RHODE ISLAND SUPREME COURT RULES FOR LESBIAN CO-PARENT VISITATION RIGHTS

In a 3–2 ruling, the Rhode Island Supreme Court held on September 25 that the state's Family Court has jurisdiction to deal with a claim for child visitation by a lesbian co-parent. Adopting the approach taken by the New Jersey Supreme Court in *V.C. v. M.J.B.*, 748 A. 2d 539 (N.J. 2000) and the Wisconsin Supreme Court in *Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) for distinguishing between a genuine co-parent and other potential third party visitation claimants, the Court ruled that Maureen Rubano should be treated as a de facto parent in this case, entitled to a judicial determination of visitation rights under the best interest of the child standard. *Rubano v. DiCenzo*, No. 97–604–A. The court found the U.S. Supreme Court's recent *Troxel v. Granville* decision not to constitute a bar to this result.

Rubano and Concetta DiCenzo had been partners for three years, living in Massachusetts, when they decided to have and raise a child, according to the majority opinion by Justice Flanders. DiCenzo obtained sperm from an anonymous donor, and bore their son in 1992. His last name was listed on his birth certificate as Rubano-DiCenzo, and the printed birth announcements sent out by the couple listed both as parents. Although co-parent adoption is lawful in Massachusetts, Rubano did not adopt the child. (According to the dissent, she wanted to do so but DiCenzo refused permission.) The women began to rise the boy together, but their own relationship deteriorated, and in 1996 they separated, with DiCenzo and the child moving to Rhode Island.

At first, Rubano and DiCenzo worked out an informal agreement on visitation, but this schedule "collapsed in the face of DiCenzo's resistance," according to the majority opinion. (The dissent states that DiCenzo became concerned that the visitation was unsettling for her son because of his behavior after the visits.) Rubano filed an action in the Family Court in Rhode Island seeking to establish her "de facto parental status" and to get a court-ordered visitation schedule. However, the parties were able to negotiate a mutually satisfactory arrangement, which was submitted to the court for its approval. Under the agreement, Rubano waived any right to assert her parental status, in exchange for an agreed-upon visitation schedule. The Family Court judge accepted the agreement and embodied it in a court order. (The dissent makes much of a colloquy between the judge and counsel in which the judge seemed to disclaim any responsibility for the content of the order, agreeing to make it because it was what the parties had agreed to.)

However, soon after the agreement was made, DiCenzo again blocked Rubano's visits, having again concluded that the visits were bad for the child. Rubano went back to the Family Court, initiating a contempt proceeding. DiCenzo argued that the Family Court lacked jurisdiction over the dispute, and that the order was not enforceable. Rubano argued for jurisdiction, and the perplexed Family Court certified three questions to the Supreme Court, hoping for guidance. The first question was whether the court had jurisdiction under G.L. sec. 8–10–3, which gives the Family Court jurisdiction to hear "equitable matters arising out of the family relationship." The second question asked whether the state constitution would require such jurisdiction, under a provision ensuring that every person in the state have recourse to the law for redress of all injuries or wrongs, in case the court answered the first question in the negative. Finally, the third question was whether, if the Family Court had jurisdiction under sec. 8–10–3, a person in Rubano's position would have standing to seek visitation.

Justice Flanders' opinion for the majority addressed these issues seriatim. In the first part of the opinion, Flanders concluded that the part of sec. 8–10–3 specified by the Family Court in its certified question does not confer general equitable jurisdiction in all family matters to the Family Court. Giving a fairly rigorous construction to the statutory language, Flanders concluded that this section confers jurisdiction only in the context of the filing of petitions for divorce, bed and board and separate maintenance, as the statute literally says, and that the more general reference to equitable matters arising out of the family relationship, according to the grammar of the provision, was not intended to expand jurisdiction beyond that subject matter. Having concluded that sec. 8–10–3 did not apply, the court had no occasion to decide whether a same-sex couple together with the biological offspring of one of them would be considered to have a "family relationship" as the term is used in that statute.

Turning to the state constitutional issue, Flanders asserted that there would be no violation of the state constitution so long as some basis could be found in Rhode Island jurisdictional laws to give Rubano access to an appropriate forum to deal with her visitation claim. Flanders found such a basis in G.L. 1956 sec. 15–8–26, a statute based on the Uniform Paternity Act, which was enacted to deal with disputes over paternity and maternity in the context of child support. Flanders noted that, among other things, this statute conferred on the Family Court the authority to determine "the existence or nonexistence of a mother and child relationship," because she is an "interested party" within the meaning of the statute (which authorizes an "interested party" to bring such an action). Alternatively, turning back to 8–10–3, Flanders found another source of jurisdiction in subsection (1), which gives the Family Court jurisdiction to hear "those matters relating to adults who shall be involved with paternity of children born out of wedlock," deciding to construe the term "paternity," not otherwise defined in the statute, as standing more broadly for parental status. Flanders also found support for jurisdiction in a past Rhode Island case allowing an estoppel argument to be raised in the context of a visitation claim by a de facto parent in a non-marital heterosexual relationship.

These turns in the analysis infuriated dissenting Justice Bourcier, with whom Chief Justice Weisberger joined. Bourcier, in addition to disagreeing with some of the majority's characterization of the facts, as noted above, found this construction of the jurisdictional statutes to be unsupportable, having the result of "recognizing for the first time in this jurisdiction or in any other jurisdiction that a man can become pregnant after intercourse with a woman and then require the woman to pay for his hospital and delivery expenses." (One would hope that a woman who found herself in such circumstances would be eager to pick up the costs of observing the first male live birth in human history…)

Flanders also noted that an action to enforce the women's agreement might have been brought in the regular trial courts, as opposed to the Family Court, although there might be some question as to the general enforceability of such an agreement concerning

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visitation with a child in the absence of the kind of best interest of the child inquiry that the Family Court is better equipped to conduct.

Flanders devoted the rest of the opinion's attention toward this second question to dealing with some of the complications that could ensue from recognizing jurisdiction in this case, and here found guidance from the New Jersey and Wisconsin cases mentioned above in setting out a multi-factorial test for determining whether a particular petitioner should be deemed to have standing to bring a custody or visitation claim with respect to a child to whom she is not related by birth or adoption. Quoting from the New Jersey case, Flanders approved the requirements that the legal parent have initially consented to and fostered the relationship between the child and the claimant, that the "third party" lived with the child, performed parental functions for the child to a significant degree, and that a parent-child bond had developed (i.e., the relationship had lasted long enough and was of a quality that could be so described).

