.glad.org). The claimed right of same-sex couples to receive marriage licenses is premised on the Declaration of Rights, articles I, VI, VII, X, XII, XVI and Pt. II, c. 1, sec. 1, art. 4, of the Massachusetts Constitution. The complaint lists the entire legal staff of GLAD as co-counsel in the case. GLAD had previously served as co-counsel in *Baker v. State of Vermont*, 744 A.2d 864 (Vt.1999), in which all the justices of the Vermont Supreme Court agreed that the failure of that state to provide legal rights and recognition for same-sex couples violated the "common benefit" provision in the Vermont Constitution, but a majority of the court was unwilling to take the next step of ordering the state to allow same-sex couples to marry, instead deferring to the legislature to devise a way of conferring the rights appurtenant to marriage to same-sex couples. The legislative response was the Vermont Civil Union Law, which confers all state-law marriage rights on eligible same-sex couples but, by withholding actual marriage, leaves open numerous questions about how other jurisdictions will treat civilly-united couples. (Of course, it is not secret that under the federal Defense of Marriage Act, the federal government will treat such civil unions and/or marriages as a nullity for purposes of federal law.)

The New York Court of Appeals heard oral argument on April 24 in *Levin v. Yeshiva University*, in which lower courts rejected a complaint that the refusal of Alfred Einstein Medical School to allow same-sex domestic partners of students to live in the school's on-site married-student housing violates bans on discrimination based on marital status under state law and sexual orientation under city law. News reports suggested that the court may be sharply split on the case, and that a main concern of the judges may be that a ruling for the plaintiffs on this claim would carry over to a wide variety of governmental and private sector policies by adopting a principle requiring domestic partnership recognition generally. James D. Esseks of Vladeck, Waldman, Elias & Engelhard argued the case for the plaintiffs as cooperating attorney for the ACLU Lesbian and Gay Rights Project. An account of the argument appeared in the *New York Law Journal* on April 25.

Here's an interesting question: Would it violate the rights of a high school student attending a racially diverse school if school officials prohibited

the student from wearing a sweatshirt inscribed with the words "White Pride"? The equivalent question has prompted the American Family Association Center for Law & Policy, a conservative litigation group, to file suit on behalf of Elliot Chambers, 16, a student at Woodbury High School in Minnesota, asserting that Chambers' 1st Amendment rights were violated when school officials asked him to remove a sweatshirt inscribed with the words "Straight Pride." Stephen Crampton, chief counsel for the Center, stated that the sweatshirt "merely makes a positive statement about heterosexuality. It does not denigrate other forms of sexuality." The lawsuit is seeking to prevent the school officials from "enforcing policies that squelch viewpoints favorable toward heterosexuality." The suit is filed in U.S. District Court in St. Paul, Minnesota. *Star-Tribune*, Minneapolis-St. Paul, April 5.

The *Washington Blade* reported on April 13 that the Florida Supreme Court has refused to review the intermediate appellate decision in *Low v. Broward County*, 766 So.2d 1199 (Fla. Ct. App. 2000), which had rejected a challenge to Broward's County's domestic partnership ordinance filed on behalf of a local taxpayer by a conservative legal foundation that specializes in challenging such laws.

The *Los Angeles Times* reported on April 13 that the Beverly Hills School Board has paid Robert Pellicone, a gay man formerly employed as the superintendent of schools, \$159,000 to settle his discrimination complaint against the school district. Pellicone was discharged as superintendent after allegations surfaced that he had misused a district credit card, but Pellicone claimed that story was a pretext for anti-gay discrimination, arguing that all the expenses incurred on the card were legitimate business expenses. He has since been hired as superintendent of the Shoreham-Wading River School District on Long Island, New York.

The *New York Law Journal* reports a sad case that may involve the elderly survivor of a lesbian couple. *Matter of Shapiro*, NYLJ, April 19, 2001 (N.Y.Sup.Ct., Nassau County, Rossetti, J.). 86-year-old Florence Nevins, who never married, lived with Emma Leitner for her entire adult life until Emma passed away in 1998. Florence had always been very private and independent, but her health started deteriorating after Emma's death, and a niece and nephew began to assist her in preparing checks to pay bills and so forth. While on a shopping expedition in January 2000, Florence was befriended by a young off-duty police officer who began visiting her; when the officer couldn't get Florence on the phone one day in June 2000, the officer broke into her apartment and found her lying on her bed, frail and overheated, and arranged for her to be moved to a nursing home. While at the nursing home, Florence was frequently visited by a neighboring family from her neighborhood, to whom she complained about the nursing home and repeated that

she didn't want her relatives to get any of her money. The family, the Vouziana's, checked her out of the nursing home to live with them, and while she was residing there, arranged for a lawyer to change her will, disinheriting the relatives and leaving everything to the Vouzianas. They also brought her to the bank to make over her accounts into trust accounts with the Vouziana's children as beneficiaries. Florence was subsequently hospitalized and her niece and nephew found out what had happened. They arranged for transfer to another nursing home, and brought this action to have the will and trust account transactions voided. The court found undue influence and incapacity as bases for ruling on the case.

A labor arbitrator reduced a suspension from four days to one day in the case of a social worker who refused an assignment that involved visiting the home of a lesbian couple. The social worker had a strong history of dislike for lesbians and gays, but the arbitrator found that this was not a justification for refusing the assignment. On the other hand, the arbitrator found that the employer had been inconsistent in the past in imposing discipline on social workers who wrongly refused job assignments, and that the penalty meted out in this case was disproportionate to past practices. *Lawrence County Dept. of Human Services and Lawrence County Commissioners and Ohio Council 8, American Federation of State, County and Municipal Employees, Local 3319*, 01-1 ARB para. 3723 (CCH) (Arbitrator Louis V. Imundo, Jr.). A.S.L.

### Criminal Litigation Notes

The plaintiffs in the Texas sodomy law case are attempting to appeal the recent ruling by an en banc intermediate appellate panel finding the same-sex only prohibition on consensual sodomy to be constitutional. The March 15 ruling in *Lawrence v. State of Texas*, 2001 WL 265994, had reversed a panel decision finding the statute violative of the state constitution. Lambda Legal Defense Fund is represented the plaintiffs-appellants, with Mitchell Katine of Williams, Bimberg & Anderson, a Houston firm, as local cooperating attorney on the case. The lawsuit arose when police, following up on a false lead, discovered the two male plaintiffs engaged in sexual activity with each other in their home, and the local prosecutor decided to prosecute them under the misdemeanor statute applicable to same-sex consensual sodomy between adults. *Lambda Press Release*, April 16.

Judge Jeffrey Bayless of Denver, Colorado, District Court gave a life prison sentence to Samuel Grauman, age 22, for the murder of 36-year-old Daniel O'Brien, whom Grauman selected as a victim because O'Brien was gay. A Denver District Court jury deliberated three hours before finding Grauman guilty of first-degree murder, robbery and auto theft. At the time of the murder, Grauman and another inmate had recently escaped from a

Colorado prison and stolen a truck, which they drove to Denver to a popular gay bar where they were looking for a victim to rob. When Grauman was arrested in Texas, he was driving a stolen vehicle and had O'Brien's wallet in his pocket. Long-time *Law Notes* readers may recognize Judge Bayless as the trial judge who first declared Colorado Amendment 2 unconstitutional. *Denver Post*, April 22.

In *Germain v. State of Maryland*, 2001 WL 350237 (Md. Ct. App., April 10, 2001), Maryland's highest court rejected an appeal of conviction of attempted second degree murder, first degree assault, reckless endangerment and carrying a weapon with intent to injure of a prison inmate charged with attempting to stab to death another prison inmate. Defendant Jean Germain claimed that John Campbell, the cellmate upon whom he inflicted 104 stab wounds and a vicious beating (amazing that Campbell survived to testify against his assailant), was an HIV+ gay man who was trying to sexually molest him. At trial, Germain's attorney wanted to use the pre-sentencing report from Campbell's conviction in order to refresh Campbell's recollection that he was actually in stir because of sexual molestation charges, but the trial court refused to let him use the report for that purpose. Campbell, of course, denied Germain's claims that he was attempting to force Germain to have sex with him. The Court of Appeals held that the trial court did not err in refusing to allow this use of the pre-sentencing report. A.S.L.

### Legislative Notes

The Texas House unanimously amended a pending bill dealing with marital property laws to emphasize that these laws do not apply to same-sex couples. According to Rep. Glen Maxey, the legislature's only openly gay member, the amendment was introduced by religious-right forces to attempt to generate a party-line vote that could be used to campaign against Democrats in legislative races in 2002. But the Democrats, having been advised by Maxey that the amendment was meaningless, since Texas does not anywhere in its laws recognize same-sex couples, all voted for the amendment, thus preventing the Republican right from using this issue next year. *Austin American-Statesman*, April 3. ••• To the surprise of many, the Texas House passed a hate crimes measure including sexual orientation on April 23. Its fate in the Senate is uncertain, where Gov. Rick Perry was said to be pulling strings to prevent the measure from coming to a vote. *New York Times*, April 24; *Ft. Worth Star-Telegram*, April 24; *Austin American Statesman*, April 19.

••• On April 18 the Texas House Criminal Jurisprudence Committee approved a measure that would repeal the states misdemeanor law against same-sex intercourse. Two Republicans joined the five Democrats on the committee to make a 7-2 vote in favor of HB 687. The statute is the subject of a law suit now on appeal to the Texas

Court of Criminal Appeals from the en banc decision of the 14th Court of Appeals affirming the conviction of a gay male couple for having consensual sex in private. *Houston Chronicle*, April 20.