Flanders also relied on these factors to deal with the federal constitutional issues that might be raised under *Troxel v. Granville*, 120 S.Ct. 2054 (June 5, 2000), in which the U.S. Supreme Court struck down a state law that appeared to authorize any person, without distinction, to seek custody or visitation of a child over the objection of the child's genetic parent. Flanders insisted that what the Rhode Island court was doing here did not violate the rights identified in *Troxel*, because standing would be limited to those who could demonstrate their de facto parental status along the lines set out in the New Jersey decision.

Finally, Flanders accepted Rubano's further argument that DiCenzo's prior agreement to negotiate a visitation schedule and have it incorporated in a court order should serve to raise an estoppel against the argument that Rubano, as a "non-biological" parent, lacked standing to seek visitation.

Turning to the third question, Flanders concluded that the court would not have to answer it, in light of its answers to the previous two questions.

Implicit in the court's discussion was the conclusion that Rubano satisfies the de facto parental test the court adopts as a prerequisite for standing, but in the procedural posture of the case, the court made no finding as to the best interest, so the case had to be remanded for that purpose. The majority and the dissent took polar opposite positions on the status of the original court ordered visitation, the majority characterizing it as a best interest determination (or at least ratification) by the Family Court, while the dissent seemed to view the Family Court's adoption of the order as more of a ministerial function, not representing an actual judgment on the issue. Although it is not entirely clear in light of the procedural posture of the case, the concluding paragraph of the majority opinion might be construed to hold that DiCenzo is equitably estopped from contesting Rubano's visitation rights, having agreed to visitation in the earlier proceeding.

The case attracted considerable attention from lesbian and gay rights groups and public interest and professional organizations concerned with family issues, resulting in a joint amicus brief organized and co-authored by Gay & Lesbian Advocates & Defenders of Boston. A.S.L.

LESBIAN/GAY LEGAL NEWS

Ninth Circuit Panel Splits The Circuits By Taking Down Teacher's Anti-Gay Bulletin Board

In *Downs v. Los Angeles Unified School District*, 2000 WL 1264599 (9th Cir. Sep. 7, 2000), a Ninth Circuit Panel (Trott, Fernandez and McKeown, Circuit Judges) affirmed the U.S. District Court for the Central District of California's grant of summary judgment to defendant, Los Angeles Unified School District (LAUSD), holding that the First Amendment does not compel a public high school to share the podium with a teacher with antagonistic and contrary views when the school speaks to its own constituents on the subject of how students should behave towards each other while in school.

Robert Downs is a teacher at Doris S. Leichman High School. Downs filed suit against LAUSD on November 30, 1998, pursuant to 42 U.S.C. § 1983 and the United States and California constitutions, seeking a permanent injunction and other relief against the LAUSD. In his lawsuit, Downs alleged that LAUSD, through its officers and employees, violated his constitutional right to freedom of speech by removing, and by asking Downs to remove, competing material that Downs had posted in the school in response to material posted on bulletin boards set up by Leichman High staff for the purpose of recognizing Gay and Lesbian Awareness Month. On March 24, 1999, LAUSD moved for summary judgment, which the district court denied concluding that the factual record was not ripe. The district court also concluded that Leichman High's bulletin boards constituted a nonpublic forum, and that the case fit within the "school-sponsored speech" rubric established by the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Under *Hazelwood*, the district court determined that the applicable First Amendment test was whether LAUSD's actions were "reasonably related to legitimate pedagogical concerns." Following some development of the record, the district court granted LAUSD's second motion for summary judgment filed on July 1, 1999. The court determined that "tolerance" was a legitimate pedagogical concern, and that no reasonable fact-finder could find that LAUSD exceeded its broad discretion in implementing its legitimate pedagogical approach.

Moreover, the district court rejected Downs's argument that a school's restriction on speech "reasonably related to legitimate pedagogical concerns" must still be viewpoint-neutral, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (recognizing that the traditional discussions of viewpoint discrimination do not fit well into the analysis of a school's decision to prohibit student or teacher speech related to the curriculum). The court analogized prohibiting a teacher from posting racist material on a bulletin board designated for Black History Month with prohibiting Downs from posting intolerant materials during Gay and Lesbian Awareness Month. The court also indicated, in dicta, its belief that even if viewpoint neutrality principles were implicated in the case, LAUSD had not advanced the gay and lesbian lifestyle, but had instead engaged in the legitimate pedagogical interest of teaching tolerance. On appeal, Downs argued that the district court improperly defined and characterized the forum to which he sought access, and thereby employed an incorrect legal standard in deciding the motion for summary judgment.

On April 11, 1997, LAUSD issued Memorandum No. 111, titled "Gay and Lesbian Awareness Month,70 to all schools and offices in the district. Memorandum No. 111 referred to a May 18, 1992, formal Board of Education resolution designating June of each year as "a time to focus on gay and lesbian issues," and noting that the resolution was passed to support 69educating for diversity." The Memorandum also specified that the District's multicultural and human relations education policy included the expectations that: "Each student has equal access to

a quality education and an opportunity to participate fully in the academic and social activities of the school," and "School policies and practices act to foster a climate that reduces fears related to difference and deters name-calling and acts of violence or threats motivated by hate and bigotry."

The Memorandum informed the schools and offices that the "Office of Intergroup Relations and the Multicultural Unity, Divisions of Instructional Services, and the Gay and Lesbian Education Commission" would provide posters and materials in support of Gay and Lesbian Awareness Month. "In recognition that some of the materials [could] be controversial in nature," the Memorandum provided that "the representations on the posters" were reviewed by, among other groups, the "Parent Community Services Branch." Pursuant to Memorandum No. 111, at some time in late May or early June 1997, several Leichman High staff members created a bulletin board inside the school building on which faculty and staff could post materials related to Gay and Lesbian Awareness Month in addition to the materials provided by the district office.