The Arizona Senate voted 16-14 on April 4 in support of a bill that would ban sexual orientation discrimination in state agencies. Representative Steve May, who is sponsoring a similar bill in the House, predicted easy passage there, but the governor's position on the measure was uncertain. *Arizona Republic*, April 5.

After a contentious five-hour hearing on a proposal to adopt a civil union bills for Connecticut, proponents decided to postpone the effort for now. State Representative Michael Lawlor, a Democrat who co-chairs the Connecticut House Judiciary Committee, told the *Boston Globe* that many legislators are not opposed to the idea, but are hesitant to involve Connecticut in the kind of political turmoil that arose in Vermont during and after passage of civil union there. *Boston Globe*, April 5.

The New York City Council overrode a veto by Mayor Rudolph Giuliani of a measure codifying an existing city policy banning contracting with employers who discriminate on the basis of any factor included in the city's human rights ordinance, which includes sexual orientation. The measure was passed as the city administration mulls over what to do about city contracts with the Boy Scouts of America, which come up for renewal on a periodic basis. Schools Chancellor Harold Levy had already taken action to restrict dealings between the public schools and the Scouts, although not banning the Scouts totally. Presumably, Giuliani was interested in preserving administrative discretion to decide how to deal with city contractors shown to have discriminatory policies, and such flexibility would be lost by a codification of a policy that he previously been embodied only in an executive order. *New York Daily News*, March 29.

Alarmed at the prospect of civilly-united couples from Vermont trying to get recognition for their relationships in neighboring New Hampshire, a group of conservative New Hampshire state legislators, all Republicans, introduced a bill that would instruct the state not to recognize such relationships. But after a heated debate, the measure was voted down in the House on March 29 by a decisive vote of 275-88. Opponents successfully argued that the measure was unnecessary. The gay-friendly state legislature, which includes some openly gay members, belies the traditionally conservative image of New Hampshire. *Foster's Daily Democrat*, March 30.

Early in April, the Nebraska Senate voted 26-8, with 15 members either excused or not voting, to amend a pending bill on real estate licensing to ban sexual orientation discrimination by real estate brokers and agents in real estate transactions. The amendment was offered by Sen. Ernie Chambers of Omaha, who is also the sponsor of a pending bill that would ban employment dis-

crimination on the basis of sexual orientation. After the vote to add the amendment, the bill, L.B. 215, received second-round approval and faced a new round of debate. *Omaha World-Herald*, April 5.

**Stealth Attack!** The city council of Concord, California, enacted a measure providing same-sex domestic partner benefits for city employees, as part of a mass of bills that were going through by unanimous consent. This drew protests from a former resident who had spearheaded anti-gay measures in the city during the 1980's and early 1990's, but the measure otherwise appeared non-controversial, and seemed to have been enacted in response to requests from some police officers who thought they were supposed to get the benefit last year as a result of collective bargaining. The *San Francisco Chronicle* (April 5) hailed the measure as a sign that Concord was shedding its "anti-gay reputation."

Iowa Governor Thomas Vilsack issued a new executive order on March 28 to replace the one that was struck down by the state courts in response to a lawsuit by Republican legislators. See *King v. Vilsack*, No. CE 40318 (Iowa, Polk County Dist. Ct., Dec. 7, 2000), reported in the January 2001 issue of *Law Notes*. The original order, No. 7, issued in September 1999, banned discrimination by the state on numerous bases, including sexual orientation and gender identity. State civil rights statutes do not specifically mention sexual orientation or gender identity. Republican state legislators contended that the Governor was engaging in unlawful legislation by purporting to add to the categories in statutes through an executive order, and a trial judge agreed. The governor decided not to appeal. The new executive order, No. 18, broadly states that it is Iowa's policy to provide equal opportunity in state employment to all persons, and reaffirms the state's intention to effectively administer affirmative action and workplace diversity programs, according to a summary by BNA published in 2001 Daily Labor Report No. 74 (April 17). State Senator Steven King, the lead plaintiff in the lawsuit that struck down the prior order, said that he will propose a state constitutional amendment to ban affirmative action programs. He expressed the view that such a ban could get through the legislature, but would undoubtedly be vetoed by the governor. *Des Moines Register*, March 29.

The California Assembly Labor and Employment Committee voted 5-2 on April 18 to endorse Carole Migden's domestic partnership bill, A.B. 25, which would extend several important legal rights to those who have registered as domestic partners under prior legislation. The bill was approved on a strict party-line vote, which included the two openly lesbian Democratic members of the committee, Migden and Jackie Goldberg. *California Alliance for Pride & Equality Press Release*, April 23.

On April 12, the Colorado House voted 41-22 to reject a section of the proposed state budget

that would have prohibited the University of Colorado from using any of its appropriations to provide domestic partnership benefits to employees. *Rocky Mountain News*, April 13. A bill that would ban sexual orientation and gender identity discrimination in employment, S.B. 154, survived its first committee test in the Colorado Senate on April 17. The Colorado Civil Rights Division estimated that enactment of the bill would add about 80 cases a year to its caseload. *Rocky Mountain News*, April 18. A hate crimes measure that would extend coverage on the basis of sexual orientation or gender identity, physical or mental disability and ago won approval on a voice vote in the Colorado Senate on April 12 (*Rocky Mountain News*, April 13), but on April 24 the Colorado House Committee on State, Veterans and Military Affairs killed a similar measure by a vote of 5-4. *The Gazette*, April 25.

A measure pending in the San Francisco Board of Supervisors to expand the benefits plan for city workers to cover gender-reassignment procedures hit a snag when it was scheduled to come to a vote on April 23. The measure required approval from at least 9 of the 11 supervisors, but two supporters of the measure were out of town on business, and one of the remaining supervisors announced that he had changed his position and would vote against the measure in response to the outpouring of negative correspondence he had received from constituents. Proponents of the measure decided to put off the vote until the first week of May, when the two traveling supervisors would be present. *San Francisco Chronicle*, April 24.

A 13-member commission devising a new charter for Urban County, New Mexico, has voted to include "sexual orientation" in the charter's non-discrimination provision, according to a report in the *Albuquerque Journal* (April 6). The vote was 11-1. The full charter proposal will go before voters later in 2001.

On April 24, the Louisiana Senate's Judiciary Committee approved a bill that would add "civil unions, domestic partnerships or similar relationships" to a law passed in 1999 that forbids the state from recognizing same-sex marriages contracted in other states or countries. *Times-Picayune*, April 25.

The Nevada Assembly Judiciary Committee held hearings early in April on Assembly Bill 496, which would establish a status of reciprocal beneficiaries for individuals who are not entitled to marry, including same-sex partners. The bill would allow reciprocal beneficiaries to make medical, estate or funeral decisions for each other, but would not extend any entitlement for health benefits (although employers could voluntarily use the reciprocal beneficiary registry system to extend benefits to their employees). Most of the testimony on the measure was negative, at least according to a report in the *Las Vegas Review-Journal*, April 11. A.S.L.

## Boy Scouts Developments

The Broward County, Florida, school board met on April 3 to determine its response to the preliminary injunction that requires it to allow the Boy Scouts to continue using school facilities on the same basis as other organizations. See *Boy Scouts of America v. Till*, 2001 WL 315360 (S.D.Fla., March 21, 2001). The board had canceled a five-year contracts that gave the Scouts free access to school facilities. Some other groups also get free access, while yet others pay a variety of rental fees. The board determined that it would be necessary to adopt a uniform fee policy before it would be able to impose user fees on the Scouts, so Boy Scout troops that are still using school facilities may continue to do so without charge while the Board tries to come up with a uniform policy, to which the Scouts will be subject just like everyone else. At the same time, the board seemed committed to appealing the court's order. *South Florida Sun-Sentinel*, April 4.

In Minnesota, the *Star Tribune* reported March 31 that the United Ways in Minneapolis and St. Paul reported a sharp increase in directed donations to the Boy Scouts in recent months. The two organizations themselves, which are slated to merge as of May 1, had cumulatively been sending about 12 percent of their undesignated donations to the Scouts. This year, for the first time, they advised donors that donors could request that their donations not go to a particular organization, and about \$2.5 million came in with strings attached specifying that the money not go to the Scouts. So the Scouts' proportional funding from undesignated funds will be reduced by about \$30,000. Several other United Ways in Minnesota, in keeping with the state's law banning sexual orientation discrimination, have decided not to direct any funds to the Scouts. The twin cities UW's plan to revisit the issue after the merger.

On March 28, Wisconsin Governor Scott McCallum reversed a decision by state administrators that would have prevented the Boy Scouts of America from receiving donations through a charitable payroll deduction plan for state employees. The administrators had decided, based on Wisconsin's 1982 ban on sexual orientation discrimination, the first statewide gay rights law to have been enacted, that the Boy Scouts did not qualify for inclusion because of their anti-gay employment and membership policies. The internal policy decision had first come to light when a Republican legislature discovered that the United Way was in danger of being excluded from the state charity drive because of its grants to the Boy Scouts. *Milwaukee Journal Sentinel*, March 29.

In San Diego, California, U.S. District Judge Napoleon A. Jones, Jr., ruling in a pending suit filed by the ACLU against the city challenging the Boy Scouts' use of a city-owned park under a sweetheart lease agreement, found that some individual plaintiffs in the case lacked standing to challenge the lease, but said that the ACLU could

continue with portions of the case concerning alleged unconstitutionality under the Equal Protection Clauses of the federal and state constitutions. *San Diego Union-Tribune*, April 20.