Materials needed no approval before being posted on the Gay and Lesbian bulletin boards, but were subject to the oversight of the school principal, who had ultimate authority within the school over the content of the boards. This was the actual practice and policy at Leichman High. There were two different principals, Donna Olmsted from January 1993 to June 1997, and Joseph Marino from July 1997 to at least the beginning of this litigation. As school principals, both were accountable to the school board, which itself was made up of publicly elected officials.

Downs objected to the recognition of Gay and Lesbian Awareness Month at Leichman High. In June of 1997, Downs created his own bulletin board across the hall from his classroom titled "Testing Tolerance." In June of 1998, in response to postings on other Gay and Lesbian Awareness bulletin boards within the school, Downs created a competing bulletin board titled "Redefining the Family." Downs's materials included "information" relaying religious condemnation of homosexuality, Biblical verses, references to anti-sodomy laws, and other anti-homosexual sentiments.

In both 1997 and 1998, after other members of the school community complained that the materials were "disrespectful," "offensive," "upsetting," "objectionable," and "derogatory," Olmsted and Marino either removed Downs's materials or ordered Downs to remove them himself. Marino testified that he considered Downs's material inconsistent with the purposes of Gay and Lesbian Awareness month because he "did not see [Downs's] activity supporting tolerance [and] did not see [Downs's] material supporting diversity."

Leading up to the 1997 removal of Downs's materials, Olmsted, Downs, and LAUSD's counsel engaged in both a written and verbal dispute over the bulletin board issue. Downs was informed: 1) that his materials were against Board policy [against discrimination on the grounds of sexual orientation] and had nothing to do with school work, student work or District approved information; 2) that he could create a bulletin board with the understanding that he had the right of free speech as an individual, provided he was not being discriminatory and maintained a separation of church and state in his statements; and 3) that the bulletin boards were not "free speech zones," and that "for this reason, Olmsted as the principal of the school [was] the proper official to make certain that the bulletin boards [were] used appropriately." Marino, the subsequent principal, followed this pattern of communication in 1998 with a similar memorandum letter.

From these facts, the Ninth Circuit concluded that the bulletin boards contained only "government speech" and that Downs had no First Amendment right to dictate or to contribute to the content of that speech. The Court further concluded that the district court's analysis of the issue it addressed was correct and affirmed on slightly different grounds. Different from the district court's analysis, which followed *Hazelwood*, the Ninth Circuit noted another related case, *Planned Parenthood v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) (school "imprimatur" case incorporating viewpoint neutrality analysis into nonpublic forum, school-sponsored speech cases in the Ninth Circuit). From here, the Ninth Circuit concluded that both cases were tangential because this case was one in which the government itself was speaking rather than one which involved speech that might "bear the imprimatur" of the school or be perceived by outside individuals as "school-sponsored." The bulletin boards were a manifestation of the school board's policy to promote tolerance and consequently government speech.

The Ninth Circuit found that Olmsted and Marino had authority over the bulletin boards' content at all times, and thus the government speech (whether through the mouth of Leichman High, LAUSD, or the school board). Moreover, this case was distinguishable from "school-sponsored" and "imprimatur" speech cases because the school district and the school board were in fact responsible for 1) the recognition of Gay and Lesbian Awareness month and 2) the bulletin boards through school principal's oversight. Thus this case involved government speech in a nonpublic forum.

As such, the Ninth Circuit held that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist. As applied here, the First Amendment allows LAUSD to decide that Downs may not speak as its representative. When the State is the speaker, it may make content-based choices. The Court went on the postulate that were "[it] to invoke the Constitution to protect Downs's ability to make his voice a part of the voice of the government entity he served, Downs would be able to do to the government what the government could not do to Downs: compel it to embrace a viewpoint. *See Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573–74 (1995) (holding that the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message).

Furthermore, the Ninth Circuit determined that its decision was consistent with cases holding that school teachers have no First Amendment right to influence curriculum as they so choose, perceiving that whether the bulletin boards by themselves may be characterized as part of the school district's curriculum is unimportant because curriculum is only one outlet of a school district's expression of its policy. Also, the Court noted that in order for a speaker to have the opportunity to speak as the government, the speaker must gain favor with the populace and survive the electoral process. The LAUSD school board was elected by the public and therefore spoke for the school district through its adopted policies. Community influences did not end with the ballot box, but continued through publicly held school board meetings at which parents and other interested parties could express satisfaction or dissatisfaction with the school board's policies or "speech." Memorandum No. 111 clearly reflected that community groups had participated in a review of posters and materials LAUSD sent to each of the schools for Gay and Lesbian Awareness month.

Finally, the Court affirmatively joined the Third and First Circuits against the Sixth and Eleventh Circuits on the question of whether a school district may formulate a message without the constraint of viewpoint neutrality, implicating the Supreme Court's ruling in

Hazelwood. *Compare. C.H. v. Oliva*, 197 F.3d 63 (3d Cir. 1999) (viewpoint neutrality is not required of educators), reh'g en banc granted, opinion vacated, 197 F.3d 63 (3d Cir. 1999), and *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), with *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999) (viewpoint neutrality is required of educators), and *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989).

The Ninth Circuit's ruling in this case involving gay and lesbian issues could represent a stand against anti-homosexual hate speech in whatever guise it takes. However, its decision to abandon the district court's interpretation of *Hazelwood* whether the speech had legitimate pedagogical concerns transcends the gay and lesbian aspect and further complicates the idea of viewpoint neutrality as applied to school-sponsored speech. *Leo L. Wong*

Seventh Circuit Court Rejects Gay Plaintiff's Title VII Retaliation Claim

In rejecting the Title VII same-sex harassment and retaliatory termination case brought by a gay plaintiff, the United States Court of Appeals for the Seventh Circuit adopted the rationale that if a plaintiff is harassed based on his sexual orientation, that harassment excludes the possibility that the harassment was "based on sex." *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*, 2000 WL 1202287 (Aug. 24, 2000).

Nurse Gary Hamner's written grievance reporting Medical Director Joseph Edwards' harassment resulted, after investigation, in a letter from Executive Director Lefkovitz on October 15, 1996, stating that Edwards acknowledged his "irreverent humor" as the basis for Hamner's homophobia complaint and that Edwards would be more mindful of Hamner's concerns in future. On October 8th, Hamner had admitted a patient on orders from Edwards, but the two failed to discuss the patient's resuscitation code status. A member of the patient's family provided Hamner with a document indicating that the patient had a code status of C at the nursing home where the patient resided, so Hamner wrote "Code C: To be approved by Dr." on the Physician Order Sheet. Edwards reported that Hamner willfully falsified the Order Sheet; Hamner was fired on October 18th.

Hamner sued the hospital, alleging that Edwards harassed him because of his sex and sexual orientation, and that the hospital fired him in retaliation for filing the grievance. The parties stipulated to dismiss the sexual harassment claim. The district court then granted the hospital's motion for judgement as a matter of law on the retaliation claim, on the argument that Hamner failed to establish the requisite element that he opposed (or had a reasonable belief that he was opposing) an employment practice unlawful under Title VII.

Circuit Judge Daniel Manion, writing for the court, affirmed the district court's decision. Manion cited a 1984 case, *Ulane* (which involved a transsexual airline pilot), in narrowly interpreting the "because of sex" language that the Supreme Court construed in the 1998 *Oncale* decision to prohibit discrimination solely based on the genitalia possessed by the victim. (Compare e.g. the reading of *Oncale* in *Samborski v. West Valley Nuclear Services Co, Inc.*,1999 WL1293351 (W.D.N.Y.): "The inquiry demanded is 'careful consideration of the social context in which particular behavior occurs and is experienced by its target,' and a determination whether discrimination occurred because of sex.")

Contrary to Hamner's complaint about Edwards' "sexual innuendos," and to Lefkovitz's testimony that Hamner had alleged that Edwards discriminated against him on the basis of "his sex and sexuality," Judge Manion reasoned that the discussion of Edwards' homophobia precludes a jury from finding that Edwards' discriminatory actions were because of sex. "The alleged harassment, and Hamner's complaints about it, were based exclusively on his homosexuality," Manion wrote. "Hamner... believed that Edwards's gestures evinced his 'homophobia' and thus pertained only to Hamner's sexual orientation, and not to his sex." . Manion characterized Hamner's contention that there is no difference between his sex and his sexual orientation as not objectively reasonable as a matter of law. Manion dismissed Hamner's contention that he reasonably believed that Edwards's harassment was based on sex because his gestures (lisping and flipping his wrists) were specifically intimidating to men and their manhood, but not to women, including homosexual women, characterizing the contention as a new argument on appeal rather than a "sex-plus" elaboration of the basis of Hamner's belief. A footnote to the opinion allows that "the record may have supported Hamner's reasonable belief claim if [it] demonstrated that Edwards disapproved of men in the nursing profession, and manifested his disapproval by perceiving all male nurses to be homosexuals, and harassed them accordingly, while female nurses were not subjected to such harassment." *Mark Major*

Federal Court Rejects Censorship of Gay Children's Books Under City Council Resolution

Religious conservatives trying to keep lesbian and gay children's books out of the hands of minors in Wichita Falls, Texas, suffered a setback September 20 when U.S. District Judge Jerry Buchmeyer (N.D. Tex.) ruled in *Sund v. City of Wichita Falls*, Civ. Action No. 7:99–CV–155–R, that a city council resolution on the subject violates the federal and state constitutions.

The Wichita Falls library purchased two copies each of *Heather Has Two Mommies*, by Lea Newman, and *Daddy's Roommate*, by Michael Willhoite, at the request of library patrons in September 1997. The books were placed in the children's collection, available on open shelves for children using the library to read and check out. These books, both of which have won awards, depict children of gay parents going about normal everyday activities, as a way of teaching children about family diversity. They have become targets for censorship by conservative religious leaders and parents groups. For a time there was no particular controversy about these purchases, but then in May 1998, the Reverend Robert Jeffress of the First Baptist Church in Wichita checked out both copies of both books and refused to return them, objecting to their "homosexual message." Jeffres destroyed the books, but paid the library $54, their cost, but demanded that replacements not be purchased. The library administrator, Linda Hughes, did buy replacement copies and placed them back in the children's section of the library.

Jeffres was unhappy and conferred with a city council member, a lawyer named William Altman, who drafted and introduced a resolution at a city council meeting, which was passed, providing that if at least 300 library-card-holding adults petitioned the library to remove a book from the children's section, it would have to be removed and placed in the adult area, to which children are not routinely given access without making a special request. A book so designated could not be moved back to the children's section without a vote of the city council, and the item would only get to the council of town officials decided to place it before the council. This resolution passed by a vote of 4–3 at a packed meeting full of religious demonstrators waving banners and distributing religious pamphlets.

Several parents joined together to bring suit against the city, claiming that the resolution and its implementation violated the First Amendment and a Texas constitutional provision barring the delegation of government authority to private citizens. Agreeing with the plaintiffs, Judge Buchmeyer found unconstitutional censorship and a violation of the delegation provision.

Buchmeyer found that the Altman Resolution, "both on its face and as applied to the removal of *Heather Has Two Mommies* and *Daddy's Roommate* from the children's area of the

Library to the adult section, violates Plaintiffs' federal and state constitutional rights to receive information. The Resolution and the Book removals burden fully-protected speech on the basis of content and viewpoint and they therefore cannot stand." Lawyer Altman had tried, craftily, to avoid censorship charges by requiring the books to be shifted from one section of the library to another, rather than to require them to be removed entirely. But this stratagem did not impress Buchmeyer, who concluded, "When opponents of the Books failed to censor the Books outright, they sought to accomplish indirectly what they could not do directly," noting that a child browsing in the library would not find a book placed in the adult section, and even that parents browsing for books for their children were unlikely to find these books.

"By conferring upon any 300 patrons the power to remove from the children's section any books they find objectionable, the Altman Resolution unconstitutionally confers a 'heckler's veto' on the complaining patrons, effectively permitting them to veto lawful, fully-protected expression simply because of their adverse reaction to it," he wrote. Furthermore, the defendants' argument that they were not exercising a veto because the books would still be available at the library missed the point of the Supreme Court precedents: "Even where a regulation does not silence speech altogether, the Supreme Court has given 'the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," said Buchmeyer, citing a string of Supreme Court decisions.