The United Church of Christ in Cornwall, Connecticut, recently voted to sever ties with the Boy Scouts of America, after having sponsored a troop for many years. The action was taken based on the church's mission statement, which says that it reaches out "in invitation to all." After extensive study, a statement was prepared and voted upon at the church's annual congregational meeting on Jan. 28, that affirmed the church's welcome to "gays, lesbians and bisexuals." In March, the church council was asked to renew its charter agreement with the local Cub Scouts outfit, but decided it could not sign on to the pledge to abide by all Boy Scouts of America policies. *Hartford Courant*, March 27.

Jamestown (N.Y.) Community College barred the Boy Scouts from using college facilities because of the ban on gay scouts. The college has a sexual orientation non-discrimination policy. The decision was taken by the college's Human Rights Committee, resulting in cancellation of an adult training session scheduled to take place March 17 at the college's Cattaraugus County Campus. *Buffalo News*, March 27.

Montgomery County, Maryland, has withdrawn a no-fee exemption under which the Boy Scout and Girl Scout organizations in the county were entitled to free use of county facilities. Other non-profit groups are charged an hourly fee to use facilities. A spokesperson for the County described this change as an "equity issue," but admitted that the controversy about the Boy Scouts' anti-gay policies had led county officials to re-examine the no-fee policy. *Washington Times*, April 10. A.S.L.

## Law & Society Notes

The *Los Angeles Times* reported April 27 that the American Sociological Review has published an article by University of Southern California sociologists Judith Stacey and Timothy J. Biblarz, which contends, based on a literature review, that the sexual orientation of a mother raising her own biological children makes a difference with respect to certain character traits of her children. They present this analysis (and the *L.A. Times* certainly reinforced this interpretation in its presentation) as refuting the contention, frequently made by expert witnesses in cases involving custody or visitation or adoption by gay parents, that parental sexual orientation makes no difference and therefore should not be relevant. Although Stacey and Biblarz do not assert that parental sexual orientation affects the sexual orientation of the children, they claim that girls raised by lesbian mothers behave in less traditionally feminine ways and are more aggressive sexually than girls raised by heterosexual mothers, while boys raised by lesbian mothers are characterized as being

more nurturing and affectionate and less sexually aggressive than boys raised by heterosexual mothers. Who knows how this stuff will cut in contested court cases, but it sounds to your editor like these are arguments in favor of lesbian mothers.

The data is in on the first half year of civil unions in Vermont. The *Boston Globe* reported on April 5 that 1,527 civil union ceremonies were registered from July 1 to December 29, 2000. Only 22 percent of those ceremonies involved two Vermont residents, the overwhelming majority of such ceremonies involving out-of-staters.

Responding to former President Clinton's Executive Order on security clearance procedures, the State Department has adopted new guidelines that strike some observers as incredibly intrusive, especially regarding the sexual activities of gay employees. EO 12968 provided that there should be no discrimination on the basis of sexual orientation, but that all employees' activities should be investigated on an equal basis to determine whether they posed security risks. The bureaucrats at Foggy Bottom have apparently interpreted this to mean that they can conduct fishing expeditions into all employees' sex lives to determine whether they are engaging in behavior that could be exploited by enemies of the U.S. to breach security. *Washington Times*, April 20.

Some conservatives, already reeling from President Bush's selection of an openly-gay man to head the White House's AIDS policy office (see below), expressed further consternation over news that Secretary of Defense Donald Rumsfeld had hired Stephen E. Herbits, a former Seagram's executive and consultant to prior Defense Department officials including Dick Cheney, as a consultant to assist in recruiting high level civilian managers for the Defense Department. Herbits is also openly-gay, and during the Clinton Administration joined with others in lobbying the Defense Department and the White House to end the ban on military service by openly gay people. Herbits refused to comment publicly about the controversy. His engagement by DoD was for a 120 day consultancy period, subject to renewal. *Washington Times*, April 13; *Washington Blade*, April 20.

Following up on the mandate of a recently enacted state law concerning equal rights of public school students, a California task force of educators, parents and community representatives sent a report with recommendations to State Schools Superintendent Delaine Eastin, including curricular reform to be gay inclusive. *Los Angeles Times*, April 13.

The N.Y. City zoning law regulating "adult establishments" survived two more challenges in the New York Court of Appeals on March 29. In *DJL Restaurant Corp. v. City of New York*, the Court held unanimously that establishments subject to regulation under the state's Alcoholic Beverage Control Law were not immune from regulation under the city zoning ordinance. The owners of several establishments with liquor licenses

whose locations place them within areas newly zoned against adult uses had argued that the comprehensiveness of state regulation of liquor-serving establishments preempted any attempt by the city to regulate such establishments. Writing for the court, Judge Rosenblatt opined that liquor regulation and zoning regulation concern distinct activities and no preemption occurred. In the other case, also in an opinion by Rosenblatt, the court rejected the attempt by one such establishment to avoid application of the zoning ordinance by welcoming minors to patronize the facility when accompanied by an adult. *City of New York v. Stringfellow's of New York*. "Stringfellow's so-called minors policy is an obvious attempt at an end run around the AZR [Adult Zoning Resolution]," wrote Rosenblatt. "When the lawmakers' purpose is as clear as it is here, we will not bend their words into the shape of a loophole." Both opinions were reported in full text in the *New York Law Journal* on March 30.

Two gay male students at Brigham Young University in Salt Lake City have been forced to leave after fellow-students reported to university authorities that they had violated the university's honor code by engaging in "homosexual conduct." One of the students was accused of holding hands with another man at a shopping mall, the other of having dated men and visited gay-oriented Internet chat sites, as well as "making out" with another man in his dormitory room. Since Brigham Young is a private university and Utah does not ban sexual orientation discrimination by places of public accommodation such as universities, the men have no legal claim. However, the incident stirred some debate among gay law professors about whether Brigham Young's Law School would apply similar policies, and whether that would violate the ABA and AALS rules concerning sexual orientation discrimination by law schools. *Deseret News*, March 29.

Florida State Representative Allen Trovillion found himself in hot water after he responded to some lobbying by gay high school students by giving them a lecture about sin. The students were seeking legislative support for a safe-schools bill that would protect students from anti-gay harassment. They reported, and Trovillion confirmed, that he told them they were "heading in the wrong direction" and that their gay activity would bar them from entering heaven. Some civics lesson for the kids! *Orlando Sentinel*, April 10.

Hope College, a school that was founded by the Reformed Church in America, has refused to grant official recognition to a Gay-Straight Alliance formed by students. The Campus Life Board voted 5-3 against the application, and a written statement from the college said, "Hope College wants its students, faculty and staff to learn all there is to know about homosexuality, but feels this would be better accomplished through an institutionally based educational effort." At the same time, the College's president, James Bultman, agreed to appoint a task force "representa-

tive of the entire campus community" to study issues surrounding homosexuality. Hope College is located in Holland, Michigan. *Grand Rapids Press*, April 20.

Wesleyan University announced on April 23 that it will create a position for a full-time faculty member whose focus will be on gay and lesbian studies. The announcement came after considerable pressure from gay students on campus urging the school to establish a gay studies program. The new professor, expected to be hired next year, will be charged with helping to develop a gay and lesbian studies curriculum. *Hartford Courant*, April 24. A.S.L.

### International Notes

On April 5, the European Parliament passed a resolution concerning the violation of the human rights of gay people in Namibia. The Resolution "strongly condemns and expresses [the Parliament's] deep indignation at the recent outburst of homophobia within the ruling party of Namibia." The Resolution was taken in response to a March 19 speech by Namibia's President Sam Nujoma, in which Nujoma stated that the Namibia police forces were to arrest, deport and imprison and purge from Namibian society all gay men and lesbians. In addition, the Resolution stated that "the vilification and persecution of persons for their sexuality" is "a violation of fundamental human rights," calls on the Namibian government to uphold the position expressed by its Prime Minister, "that the human rights of all Namibians are protected under the Constitution," and calls on various international bodies to "take appropriate steps to convince the Namibian government to refrain from further homophobic acts."

The Parliament of New Zealand passed four pieces of legislation on March 29 of special significance for same-sex couples. The Property (Relationships) Amendment Act 2001 gives same-sex couples an de facto opposite-sex couples the same relationship property rights and obligations as married couples upon termination of a relationship. The default rule will be an equal share of assets if the parties have been in a relationship for at least 3 years, but parties can contract out of the default rule or attempt to show a differential contribution to the assets. The Administration Amendment Act 2001 provides surviving same-sex partners the same rights as surviving marital partners in cases of intestacy. The Family Protection Amendment Act 2001 allows a surviving same-sex partner to claim against an estate where the will has failed to make provision for the survivor. The Family Proceedings Act 2001 provides for spousal maintenance rights after a same-sex relationship breaks down. All of this legislation does not come into effect until February 1, 2002, according to a summary and explanation posted to the internet by New Zealand attorney Nigel Christie, a Solicitor in Wellington.

In Canada, the *National Post* reported April 3 that the government of Alberta is undertaking a review of all legislation to determine what needs changing to comply with Charter requirements on sexual orientation discrimination. The review is sparked by a ruling on April 2 by Mr. Justice Del Perras, Alberta Court of Queen's Bench, ruling on a challenge by Mr. Brent Johnson, a gay man, to the Alberta Intestate Succession Act, which provides that upon the death of a person without a will, designated legal relations of the decedent will inherit the assets of the estate. Johnson's long-time partner died without a will, giving him standing to challenge the operation of the law which will direct the assets to his partner's children from a prior marriage. Justice Del Perras, relying on prior Canadian court decisions, found, "There is differential treatment, as the claimant is denied the right to access the [Act] based on his sexual orientation."