In addition, by requiring the removal to be carried out immediately upon receiving the petition, without any public hearing or even an opportunity to verify the legitimacy of the signatures, the Resolution clearly violated the Texas ban on delegation of a governmental function to private citizens, since the selection of books for the public library is clearly a governmental function.

A local news report published in the *Dallas Morning News* on Sept. 24 indicated that the Wichita Falls City Council's leaders have indicated they don't plan to appeal the ruling. A.S.L.

Federal District Court Allows Anti-Gay Harassment Suit Under Title IX

In the September 2000 issue of the Law Notes, we reported on a July decision (Ray v. Antioch Unified School District, 2000 WL 1048514) in which a California federal magistrate judge refused to dismiss a Title IX claim brought against a school district by an 8th grade student who claimed he was subjected to harassment by other students due to his perceived sexual orientation. Following on the heels of that decision, U.S. District Judge Tunheim of Minnesota has become the first district judge to issue a similar ruling, refusing to dismiss a lawsuit brought by a high-school student who alleges he was forced to transfer to another school district because of eleven years of unrelenting harassment by his classmates. *Montgomery v. Independent School District No. 709*, 2000 WL 1233063 (Aug. 23). The court ruled that the plaintiff may present his Title IX, Equal Protection and state anti-discrimination law claims to a jury.

Jesse Montgomery attended three schools in Minnesota's District 709 from kindergarten through tenth grade. He alleges, and the school district does not dispute, that during that time he experienced "severe and unrelenting" teasing and abuse. According to Montgomery's complaint, he was subjected to verbal taunts by other students (including "faggot", "Jessica", "fairy", "homo", "femme boy", "girl" and "queer"), which escalated to include physical violence beginning in the sixth grade. Students repeatedly punched him and kicked him, destroyed his personal property, and threw objects at him. The harassment took on a more sexual nature in ninth and tenth grades, when fellow male classmates began to grab at his legs, inner thighs, chest, crotch, buttocks and genitals. On one occasion a student threw Montgomery to the ground and pretending to rape him anally. Another student sat on Montgomery's lap and bounced, pretending to have sex with him, while other students watched and laughed.

Montgomery alleges that both he and his parents repeatedly complained to various school officials, including teachers, bus drivers, principals, school counselors, and cafeteria monitors. Notwithstanding disciplinary measures imposed against offending students by the schools (which generally were limited to verbal reprimands and forced apologies, but which on at least one occasion included suspending a student for five days), the harassment against Montgomery continued unabated. Montgomery avoided going to the school cafeteria and the school bathroom except in emergency situations, stopped using the school bus, avoided participating in intramural sports, and sometimes stayed home from school in order to avoid the abuse by his classmates. Eventually, after Montgomery finished the tenth grade, he transferred to another school district to finish high school.

The court dismissed the school district's motion for judgment on the pleadings and for summary judgment, ruling that the facts presented by the plaintiff were sufficient to state a claim under both federal and state law.

One of the most notable sections of the court's lengthy decision concerned its analysis of the plaintiff's Title IX cause of action. In 1999, the United States Supreme Court ruled that Title IX was available to redress claims that school officials were deliberately indifferent to complaints of student-on-student sexual harassment, where the harassment was so severe that it interfered with the victim's access to education opportunities and benefits. Although the Supreme Court never addressed whether Title IX applies to sexual harassment where the harasser is the same gender as the victim, Judge Tunheim concluded that it did, drawing from two elements of Title VII jurisprudence. First, the court cited the United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and explained that same-sex harassment is actionable under Title IX, as it is under Title VII, if a plaintiff can demonstrate that she or he was harassed because of her or his "sex" (as opposed to her or his "sexual orientation," since sexual orientation is not a protected class under Title VII or Title IX). Next, citing *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the court explained that sex discrimination can be based on conduct motivated by gender stereotyping. In the present case, the court emphasized the fact that the alleged harassment against Montgomery began as early as in kindergarten, when the it was "highly unlikely" that he openly identified himself as gay or engaged in any homosexual conduct. "It is much more probable," said Judge Tunheim, "that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy." The court therefore ruled that Montgomery's complaint stated a viable cause of action under Title IX based on sex discrimination because the alleged harassment was motivated by perceptions that the plaintiff flouted male gender roles. The court will allow a jury to decide whether the school district was deliberately indifferent to Montgomery's complaints.

Equally significant was the court's ruling concerning Montgomery's Equal Protection claims. The school district maintained that sexual orientation is not a constitutionally protected class, and therefore Montgomery could not seek relief under the Equal Protection Clause of the Fourteenth Amendment. The court rebuffed this argument, accusing the school district of misapplying "the most basic principles of constitutional law." Citing *Romer v. Evans*, 517 U.S. 620 (1996), the court pointed out that while Title VII explicitly limits its scope to people subjected to dis-

crimination on the basis of "race, color, religion, sex, or national origin," the Equal Protection Clause is not limited to protecting only certain classes. "The court's finding in *Romer* forecloses the defendant's argument that individuals are entitled to no constitutional protection whatsoever from discrimination based on sexual orientation… The School District offers no rational basis for permitting students to assault plaintiff on the basis of his sexual orientation while protecting other students from similar forms of harassment." According to Judge Tunheim, the plaintiff can present to jury evidence that the school district treated his complaints differently from those made by female students.

Judge Tunheim's decision, like that of the California magistrate judge, is a significant victory on two fronts. First, it weaves together Supreme Court precedent and creates a legal framework to provide lesbian and gay students with a federal remedy against student-on-student harassment. Second, and on a more practical level, it provides a strong impetus for school districts to address complaints of same-sex sexual harassment and take homophobia in the classroom seriously.

Plaintiff Jesse Montgomery was represented by Kyle Torvinen of Hendricks, Knudson, Gee, Hayden, Torvinen & Weiby. Independent School District 709 was represented by Elizabeth A. Storaasli of Boyd Agnew Dryer & Storaasli. *Ian Chesir-Teran*

Maryland Appeals Court Dismisses Ex-Husband's Tort Claim Against Wife's Same-Sex Partner

A complaint brought in the Court of Special Appeals in Maryland by a man alleging that his ex-wife's lesbian lover interfered with his parental rights by causing his daughter to be estranged from him was dismissed for failure to state a cause of action in *Lapides v. Trabbic*, 2000 WL 1264630 (Sept. 7).

Under the joint custody arrangement agreed to by Lapides and his ex-wife, their daughter Jessica had the right on any given day to decide for herself where she would reside, whether at her father or mother's home. Some time after the divorce, it appears that Jessica became alienated from Mr. Lapides, which he believes was the fault of his ex-wife's domestic partner, appellee Trabbic. According to Lapides' allegations, Trabbic made it difficult for him to speak with Jessica on the phone, interrupted his visits with her, told her not to speak to him, and generally undermined his parental authority.

The main issue before the court was whether Lapides could maintain an action in tort for intentional interference with parent/child relations. The appellant based his case on *Hixon v. Buchberger*, 306 Md. 72 (1986) and the Restatement of Torts, which he claimed recognized a common law cause of action based on intentional interference with a non-custodial parent's visitation rights by a non-parental third party. Judge Adkins, writing for the court, disagreed that there was such a tort cause of action in Maryland, in the absence of the third party taking actions to entice, abduct, assist in abduction or otherwise cause the custodial parent to be deprived of the physical presence of the child for a continuous period of time. Adkins distinguished the facts of *Hixon*, finding that the actions of Trabbic did not cause the removal of Jessica from Lapides' care and control to her mother's care and control.

The court thus drew a distinction between merely undermining the relationship between the parent and child and enticing or abducting a child from the home of the custodial parent. Adkins wrote: "Were Maryland to recognize an action for tortious interference with parent/child relations, we think that physical removal of the child from the custodial parent would be essential to such action. The great potential for injury resulting from such physical removal may warrant the imposition of tort damages. Any lesser interference with a parent's custodial rights would be outweighed in the balancing between the merits of the tort action as a deterrent to interference, and the great potential for injury to children that will result from additional litigation." The court was concerned that the creation of such a tort action might force children to testify against their beloved parents, and lead to an escalation of intra-family warfare.

Furthermore, Adkins wrote, even if it were true that Trabbic induced Jessica to live with her mother rather than her father, this would not state a tort cause of action for intentional interference with custodial rights, because Jessica had the right to choose whose house she wanted to be at on any given day. So long as it was Jessica's choice to reside with her mother rather than her father, it was within the acceptable alternatives contemplated by the custody agreement. Lapides gave up the right to physical custody to his ex-wife and vice versa, depending on Jessica's desires. Therefore, there were no custodial rights to be interfered with by Trabbic.

The other claim of interest involves the appellant's allegation that appellee misrepresented "the true nature of her relationship with [his ex-wife, Kathy] — it was one of a 'sexual lesbian relationship.'" Appellant argued that, had he known this, he would have agreed to a different custodial agreement. The court quickly dispatched this claim by stating that Lapides failed to allege that he was damaged by the alleged misrepresentation. The court ruled that the mere existence of a lesbian relationship is not enough to show harm to the child who resides with the lesbian co-parents, or to his or her relationship with the non-custodial parent. Even if Lapides could show that a different arrangement would have reduced Trabbic's access to Jessica and thereby diminished her influence on her, and he would not have suffered emotional distress from the alienation of his daughter's affections, the court held that this would not be compensable in monetary damages. The court was not able to find any precedent that a fraud cause of action may be premised upon allegations of emotional distress, without more. Adkins summarized the opinion by stating that it is better to redress damage to the parent/child relationship by promoting constructive changes in the relationship, rather than by establishing a tort cause of action which would only encourage aggrieved parents to belligerently pursue monetary damages against a third party. *Elaine Chapnik*

Florida Appeals Court Upholds Most of Broward Partnership Ordinance

A unanimous panel of the 4th District Court of Appeal of Florida mainly rejected a taxpayer's challenge to the validity of the Broward County Domestic Partnership Act in *Lowe v. Broward County*, 2000 WL 1345513 (September 20), finding problems only with one severable provision. The opinion for the court by Judge Gross is made especially valuable by its appendix, which includes substantially all of the legislation.

Lawrence Lowe, a resident and taxpayer in Broward County, filed suit in the Broward County Circuit Court shortly after the law was enacted in 1999. The act establishes a domestic partnership registry, open to all adult domestic partners, both same-sex and opposite-sex. County employees can obtain spousal benefits for their partners through registering. The act also adopts a preference in contracting by the county for employers who provide domestic partnership benefits to their employees, opens up visitation at health care and correctional facilities for domestic partners of inmates, and extends rights regarding guardianship and health care surrogate decision-making. Lowe argued that the law exceeds the county's legislative powers, is preempted by state law, and is contrary to state law. He succeeded only in challenging the health care surrogate provision, due to Florida's explicit statutory hierarchy governing this issue.

Lowe first argued that the act improperly sought to make law on a matter purely of statewide interest by setting up a "marriage-like" relationship. While acknowledging that domestic relations law is a matter of statewide interest, Judge Gross concluded that

"the Act does not legislative within that domestic relations zone that is reserved for the state. The DPA does not curtail any existing rights incident to a legal marriage, nor does it alter the shape of the marital relationship recognized by Florida law." Further, the DPA establishes only very limited rights for registrants, by contrast to the broad panoply of rights and responsibilities relating to marriage, so it "does not reflect a legislative value judgment that elevates a non-traditional personal relationship to equal status with the marital relationship created" by Florida's state marriage laws.

Next Lowe argued that the act is inconsistent with Florida's version of the Defense of Marriage Act (DOMA), which forbids same-sex marriage. Gross brought a similar analysis to this issue, again pointing out that what the DOMA refers to is legally-contracted same-sex marriages, which a Broward domestic partnership is not. The county argued in its brief that the purpose of the state DOMA was to avoid having to recognize same-sex marriages performed in other states, a purpose that has no relationship to the act at issue in this case.

Lowe also argued that the act is inconsistent with state laws authorizing public employee benefits programs, which state that local government employers may extend benefits to the spouses and dependents of their employees. Seeking to avoid problems that have been encountered in other jurisdictions, such as Georgia and Massachusetts, the drafters of the Broward act had taken care to require that benefits only be extended to "dependents" and, as the state benefits law does not define that term, the court had plenty of interpretive leeway to find the definition contained in the Broward law to be reasonably consistent with the requirements of state law. Thus, the court found distinguishable Lowe's main authority, *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999), which found Boston's proposed domestic partnership law invalid due to a direct conflict with the state law on public employee benefits, which more precisely spells out eligibility in a manner that doesn't afford the same interpretive leeway.