Reuters reported April 2 that the beginning of same-sex marriages in the Netherlands has inspired that country's neighbor, Belgium, to contemplate taking the same step. Health Minister Magda Alvoet, a member of the leftist Green Agalev party, a member of the governing coalition, stated: "The government considers the right to marry a constitutional right, and the chance to marry the sole true opportunity to see that homosexual and heterosexual couples are treated in the same way." A source from the prime minister's office told Reuters that the core cabinet would consider the proposal in late April, that agreement was likely, and that suitable legislation might be in place to allow same-sex marriages beginning in 2002. Belgium's population is only 10 million. 75 percent of the population are Roman Catholic. It will be interesting to hear the Church's reaction to this possible development.

In Canada, the *National Post* reported April 3 that the Toronto City Council is considering a plan to create a separate shelter for transsexuals, in response to problems encountered by transsexuals in existing shelters that are all-male or all-female. The manager of a women's shelter in the city testified that matters have been complicated by the Ontario government's 1998 decision to stop funding sex-change procedures under their administration of the health insurance program, which has resulted in a rise in the proportion of pre-operative transsexuals among homeless persons. These are the most difficult people to place safely, according to the shelter manager.

Gay life has become so accepted and commonplace in the gay capital of Sydney, Australia, that a jury rejected a defamation claim brought by a businessman against a newspaper that had falsely published that the businessman had homosexual sex with his chauffeur and with the male lover of a prominent Sydney model, Ms. Caroline Byrne, whom the plaintiff was suspected of having murdered. Plaintiff Rene Rivkin proclaimed that he was flabbergasted by the jury's verdict in his case against two newspapers. The attorney for the

newspapers successfully argued that any claim that Mr. Rivkin had gay sex would not be defamatory because homosexuality was now widely accepted, according to a news report in the April 24 *Sydney Morning Herald*.

Following up on a recent vote by the Chinese Psychiatric Association, the government has removed homosexuality from the official register of psychiatric disorders in the new third edition of *Chinese Standards for Classification and Diagnosis of Mental Disorders*, which was published on April 20. However, in reporting on this action, Chinese newspapers gave considerable play to the comments of conservative psychiatrists who dissented from the vote and insist that homosexuality is "abnormal" behavior. *National Post*, April 21.

A Labor Tribunal in England ruled that a lesbian who had been employed as a welder was entitled to damages of 8,564 pounds for unlawful discrimination in connection with her year-long employment at Artecco Metalcraft Ltd in Leeds, West York. The tribunal chairman, Peter Hildebrand, said that Michelle Mahon had been unfairly dismissed and suffered sex discrimination. Co-workers referred to her as "big bitch dyke" and was threatened with being beaten up, as well as ordered to do "women's work" such as making tea for the crew. She also claimed she was twice dismissed by her employer for trumped-up reasons, including errors made by male coworkers. *Daily Telegraph*, April 19. A.S.L.

### Professional Notes

The *Chicago Daily Law Bulletin* reported April 2 that the 37-attorney firm, Levenfield, Pearlstein, has designated a gay partner to start a practice group within the firm specially catering to lesbian and gay clients in tax and business matters and estate planning. The firm's managing partner, Bryan I. Schwartz, told the *Bulletin* that L&P is the first firm of its size to carve out a specialty practice area in lesbian, gay, bisexual and transgender law. The idea of starting the practice group grew out of a lunch meeting between Schwartz and Mark J. Bereyso, the gay partner, who had expressed an interest in getting more involved in the firm's marketing plans. Schwartz asked Bereyso how his being openly-gay might be part of the plan, and, said Schwartz, "Mark, who's a relatively reserved guy, started spewing out all this information about gay and lesbian rights. There is a lack of understanding between the heterosexual world and the gay and lesbian community. I've always considered myself fairly liberal, and I learned that I had a lot to learn." The special practice group was founded shortly thereafter, with one associate, Natalie M. Perry, assigned to work with Bereyso, who described this practice as "a dream come true for me."

Lambda Legal Defense Fund has announced the appointment of Tracy Moore as Regional Director of its Western Regional Office in Los Ange-

les, and the promotion of Myron Quon to the position Deputy Regional Director.

The National Gay and Lesbian Task Force announced April 25 that it will be home to the nation's first legal fellowship specifically devoted to transgender rights, funded by a grant from the National Association for Public Interest Law. The

first Equal Justice Fellow to occupy this internship will be Lisa Mottet, who graduates from Georgetown University Law Center during May. The immediate goal of the Transgender Civil Rights Project is to gain amendments to civil rights laws to extend coverage explicitly to gender identity, and to seek expansive interpretation of

existing sex discrimination laws to cover gender identity claims.

At its annual Jefferson-Jackson Day Dinner, the Michigan Democratic Party gave its Martin Luther King, Jr. Freedom Award to gay attorney Rudy Serra, in recognition of his "work to promote equality and inclusion of all people from every race, creed and gender in the Democratic Party." A.S.L.

## AIDS & RELATED LEGAL NOTES

### Supreme Court of Canada Faults Canadian Red Cross Society on HIV-Transfusions

The Supreme Court of Canada unanimously ruled April 19 that the Canadian Red Cross was negligent in the early 1980's in failing to adopt blood-screening methods developed in the United States to protect blood transfusion recipients from contracting HIV infection. *Walker Estate v. York Finch General Hospital*, 2001 SCC 23. The ruling came on appeals from decisions in three cases where individuals contracted HIV infection as a result of donations by gay Canadian men between September 1983 and March 1985.

Although the identification of HIV, the virus associated with AIDS, was not publicly announced until 1984, and U.S. authorities did not license a blood test for use in screening donated blood until a year later, epidemiologists in the U.S. had concluded by early 1983 that the emerging AIDS epidemic was due to a blood-borne virus, and had identified population groups that appeared to be at highest risk for infection. By spring of 1983, the American Red Cross had developed literature for use at blood donation centers, advising donors about AIDS and suggesting that men who had engaged in sexual contact with other men or who had one of a variety of symptoms then recognized as characteristic of AIDS or what was then called pre-AIDS or ARC (AIDS-related complex), should refrain from donating blood. That literature was in general use in the U.S. by the fall of 1983.

By contrast, the Canadian Red Cross was slower to adopt such explicit screening procedures, and as of 1983 the Canadian Red Cross literature merely advised that people should not donate blood unless they were generally healthy. It was not until the spring of 1984 that the Canadian organization began using screening literature that mentioned AIDS, but the literature was much less explicit than what the American Red Cross was using, as it did not list symptoms, and described the risk group as homosexual or bisexual men with multiple partners. It was not until November 1985, months after the last donation involved in these cases, that the Canadian Red Cross finally adopted more explicit screening literature and began systematically to use the ELISA test for HIV-antibodies on all donated blood, many months after these standards were adopted in the U.S.

Two gay male blood donors were involved in the three cases considered by the Canadian Supreme Court on April 19. The first, named Robert M., donated blood in September 1983 when the literature merely stated that people should not donate if they were not healthy. Although in retrospect it appears that Robert M. had apparently been HIV-infected for some time, as he estimated in a deposition prior to his death from AIDS that he had upwards of 1,000 sexual partners as of September 1983, at that time he felt healthy. In addition, Robert M. testified that he was not "political," did not bother reading newspapers much, and was unaware of the emerging AIDS epidemic at the time of his donation. (This is believable, since even in America, where the epidemic was more advanced, the press did not really focus on AIDS until 1985.)

The second donor, named Everett, had led an active gay lifestyle for several years during which he estimated he had more than 200 sexual partners, but he had stopped having gay sex in 1982. When he went to donate the blood involved in these cases in 1984 and early 1985, he did not interpret the screening literature to apply to him, since he believed he was healthy and, as written, the literature appeared to say that the risk group consisted of currently active gay men, and did not specify a time-frame during which exposure to the cause of AIDS might have occurred. Furthermore, although Everett had experienced swollen lymph nodes for many years, he had lived with this and never considered it serious. Had he been confronted with the American Red Cross's literature when he went to donate, he would have been alerted that swollen lymph nodes were a possible symptom of AIDS and that the risk group included men who had engaged in sex with another man since 1977, and most likely would have deferred giving blood.

The Supreme Court opinion by Justice Jack Major agreed with the lower courts that the American Red Cross's approach to this issue defined the "state of the art" at that time, and that the Canadian Red Cross had been negligent in failing to adopt more explicit screening methods for donors during the critical period 1982-1985 when it was known that AIDS could be transmitted through transfusions but there was not yet a simple blood test that could detect tainted blood.

At the trial level, the courts had found Red Cross liability in the cases of Everett's blood do-

nations, based on his deposition testimony that if the more explicit screening materials had been used, he would have deferred giving blood due to his lymph node condition, but the trial court refused to find liability in the case of Robert M.'s donation, holding that there was no evidence that he would have deferred giving blood because it appears he had continued to give blood after the Canadian Red Cross had adopted screening materials that specifically referred to AIDS and risk groups in 1984.

The Supreme Court endorsed the liability ruling involving Everett's donations, but reversed the lower court as to Robert M.'s donations, finding that the key issue was whether the failure of the Canadian Red Cross to have adopted the approach of the American Red Cross as of September 1983 had caused the transmission of HIV to the plaintiff, who has since died from AIDS. The Court found that the 1983 screening literature of the American Red Cross was more explicit than the 1984 literature of the Canadian Supreme Court, including describing the gay male risk group in a way that would clearly apply to Robert M., so it was improper to presume that Robert M. would not have deferred donating had he been confronted with the American literature.