However, Lowe was successful in challenging the provision that gives a domestic partner equal standing with a spouse to make medical decisions for an incapacitated person in the absence of a patient's own written designation. The state law provides that a spouse and an adult child shall take priority over anyone else in such a situation, and the court found the Broward provision contradicts the state law by raising the partner to the level of a spouse (and thus elevating the partner above the position he or she might have under the state law's hierarchical approach). But because the court found this provision severable from the rest of the act, this inconsistency did not serve as a basis for invalidating the entire statute.

The court rejected arguments that the act is an improper attempt to recognize common law marriages, that it violates the state law against open and notorious cohabitation by unmarried heterosexual couples, or that the law is generally preempted by the state's legislative occupancy of the field of domestic relations.

A large collection of lesbian and gay national and local organizations joined in an amicus brief in support of the Broward act, written by Dean J. Trantalis of Lighthouse Point and Lambda Legal Defense Fund attorneys Stephen R. Scarborough and Marvin Peguese. A.S.L.

Maryland Appeals Court Sustains Validity of County Gay Rights Ordinance

The Court of Special Appeals of Maryland refused to consider the claims of a Christian Broadcasting company that Montgomery County acted beyond its authority under state law when it passed an ordinance banning discrimination on the basis of sexual orientation. *Montgomery County, Maryland v. Broadcast Equities, Inc.*, 2000 WL 1273543 (Sept. 8). Broadcast Equities filed a motion for declaratory judgment and injunctive relief to invalidate the county ordinance after a former employee filed a claim of employment discrimination against it. Although both the county and the company had insisted that the court was not barred from ruling on the merits of the motion, the court determined that this case did not qualify for the narrow exception to general rule against declaratory judgments.

Montgomery's ordinance, spelled out in Article I, Chapter 27 of the county code, prohibits discrimination in places of public accommodation, in real estate matters, in employment matters, and racial and religious discrimination. Section 27–18 (b) prohibits discrimination on the basis of, among other attributes, sexual orientation, by an employer, unless the employer qualified for a limited "religious activities" exception. A victim of discrimination is eligible for damages in the form of back pay and benefits, and a punitive award of up to $1,000 for "humiliation and embarrassment." The county's anti-discrimination ordinance offers broader protection than the state statutes, which neither outlaw discrimination on the basis of sexual orientation nor provide for punitive damages.

From 1990 to 1993, Broadcast Equities, Inc., a subsidiary of The Christian Broadcasting Network, operated a radio station in Silver Spring, located in Montgomery County. In January, 1990, the station hired Richard J. Mangus as a senior producer and on-call control board operator, but fired him before the end of the year. Mangus filed a complaint with the Montgomery County Commission on Human Relations in October, 1991, alleging that he had been discriminated against on the basis of his sexual orientation. Although the radio station initially denied the allegations, the Commission investigated Mangus's claim, and determined that his termination had been influenced by discrimination. The station refused the Commission's invitation to enter settlement negotiations, and eventually, in March, 1995, the Montgomery County Attorney filed charges with the Commission, seeking $134,592.24 in back pay and $1,000 in punitive damages on Mangus's behalf.

In August, 1996, prior to the Commission's public hearing on the case, Broadcast Equities filed a complaint in the Circuit Court of Montgomery County for declaratory judgment and injunctive relief against various county offices and officials. Mangus, however, was not a named party in this suit. The complaint alleged that enforcement of the antidiscrimination statute violated its constitutional rights under the First Amendment (speech, religion and association), the Fourteenth Amendment (equal protection), the Civil Rights Act of 1871 and 42 U.S.C. § 1983. Broadcast Equities also asserted that the county's anti-discrimination statute had been held unconstitutional in *McCrory Corp. v. Fowler*, 319 Md. 12 (1990), and that other procedural considerations prevented the county from bringing charges against it.

The Circuit Court granted the county's motion for summary judgment, denied the requests for injunctive relief, and rendered a declaratory judgment, finding that the federal constitutional issues and the § 1983 claim were not ripe for review because the station had not been denied any constitutionally protected property right or liberty interest. The court declined to rule on the claims under the state constitution, finding that the station had not exhausted its administrative remedies. Finally, the court held that the county statutory scheme had not been invalidated by the *McCrory* case and that the ordinance did not conflict with any other state law. On its first consideration of these issues, the Special Court of Appeals agreed with the Circuit Court determination that the federal constitutional issues were not ripe. However, the question remained whether the provision in the county ordinance allowing punitive damages conflicted with the state law remedy, which only provided for an award of back pay. An intermediate appellate court had found that the statutes were in conflict, and

therefore the county ordinance was preempted. The Special Court of Appeals accepted a petition for a writ of certiorari from the County, which posed two questions: (1) whether the *McCrory* decision had rendered the county ordinance unconstitutional, and (2) whether the ordinance qualified as a "local law," immunizing it from preemption by state law.

The court began its analysis by observing that the bulk of the issues involved in the litigation (i.e., the state and federal constitutional claims) were not before it, and were the subject of a pending administrative proceeding. Also, because Mangus was not a party to this action, the court noted that any resolution by the court of the questions presented would not be binding on Mangus in the pending administrative action. Finally, the court observed that the radio station was "attempting to use the Circuit Court's declaratory and equitable jurisdiction solely to abort that administrative proceeding," rather than exhausting its administrative remedies.

For these reasons, the court independently raised the issue of whether the parties' failure to exhaust prevented the court from ruling on the questions presented. At oral argument, all parties stipulated that this case fell within an exception to the exhaustion requirement under *Harbor Island Marina v. Calvert Co.*, 286 Md. 303 (1979), but the court refused to accept this concession as dispositive of the issue. The court reiterated that the exception to the exhaustion requirement was very narrow, and would only apply in circumstances where the constitutionality of a statute as a whole was under attack. The policy reason for this narrow interpretation was clear: the court should only issue declaratory or equitable relief where doing so "will terminate the controversy and make subsequent administrative and judicial review proceedings unnecessary."