The court emphasized that its ruling related to the peculiar situation of that 1982-84 time period, and did not imply that the Canadian Red Cross had been negligent regarding procedures after it adopted ELISA-testing of donated blood later in 1985. A.S.L.

### 5th Circuit Finds ADA Applies to Harassment Claims by HIV+ Employee

The 5th Circuit has become the first federal appeals court to rule on the merits that the Americans with Disabilities Act prohibits disability-based harassment, including harassment based on an employee's HIV status. *Flowers v. Southern Regional Physicians Services, Inc.*, 2001 WL 314603 (March 30). The court based its decision on the similarities between the purpose and statutory language of the ADA and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination and harassment on the basis of race, color, religion, sex and national origin. Notwithstanding the court's favorable ruling on the law, the unanimous panel concluded that the plaintiff failed to present evidence at trial demon-



strating that she sustained any actual damages as a result of the defendant's wrongful conduct. Therefore, the court vacated a \$100,000 jury award, and limited plaintiff's award to nominal damages.

Sandra Spragis Flowers was hired by Southern Regional in September 1993 as a medical assistant for Dr. James Osterberger, a physician at Southern Regional. Flowers' immediate supervisor, Margaret Hallmark, learned in March 1995 that Flowers was HIV+. Before then, Flowers and Hallmark were close friends, and often went to lunch, drinks, and movies together. After learning of her HIV status, however, Hallmark stopped socializing with Flowers entirely, began intercepting Flowers' telephone calls and eavesdropping on her conversations, and required Flowers to undergo four random drug tests in one week. Southern Regional's president, William Cooper, also became very distant towards Flowers after learning that Flowers was HIV+, even though the two had gotten along well previously. Within a month of revealing her HIV status, Flowers was "written up" for the first time in over a year and put on 90 day probation. Just days before the probation period ended, Flowers was written up again, allegedly under false pretenses, and placed on a second 90 day probation. She was terminated in November 1995.

In October 1996, Flowers filed a charge of discrimination with the EEOC, and ultimately filed suit in the United States District Court for the Middle District of Louisiana under the ADA, claiming that she was terminated because of her disability, and also that she was subjected to "harassing conduct" designed to "force her from her position or cast her in a false light for the purpose of terminating her because of her HIV status." Flowers' case went to trial in December 1998. At trial, South Regional did not attempt to explain Hallmark's sudden change in attitude and behavior toward Flowers after Hallmark learned that Flowers was HIV+. After deliberation, the jury found that Flowers' disability was not a motivating factor in Southern Regional's decision to terminate her, but that she was subjected to disability-based harassment that created a hostile work environment. As a result of its finding, the jury awarded Flowers \$350,000, which the district court reduced to \$100,000.

Both in its motions for judgment as a matter of law before and after the jury's verdict, and again on appeal, Southern Regional argued that no cause of action exists under the ADA for disability-based harassment. The 5th Circuit panel disagreed. Writing for the panel, Chief Judge King explained: "It is evident, after a review of the ADA's language, purpose, and remedial framework, that Congress's intent in enacting the ADA was, inter alia, to eradicate disability-based harassment in the workplace." Relying on the 1986 United States Supreme Court decision of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, in which the high court ruled that sexual harassment

is actionable under Title VII, the 5th Circuit panel ruled that the ADA's prohibition against discriminating against an employee with a disability in the "terms, conditions and privileges of employment" also prohibits disability-based harassment. The court ruled that the evidence presented by Flowers at trial was sufficient to support the jury's finding of harassment.

However, the court concluded that the plaintiff failed to offer sufficient evidence that she sustained an actual injury that would entitle her to more than nominal damages. The court noted that as a matter of law, emotional harm cannot be presumed simply because the plaintiff was a victim of discrimination. Nor was the plaintiff's own self-serving statements that the harassment and subsequent discharge "took away from her self-respect and her dignity" sufficient. Although Flowers' personal doctor at the time she was employed by Southern Regional testified during trial that daily harassment towards an HIV+ person can affect the individual's emotional and physical well-being, he failed to testify that Flowers herself suffered actual injury as a result of the harassing conduct by the defendant.

The plaintiff was represented by Richard Paul Bullock and Jill Leininger Craft of Craft & McKenzie. The defendant was represented by Murphy J. Foster, III and Melissa Morse of Shirley, Breazale, Sachse & Wilson. *Ian Chesir-Teran*

### Federal Court Accepts HIV "Back-to-Work" Dispute for Trial

In *Equal Employment Opportunity Commission v. Federal Express Corporation*, 2001 WL 391577 (April 6), U.S. District Judge Donovan W. Frank (D. Minn.) refused to dismiss a claim that Federal Express violated the Americans With Disabilities Act by refusing to engage in an interactive search for reasonable accommodation for Paul B. Hummel, a man living with AIDS who sought to return to work from a disability leave status. Judge Frank rejected cross-motions for summary judgment.

Federal Express hired Hummel in May 1993 to be a permanent part-time employee as a cargo handler at the Minneapolis-St. Paul Airport, and promoted him to be a Heavyweight Handler on March 31, 1994. But Hummel, who was HIV+ prior to being hired, became sick within a few days of the promotion and went on medical leave due to complications of AIDS beginning in July 1994. His supervisor, who knew that he was HIV+ from insurance forms Hummel completed shortly after joining the company, visited him in the hospital and observed his severe medical condition. However, Hummel benefitted from lucky timing, as the new protease cocktails were just coming into use at that time. After he went on the new regimen, Hummel's health began to improve dramatically.

In August 1996, Hummel contacted his supervisor about coming back to work, and she requested a medical release. Dr. Woodworth wrote a

letter dated August 12 stating that Hummel's health was greatly improved and should continue to improve, estimating that he would soon get back to "his baseline where he was a year ago and he is 80% there already." Hummel gave this letter to his supervisor early in the fall, and she sent it to corporate headquarters, but more documentation was requested and, claims Hummel, Federal Express stalled in offering reinstatement to active duty.

Judge Frank notes that the parties sharply dispute the chain of events that led to Hummel's eventual termination. Hummel claims he made frequent contact with Federal Express, but that the company failed to engage in an interactive process to determine an appropriate placement for him. The company, of course, claims that it acted properly and disputes whether Hummel was "qualified" to come back to work at various times. Federal Express's case is not helped by documents turned up during discovery referring at one point to a letter having been sent to Hummel to "stall" things, and at another to an internal memo in which a Federal Express employee refers to Hummel as having "fallen through the cracks." Hummel's disability leave expired early in June 1997, and further attempts by him to return to work were unavailing.

In the fall of 1997, Hummel filed charges with the Equal Employment Opportunity Commission, claiming a violation of the employment provisions of the Americans With Disabilities Act. The EEOC determined that his claim had merit, and filed suit against Federal Express. Hummel intervened as a co-plaintiff, adding a charge of violation of the Minnesota Human Rights Act.

In the pre-trial motions, Federal Express argued that the court should not consider anything that happened more than 300 days prior to the date Hummel filed his claim, which would leave out everything that occurred in 1996. The EEOC argued that this was a "continuing violation" case. Under the "continuing violation" rule, where a complaint alleges an unlawful continuous course of conduct over a period of time, the complaint will be considered timely as long as some of the conduct occurred within the statutory time period for filing a claim. Frank found that Hummel's complaint concerned a continuing course of conduct by Federal Express beginning from the time he requested reinstatement, and so the court was not precluded from looking at what happened beginning in August 1996.

Frank rejected Federal Express's argument that Hummel and the EEOC had failed to demonstrate a possible violation of the ADA, and concluded that the parties' disagreements about what actually happened between August 1996 and Hummel's termination made it impossible to decide this case based on pre-trial motions. A trial will be necessary to determine the facts before Frank can decide whether the facts dictate a ruling for or against Federal Express. The opinion is important because the phenomenon of people with AIDS at-

tempting to return to the workplace after rebounding from disability in response to advanced medical treatments is growing. This case illustrates the problem of employers, reluctant to take back people with AIDS, and poses the question what rights people with AIDS have to be considered for reinstatement when they respond positively to medical treatment. Frank's refusal to dismiss the case, finding that Hummel's allegations are sufficient to maintain an ADA claim, underscores the importance of EEOC regulations requiring employers to make a good faith effort to find a reasonable accommodation so that employees with AIDS can return to work.

Hummel is represented by Minneapolis attorney Joni M. Thome. A.S.L.

### ANY Court of Claims Refuses to Dismiss AIDS-Phobia Case Involving Missing Needle

In a decision announced January 22, Justice Richard E. Sise of the New York Court of Claims refused to grant summary judgment to New York State on a claim by a former hospital patient for AIDS-phobia in connection with a needle stick injury she incurred at the State University Hospital at Stony Brook. *Harris v. State of New York*, 2001 WL 378449.

Susan Harris was a patient in July 1997. She had just undergone surgery and was getting into a freshly-made hospital bed. She suffered a needle stick injury as she put her hand between the sheets and her middle finger came in contact with a hypodermic needle. The nurse who was first on the scene advised Harris there was no need to keep the needle and apparently discarded it, according to the court's opinion. Later, hospital officials advised Harris to be tested for HIV immediately and be retested periodically for a year. Harris has consistently tested negative since then, but claims she incurred medical costs and suffered emotional distress as a result of this incident, and is seeking damages.

New York has followed the rule on AIDS-phobia cases that in order to state claim, an HIV-negative individual must be able to allege that they were actually exposed to a mechanism for transmission of HIV. In needle stick cases, this has usually meant a showing that the needle was previously used on an AIDS patient, or at least that there is a likelihood that the needle could pose an injury due to the surrounding circumstances. In this case, since the needle was apparently disposed of right after the injury was incurred, Justice Sise held that it was necessary for the parties to develop the surrounding circumstances so the court could determine the validity of Harris's claimed fear of contracting AIDS. Thus, it would not be appropriate to grant summary judgment on the basis of the existing record, which consists only of the parties' pleadings, the hospital incident report, the plaintiff's deposition testimony, and the deposition testimony of the

nurse who was first on the scene but did not observe the incident.

Susan Harris is represented by Donald W. Leo. A.S.L.

### Supreme Court of New South Wales, Australia, Rebuffs Challenge to Safe Needles Program

In Australia, a judge of the Supreme Court of New South Wales has dismissed a challenge to a licence granted by the government of that State to a church to operate a medically supervised injecting room. In *Kings Cross Chamber of Commerce and Tourism Inc v The Uniting Church of Australia Property Trust (NSW)* [2001] NSWSC 245, the plaintiffs tried to prevent a trial of such a project by contesting the decision under amendments to the NSW Drug Misuse and Trafficking Act which permitted a licence to be granted to operate the facility for a trial period. The amendments were inserted as part of a legislative package after a "drug summit" held by the government. The challenge was on administrative law grounds. The court found the Uniting Church Property Trust to be an appropriate legal entity to hold the licence and described the proposal by the Uniting Church to be "very precise and obviously well thought-through." It also held the decision by the Police Commissioner and Health Department to grant the licence to the Uniting Church to be not unreasonable.

In Australia, the main illegal injected drug is heroin, which is a prohibited import, possession of which is illegal under the federal Customs Act. Under the Australian Constitution, federal laws designed to "cover the field" prevail over State laws which are inconsistent. The NSW court held that the Customs Act "has no connection with the putting into effect of a precisely and carefully controlled social experiment aimed at alleviating some of the worst consequences of individual addiction to substances such as heroin."

The Chamber of Commerce is appealing, particularly on the latter question and the fact that Australia is party to the Single Convention on Narcotic Drugs 1961 which underpins the drug prohibition law of many countries. The judgment can be accessed at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2001/245.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2001/245.html). *David Buchanan*, Sydney, Australia.

### AIDS Criminal Litigation Notes

On April 2, Hennepin County, Minnesota, District Judge Gary Larson imposed a 30-year prison sentence on Gabriel L. Pugsley, age 22, an HIV+ man who pled guilty to first-degree criminal sexual conduct and other charges. Last September, Pugsley abducted and raped a 4-year-old boy in Minneapolis. The boy has not tested positive for HIV but has been taking prophylactic medication and will continue to do so until the anniversary of the rape. His mother testified that the boy suffered from nightmares and has had difficulty adjusting

to the heavy medication regime. *Star-Tribune*, April 3.

The Washington Court of Appeals ruled in *State of Washington v. Miller*, 2001 WL 333818 (April 6) (unpublished opinion) that a trial court had properly ordered that a man convicted of violating the controlled substances act by selling heroin must submit to HIV testing as part of his sentence. The man claimed on appeal that because he had not been convicted of using heroin, merely of selling it, there was no basis for ordering HIV testing. In an opinion by Justice Houghton, the court noted that the relevant statute, RCW 70.24.340, "authorizes a court to order an HIV test if it determines that the offender's crime was drug related and 'one associated with the use of hypodermic needles.' The statute does not require findings or even a determination on the record... It is evident that the delivery of heroin is a crime 'associated with the use of hypodermic needles.' In fact, Miller in his direct testimony, admitted using hypodermic needles and providing them for use in the consumption of heroin." Thus, even though he wasn't tried for using heroin, the trial court did not err in ordering the testing.

In a brief unpublished opinion, the Texas Court of Criminal Appeals in Houston rejected a claim by a defendant who pleaded no contest to several serious felony charges that "due to his physical condition and medical treatment, he was unable to comprehend the consequences of his plea." *Butler v. State of Texas*, 2001 WL 395376 (April 19). Mr. Butler was charged with aggravated sexual assault, aggravated robbery, and aggravated assault. His no contest plea earned him a combined sentence of 22 years in prison. In challenging his plea, he claimed that as a result of injuries from two auto accidents and his HIV+ status, he was taking 16 different medications at the time of his plea, and that the combined effects of all these medications had rendered him incapable of understanding the consequences of the plea. The court of appeals found that the trial court had complied with all procedural requirements for such matters, including getting both the defendant and his attorney to sign the written admonishments indicating their understanding of the plea. Under these circumstances, the court held, in the absence of any further evidence (none of which was submitted by the appellant), there was no basis to set aside the plea.

The U.S. Attorney's Office in New York City has charged Ives Health, an Oklahoma-based firm, with making false claims about a "breakthrough" AIDS medication and defrauding the Food and Drug Administration, in violation of federal conspiracy and wire fraud laws. The charges arose from Ives offering its new medication, called T-Factor, on a website beginning in February. The drug has never been approved by the FDA. *Journal Record*, April 11.

In an unpublished opinion, the Texas 14th District Court of Appeals affirmed a life sentence for Paul Edward Broussard, who was convicted of

sexually assaulting a young male relative for a period of 3 years with the victim testing HIV positive. Broussard had refused to submit to an HIV test. *Broussard v. State of Texas*, 2001 WL 422059 (April 26, 2001). On appeal, Broussard objected to one of the trial court's voir dire rulings, and alleged ineffective assistance of counsel, but the court's per curiam affirmance disposes of each of his objections by rejecting their factual bases.

Paul Leslie Hollingsworth accepted a plea bargain on charges of knowingly transmitting HIV by having unprotected sex with five different women. Hollingsworth pled to charges of aggravated assault with a deadly weapon. This was believed to be the first such case brought in Texas. Due to the advanced stage of Hollingsworth's own case of AIDS, he was given nine months' deferred adjudication, a form of probation. Prosecutors believe he wouldn't live long enough to face a jury, and so were willing to make the plea agreement. *Houston Chronicle*, April 15.

On March 27, the U.S. District Court for the Southern District of Alabama granted summary judgment to the defendants in *Bowens v. City of Atmore*, 2001 WL 395170, an action in which the survivors of Marilyn Bowens, an HIV+ substance abuser, sued prisoner authorities for wrongful death in connection with Bowens' jailhouse suicide. The opinion by Chief Judge Butler contains an extensive statement of facts about Bowens' history, as well as a detailed account of the last day of her life, during which she was in the early stages of serving a 120 day prison sentence. Butler found that qualified immunity protected the defendants, because although Bowen had a history of making suicidal statements when she was "coming down" from a cocaine high, the jailer had no way of knowing that she had ingested cocaine prior to her trial. She appeared quite normal up until shortly before she committed suicide, laughing and joking with jailers and her visitors, so the court found no basis for imputing liability to the jail officials.

An HIV+ man sentenced to 18 years in prison after pleading guilty to burglary of a residence lost his appeal of the sentence in *Mack v. State of Mississippi*, 2001 WL 410805 (Miss. Ct. App., April 24, 2001). The court found that Mack had not raised the issue of his HIV status before the trial court, and could not raise it for the first time on appeal. There is no extended discussion or analysis of this issue in the court's opinion.

The U.S. Court of Appeals for the 2nd Circuit has affirmed a determination by District Judge Naomi Reice Buchwald that as of 1997 the right of privacy of a federal prisoner to preserve the confidentiality of his HIV status had not been sufficiently well-recognized to overcome a qualified immunity defense. *Gill v. DeFrank*, 2001 WL 388057 (April 16). Gill sued medical personnel and correctional officers at Woodbourne Correctional Facility, asserting among other claims a right of privacy action concerning unauthorized disclosure of his HIV-status to non-medical personnel. Without opining about whether such a rul-

ing would apply to an incident occurring now, the court stated merely that it agreed with Judge Buchwald that the state was entitled to judgment as a matter of law. A.S.L.

### AIDS Civil Litigation Notes

A panel of the U.S. Court of Appeals for the 2nd Circuit decided that the City of New York's appeal of a decision holding that the Division of AIDS Services had failed in its legal duty to provide housing to homeless people living with AIDS was premature. *Henrietta D. v. Giuliani*, 2001 WL 343941 (April 9). District Judge Sterling Johnson issued his decision on September 18, 2000, finding that the Division had violated Title II of the Americans With Disabilities Act and Section 504 of the Rehabilitation Act. At the conclusion of his opinion, Judge Johnson appointed a U.S. magistrate to hold hearings to determine whether the City of New York was continuing to violate the pertinent statutes after the effective date of his order. The City promptly appealed, but the 2nd Circuit panel noted that the City was still in the process of negotiating with the plaintiffs about how it would comply with the decision; such agreement was to be incorporated in an order to be signed by the Magistrate. Since none of that has been concluded yet, the court raised *sua sponte* the issue of its own jurisdiction in the case and decided that the district court's decision is not yet "final" and thus not appealable. The decision below is reported at 119 F. Supp. 2d 181, 71 Soc. Sec. Rep. Serv. 458, 19 NDLR p. 86 (E.D.N.Y., Sept. 18, 2000).

The *National Law Journal* (April 19) reported on the grant of summary judgment to the Red Cross in an unusual AIDS phobia case. Bernice Mantooth was notified that she had received a blood transfusion from a donor whose blood was mistakenly used; the donor should have been rejected because the donor had served in the Peace Corps in a country where the high prevalence of HIV resulted in all persons who lived in that country being placed on a deferral list. There is no evidence that the donor or Ms. Mantooth are HIV+. However, the strain of HIV circulating in that country is not detectable using screening tests in use in the U.S., so neither Ms. Mantooth nor the donor can be sure that they are not infected. Nonetheless, the Fulton Co., Georgia, Superior Court, applying state precedents, granted summary judgment in *Mantooth v. American National Red Cross*, No. 1999-CV-13088, finding that an AIDS phobia plaintiff must present evidence of actual exposure to HIV in order to survive summary judgment. The attorney for the Red Cross, Scott Hilsen, told the *National Law Journal* that the plaintiff had made a \$1 million settlement demand prior to the court's ruling on the motion.

Marsh's Sun Fresh grocery store in Westport, Missouri, settled an HIV discrimination suit by a former deli worker by offering \$80,000 in back

pay and damages, according to an April 11 announcement by the Equal Employment Opportunity Commission, which had filed suit on behalf of Timothy Ray Williams. The settlement was reached through mediation, and the defendant never admitted violating the ADA. As part of the settlement, the store will train managers and supervisors about applicable ADA requirements, and also agreed to train workers about which diseases can and cannot be spread through food handling. *Kansas City Star*, April 12. A.S.L.

### AIDS Law & Society Notes

Whither the White House Office of National AIDS Policy? Although the Bush Administration promptly denied press reports that the Office had been disbanded, the *Washington Post* reported late in March that there was nobody on the White House staff with responsibility for this Office, which consists of a website that directs callers to a telephone extension that nobody answers. Furthermore, the 35-member Presidential Advisory Council on HIV/ AIDS, appointed by President Clinton, appeared to be in limbo as well. Chair Ron Dellums, a former Democratic Congressman, wrote to President Bush and Health and Human Services Secretary Tommy Thompson seeking clarification of the Council's status, but as of the end of March had received no reply. *Los Angeles Times*, March 31. Then the Bush Administration startled conservatives and the media by announcing the appointment of an openly-gay Republican from Wisconsin, Scott H. Evertz, to head the office. The appointment appeared to vindicate Bush's statement that he would appoint people who shared his positions on the issues, regardless of sexual orientation, as the appointee was reportedly a politically conservative Republican, whose only departures from the party's current orthodoxy are his support for the principals of non-discrimination on the basis of sexual orientation, sexually-explicit AIDS education, and needle exchange programs. Evertz has been a leader among the Log Cabin Republicans, a gay political club. He was part of a group of gay Republicans who met with Bush during the Presidential campaign. *New York Times*, April 9.

The US Department of Labor announced in the Federal Register on April 18 that it will make available \$8.5 million in grants to non-profit organizations to develop global workplace education programs to combat the spread of HIV. 2001 Daily Labor Report No. 75 (April 18).

*American Political Network* reported on-line on April 6 that the U.S. Centers for Disease Control and prevention is considering "loosening" guidelines covering "invasive procedures" that should not be performed by HIV+ health care workers. So far, the only incidents of transmission that have been at least partially verified all stem from one HIV+ dentist in Florida, prior to the issuance of current guidelines. There is, of course, controversy about allowing HIV+ health care workers

to perform a wider range of patient-contact functions, some arguing that the lack of reported cases may be due to compliance with the guidelines! The proposed guidelines would shift the focus of attention away from categorical exclusions and toward promotion of universal precautions.

According to news reports, Massachusetts has become the first state to offer full health insurance to indigent persons with HIV infection in order to provide prophylactic treatment in hopes of avoiding progression to full-blown AIDS. In other states, insurance assistance programs requiring a disability determination don't kick in prior to an individual's development of AIDS symptoms. Massachusetts is betting that the new program, while initially more costly, will in the end prove both humane and efficient by forestalling the much greater costs of treating AIDS complications. *Worcester Telegram & Gazette, Providence Journal*, April 5. A.S.L.

#### AIDS International Notes

Late in April, U.N. Secretary General Kofi Annan announced that the world organization would launch a major effort to enlist the wealthier na-

tions in supporting a major effort to fight the spread of HIV in the Third World. Annan proposed the establishment of a centralized fund that would unite disease-prevention efforts and aid in the dissemination of life-extending drugs, taking up the pharmaceutical companies on their new offers of cut-rate medications for poor countries. *Wall Street Journal*, April 25.

Predictably, South African President Thabo Mbeki's special panel of international scientists convened to determine whether HIV causes AIDS was unable to reach agreement after a year of deliberations. This is predictable because Mbeki appointed to the panel Peter Duesberg and David Rasnick, two of the leading dissidents from the consensus that otherwise prevails among most AIDS researchers. The only point upon which the panel reached agreement was on the need for further research and discussion. *The Guardian*, April 5. The lawsuit brought by a group of major international drug companies contesting any move by South Africa to circumvent patents on AIDS medications has been withdrawn, with the industry conceding the South African government's right to deal with the AIDS emergency in that nation by importing generic drugs from India or

other places. The problem, however, was that even at the prices being charged for generics, there was doubt whether the government had the will or the resources to pay for the necessary drugs to make a dent in the overwhelming situation there. ••• Unable to leave well enough alone, however, President Mbeki then stated during a television broadcast that unlike various other South African officials he would not submit to an HIV test because it would send a message that he supports a particular scientific viewpoint concerning HIV and AIDS. *Los Angeles Times*, April 25.

AIDS activists in Hong Kong expressed concern about a new blood donor form being used by the Red Cross, that would require male blood donors to identify themselves as having engaged in homosexual activity. A spokesperson for a gay group argued that the form should ask whether people are having sex without condoms, not whether they are having gay sex. A spokesperson for the Red Cross defended the form by reference to what is being done in other countries, including the U.S., where sexually active gay men are excluded from being blood donors. *South China Morning Post*, April 20. A.S.L.

## PUBLICATIONS NOTED & ANNOUNCEMENTS

### MOVEMENT JOB ANNOUNCEMENTS

**MANAGING ATTORNEY FOR PUBLIC EDUCATION:** Lambda Legal Defense seeks creative, motivated attorney to fill a new position that will shape Lambda's civil rights messages and guide the education and outreach components of its program. This non-litigating attorney will work closely with the litigating lawyers and with the Communications Department, and will supervise Lambda's Outreach Associates. Responsibilities include crafting the message/ educational "track" that accompanies Lambda cases, writing and ghostwriting educational pieces of all varieties, devising organizing tools, and conducting trainings. Applicants need excellent writing and speaking abilities, good judgment and creative ideas about how to advance change outside the courtroom, and excellent skills in working with others. Law degree necessary, but no particular legal experience or career path required. People of color and people with disabilities are especially encouraged to apply. Letter, resume, and writing sample to: Ruth Harlow, Lambda Legal Defense and Education Fund, 120 Wall Street, Suite 1500, ANY, ANY 10005. Check [www.lambdalegal.org](http://www.lambdalegal.org) for details. ••• \* **STAFF ATTORNEY/ WESTERN REGIONAL OFFICE:** Lambda Legal Defense seeks an attorney in Los Angeles for groundbreaking HIV/ gay rights work in its 10-state Western Region. Three or more years litigation experience; excellent writing/ speaking skills required. Salary depending on experience; full benefits. People of color and people with disabilities are especially encouraged to ap-

ply. Letter, resume, and writing sample to: Ruth Harlow, Lambda Legal Defense and Education Fund, 120 Wall Street, Suite 1500, ANY, ANY 10005. ••• We are informed that Lambda is still accepting applications for staff attorney positions in other offices. Check [www.lambdalegal.org](http://www.lambdalegal.org) for details.

### EVENTS

The Lesbian and Gay Law Association Foundation of Greater New York and the Committee on Lesbians and Gays in the Law of the New York County Lawyers' Association ("NYCLA") cordially invite all LeGaL members and their guests to join the Lesbian, Gay, Bisexual and Transgender community at a Reception Honoring the Openly Lesbian and Gay Members of the New York Judiciary and Introducing the 2001 Hank Henry Judicial Intern. The reception will be held on Tuesday, June 5, 2001, from 5:30 p.m. to 7:30 p.m. at the New York County Lawyers' Association, located at 14 Vesey Street (between Broadway and Church Street) in Manhattan. This reception marks the first time that these courageous jurists will be honored as a group for their accomplishments in the legal profession and their ability to transcend barriers posed by sexual orientation bias. The celebration will also serve to introduce the recipient of the 2001 Hank Henry Judicial Internship. This internship, sponsored by the LeGaL Foundation, provides law students with the opportunity to work during the summer alongside openly lesbian and gay judges. If you would like to attend the reception, please RSVP to

Thomas F. Hickey, Chair of NYCLA's Committee on Lesbians and Gays in the Law, at 212-217-2871 by May 29.

### LESBIAN & GAY & RELATED LEGAL ISSUES:

Abramson, Leslie W., *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned"*, 14 Georgetown J. Leg. Ethics 55 (Fall 2000).

Adler, Amy, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209 (March 2001).

Bell, Bernard W., *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 Fed. Comm. L. J. 191 (March 2001).

Chasen, Jerry Simon, and Elizabeth F. Schwartz, *Estate and Gift Tax Planning for Non-traditional Families*, 15-FEB Prob. & Prop. 6 (Jan/ Feb 2001).

Currah, Paisley & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 Wm. & Mary J. Women & L. 37 (Fall 2000).

Dent, George W., Jr., *The Defense of Traditional Marriage*, 15 J. of L. & Politics 581 (Fall 1999).

Ertman, Martha M., *Marriage as a Trade: Bridging the Private/ Private Distinction*, 36 Harv. Civ. Rts. — Civ. Lib. L. Rev. 79 (Winter 2001).

Flynn, Taylor, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392 (March 2001).

Frye, Phyllis Randolph, *The International Bill of Gender Rights vs. The Cider House rules: Transgender Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 Wm. & Mary J. Women & L. 133 (Fall 2000).

Glennon, Lisa, Fitzpatrick v. Sterling Housing Association, Ltd. — *An Endorsement of the Functional Family?*, 14 Int'l J. L. Policy & Fam. 226 (Dec. 2000).

Harms, Brian C., *Redefining "Moral Turpitude": A Proposal to Congress*, 15 Georgetown Immigration L.J. 259 (Winter 2001).

Harvey, Colin, and Stephen Livingstone, *Protecting the Marginalized: The Role of the European Convention on Human Rights*, 51 N. Ireland Leg. Q. 445 (Autumn 2000).

Hassel, Diana, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813 (March 2001).

Ivezaj, George, *Child Pornography on the Internet: An Examination of the International Communities Proposed Solutions for a Global Problem*, 8 Mich. St. U. - DCLJ Int'l L. 819 (Fall 1999).

Jahnke, Kari, *Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment*, 19 L. & Inequality 101 (Winter 2001).

Juliano, Ann, and Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. 548 (March 2001).

Keywood, Kirsty, *More than a Woman? Embodiment and Sexual Difference in Medical Law*, 8 Feminist Legal Studies 319 (2000).

Laabs, Audra Elizabeth, *Lesbian ART*, 19 L. & Inequality 65 (Winter 2001).

Lehman, Brian, *Why Title VII Should Prohibit All Workplace Sexual Harassment*, 12 Yale J. L. & Feminism 225 (2000).

Levi, Jennifer, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 Wm. & Mary J. Women & L. 5 (Fall 2000).

Liddy, Jane, *Article 8: The Pace of Change*, 51 N. Ireland Leg. Q. 397 (Autumn 2000) (special issue about Human Rights Law in Europe).

Munst, Agnes Senganata, *Lesbians' Contribution to the Autonomous Women's Movement in (West-) Germany, Exemplified by a State Capital City*, 23 Women's Studies Int'l Forum 601 (Sept/Oct 2000).

Pieterse, Marius, *In loco parentis: Third Party Parenting Rights in South Africa*, 2000 Stellenbosch L. Rev. 324.

Strasser, Mark, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 Ariz. L. Rev. 935 (Winter 2000).

Varona, Anthony E., and Jeffrey Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on*

*Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67 (Fall 2000).

Wright, R. George, *Traces of Violence: Gadammer, Habermas, and the Hate Speech Problem*, 76 Chi-Kent L. Rev. 991 (2000) (part of Symposium on Philosophical Hermeneutics and Critical Legal Theory).

#### Student Notes and Comments:

Adjin-Tettey, Elizabeth, *Baker v. Canada (Minister of Citizenship and Immigration)*, 12 Canadian J. of Women & L. 454 (2000).

Anderson, Thomas G., *Comment on the Report of the British Columbia Law Institute on Recognition of Spousal and Family Status*, 12 Canadian J. Women & L. 439 (2000).

Bell, Alessia, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 Harv. Civ. Rts. Civ. Lib. L. Rev. 225 (Winter 2001).

Bell, Jodi L., *Prohibiting Adoption by Same-Sex Couples: Is It in the "Best Interest of the Child?"* 49 Drake L. Rev. 345 (2001).

Coon, Laura L., *Employment Discrimination by Religious Institutions: Limiting the Sanctuary to Religion-Based Employment Decisions*, 54 Vanderbilt L. Rev. 481 (March 2001).

Griffin, Emily V., *"Relations Stop Nowhere": ERLISA Preemption of San Francisco's Domestic Partner Ordinance*, 89 Cal. L. Rev. 459 (March 2001).

Howell, Alison E., *Loki Surfs for Porn: An Analysis of the Discard the Internet May Cause in Obscenity Law*, 22 Comm/ Ent 509 (Spring/Summer 2000).

Levinson, Jeffrey, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 Am. Crim. L. Rev. 147 (Winter 2001).

Lin, Alvin C., *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 Georgetown L. J. 719 (March 2001).

McCoy, Scott D., *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 Cardozo L. Rev. 629 (Jan. 2001).

Pena, Melissa J., *The Role of Appellate Courts in Domestic Violence Cases and the Prospect of a New Partner Abuse Cause of Action*, 20 Rev. of Litigation 503 (Spring 2001).

Thorp, Rondi, *City of Erie v. Pap's A.M.: The First Amendment: Wounded in the War for Freedom of Expression*, 36 Gonzaga L. Rev. 183 (2000/2001).

Vogel, Jill S., *Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After Davis v. Monroe County Board of Education*, 37 Houston L. Rev. 1525 (Winter 2000).

Wethington, Jennifer L., *Constitutional Law — Commerce Clause — Violence Against Women Act's Civil Rights Remedy Exceeds Congress's Powers to Regulate Interstate Commerce*. United

States v. Morrison, 120 S. Ct. 1740 (2000), 23 U. Ark. Little Rock L. Rev. 485 (Winter 2001).

Yamagami, Donald S., *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 Santa Clara L. Rev. 547 (2001).

#### Specially Noted:

Volume 7, No. 1 of the William & Mary Journal of Women and the Law features a symposium titled "(De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law." Individual articles are noted above.

The *New York Times Sunday Magazine* of April 1 devoted a substantial article by Eyal Press to the case of *Pedreira v. Kentucky Baptist Home*, in which the ACLU is representing a lesbian social worker who was discharged when her employer, most of whose income is derived from state funds, discovered that she was a lesbian. The employer claims a right to impose a religious test for employment, while the plaintiff argues that because the employer's revenue is derived overwhelmingly from the government, it is precluded from posing such a test. The article discusses the case from the perspective of issues raised by the Bush Administration's proposal to facilitate an increase of federal funding for "faith-based" social service agencies, the author questioning whether these federal funds will be allowed to be used in discriminatory ways by such organizations.

Vol. 9, No. 1 of the American University Journal of Gender, Social Policy & the Law includes the First Annual Peter Cicchino Awards for Outstanding Advocacy in the Public Interest Panel Discussion. Mr. Cicchino, an openly-gay professor at American University, participated in this panel discussion shortly before his death.

Gay attorney Michael Nava of San Francisco has published the last of his series of mystery novels focusing on openly-gay attorney Henry Rios. Titled *Rag and Bone*, the book has been favorably reviewed in several major newspapers, including the *New York Times Sunday Book Review*. In an afterword to the novel, Nava reports that this will be his last mystery novel. One hopes that he will continue to write in a non-mystery vein.

#### AIDS & RELATED LEGAL ISSUES:

Bodensteiner, Ivan E., and Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era*, 22 Berkeley J. of Emp. & Lab. L. 99 (2001).

Burris, Scott (ed.), *Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on Emerging Policy and Law in the United States (American Bar Association AIDS Coordinating Committee, 2001)*.

Fernandez, M. Isabel et al., for the Prenatal Guidelines Evaluation Project, *Acceptance of HIV Testing During Prenatal Care*, 115 Public Health Reports No. 5, 448 (Sept/Oct 2000).

Gic, Judith Ann, and Robert E. McKnight, *HIV and AIDS*, 47 *Med. Trial Tech. Q.* 247 (2001).

Marcus, Allan M., *Interpreting Employee Benefits: The ADA and Insurance After a Decade of Litigation*, 43 *For the Defense No. 2*, 25 (Feb. 2001).

Mayss, Abla, *Drug-Testing on Seropositive Pregnant Women in the Developing World: Moral and Legal Implications*, 4 *Med. L. Int'l* 183 (2000).

Ravitch, Frank S., and Marsha B. Freeman, *The Americans With "Certain" Disabilities Act: Title I of the ADA and the Supreme Court's Result Oriented Jurisprudence*, 77 *Denver U. L. Rev.* 119 (1999).

Wojcik, Mark E., *Discrimination After Death*, 53 *Okla. L. Rev.* 389 (Fall 2000) (discriminatory practices of funeral homes with respect to services for people who died from AIDS).

Wong, Edward, *Migration and Health: Asian-Americans and AIDS*, 29 *Migrationworld No. 1-2*, 25 (2001).

#### Student Notes & Comments:

Bisordi, John, "I Can't Work. Just Kidding, I Can.": *The Effects That Applying for Disability Benefits Have on an ADA Claim*, 45 *Villanova L. Rev.* 627 (2000).

Heuvel, Douglas C., *Employment Discrimination - Americans With Disabilities Act - Ninth Circuit Holds That the Direct Threat Defense is Not Available When an Employee Poses a Threat to His Own Health or Safety - Echazabal v. Chevron USA, Inc.*, 226 *F.3d 1063 (9th Cir. 2000)*, 54 *SMU L. Rev.* 447 (Winter 2001).

Tarwater, Jeremy R., *The Tuberculosis & HIV Debate in Immigration Law: Critical Flaws in United States Academic Anti-Exclusion Arguments*, 15 *Georgetown Immigration L. J.* 357 (Winter 2001).

Testerman, Andrew C., *Sutton v. United Air Lines, Inc.: The Supreme Court Applies "Corrective" and "Mitigating" Common Sense to the ADA*, 77 *Denver U. L. Rev.* 165 (1999).

#### Specially Noted:

The Social Security Administration, in collaboration with the Department of Justice and the Equal Employment Opportunity Commission, has published *A Guide for People with Disabilities Seeking Employment*. This publication explains the legal rights under the Americans With Disabilities Act of people who are receiving Social Security disability benefits but seek to participate in the workplace. Copies can be obtained from the websites of all three agencies. The EEOC's website address is [www.eeoc.gov](http://www.eeoc.gov).

#### 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.