In this case, the court refused to answer the certified questions because doing so would not definitively resolve the dispute for two reasons. First, Mangus would not be bound by these proceedings in his administrative proceedings. Second, the Commission would still conduct its public hearing, and might determine that no unlawful employment discrimination had taken place. Therefore, rendering a decision on the issues presented at this time would also be "inconsistent with the firmly established principle of Maryland law that we will not reach a constitutional issue when a case can properly be disposed of on a nonconstitutional ground." Therefore, the court determined that all previous decisions on the merits in this case should be vacated, and the case should be dismissed, in order that the administrative proceedings may run their course. *Sharon McGowan*

Iowa Appeals Court Rejects Restriction on Gay Dad's Visitation

In *Kraft v. Peterson*, 2000 WL 1289135 (Iowa Ct. App., Sept. 13), the court unanimously rejected an attempt by Julie Ann Kraft to get a modification of the terms of custody and visitation set for herself and her ex-husband, Michael Peterson, a gay man.

Kraft and Peterson were married in 1989 and had two children, Gabrielle (1993) and Keenan (1995). They lived in Polk County, Iowa. Their marriage ended when Michael came out as gay in 1999 and moved to St. Louis. In the divorce proceeding, Kraft, who was to be the residential parent under a joint custody arrangement, sought a "morality clause" under which both parents would be required to shield the children from any exposure to "the intimate details of their respective romantic relationships while unmarried," but she backed away from this request, falling back on a demand that court require the parties to decide jointly when and how Michael would tell the children about his homosexuality. In addition, Kraft opposed Michael's request to have the children visit with him for five weeks (no more than two of which would be consecutive) during the summer. The trial court rejected her arguments, and awarded Michael both the five weeks of visitation as well as the right to have two telephone calls each week with the children.

Kraft appealed, arguing that how and when the children learned of their father's sexual orientation was as important a factor in their upbringing as the other matters about which joint decision-making was specific in the divorce decree, such as religious upbringing, medical care, and educational decisions. Writing for the unanimous court, Justice Streit agreed that this might be as important an issue, but rejected Kraft's argument that it should be spelled out in the decree. Streit observed that the list of items to be decided jointly was not "all-inclusive," and that the grant of joint custody "presupposed" that the parties would confer with each other about all basic decisions. Streit also noted Michael's testimony that he "has no intention of exposing Gabreille and Keenan to anything that would be harmful to their best interests," and concluded that a specific requirement on this issue "would needlessly involve the courts in these relationships."

On the visitation issue, Julie Ann disclaimed any attempt to "punish"Michael for his homosexuality by arguing for reduced visitation, insisting she was concerned that five weeks would be "too much" for these very young children. But the court found that five weeks was "not excessive," in light of the goal of seeking to preserve the relationships between the children and their father, and pointed out that by next summer the children will be 7 and 5 years old. Furthermore, a restriction on visitation usually requires a showing of harm, and here the record showed that the children had never suffered any harm in their father's care.

Even though both the visitation order and the telephone call requirements would cause disruptions and inconveniences for the children and Julie Ann, the court found that these were outweighed by the overall goal of assuring the children "the opportunity for maximum continuing physical and emotional contact with both of their parents." Consequently, the court refused to alter the trial court's decree.

Peterson, who is a non-practicing attorney, represented himself pro se on the appeal. A.S.L.

N.Y.C. Rebuffed Again In Attempt to Close Adult Business

In *City of New York v. Big Apple Cinema*, NYLJ, 9/20/2000, p.26, col.3 (N.Y. Sup.Ct., N.Y.County), Justice Louis York dealt yet another stinging rebuke to the City in it campaign to shut down "adult establishments," by denying the city's motion to amend its initial complaint to assert violations of internal guidelines that were implemented by the Building Department more than a year after the initial complaint was filed. Instead, the court dismissed the complaint, taxing costs against the city.

This case represents the City's third unsuccessful try at the issue. The City enacted a zoning ordinance intended to shut down businesses which devoted more than 40% of floor space (subject to an absolute 10,000 foot maximum) or, where applicable, 40% of accessible stock, to "adult activities," unless such businesses were located in tightly drawn, remote areas of the city. Some businesses (straight and gay) shut down, but others found that by adjusting floor layouts, they come into literal compliance by allotting less than 40% of floor space (or 40% of accessible stock) to the proscribed activities. The nature of these businesses resulted in a situation where the 60% of space or accessible stock devoted to "non-adult activities" yielded far less than 60% of revenue.

The City's argument that the surviving businesses could be shut down as nuisances because their literal compliance was a "sham" was twice rejected in quite strong terms by the New York Court of Appeals in *City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999) (regarding bookstores) and *City of New York v. Dezer Properties*, 710 N.Y.S.2d 836 (2000) (regarding restaurants).

This action was filed in November 1998. At that time, the trial court refused to issue a

temporary closing order. After inspecting the premises a month later in the company of counsel, the judge found the premises in literal compliance with the zoning ordinance. The City's motion for a preliminary injunction was denied in Spring, 1999, and the City's motion to re-argue was denied in July 1999. In late July this year, the City moved to amend its complaint to include the results of two recent inspections by undercover agents for the building department and to assert non-compliance with the new building department inspection guidelines. The new "Operating Policy and Procedure Notice #1/00" established factors for building inspectors to observe in making their determinations whether compliance with the applicable building ordinance was a "sham." Justice York called this the first reported case in which the guidelines were applied to an inspection of an adult establishment subsequent to their implementation.

The court rejected the City's argument that these guidelines merely stated what had previously been unstated in determination whether compliance was a "sham," citing with approval previous trial court cases questioning whether such guidelines or regulations were designed to promote standards of conduct for overall societal good or to provide a vehicle for punishing conduct which the regulators dislike. "The City's use of the word 'sham' borders dangerously close to the latter." The court also noted other reported cases where the trial courts declined to give ex poste facto application to the guidelines.

The court expressed serious qualms about allowing amendment to the complaint so late in the proceedings (this case has gone on for nearly two years, and has been quite hard fought with an extensive record), and noted that the guidelines were just that — merely guidelines. Was this an effort to bypass the City's ordinance passage procedures, thus raising due process concerns? In the absence of guidance from higher courts, Justice York determined that it was, and refused to allow the amendment. The court did look to the substance of the proposed amendment, in which it was alleged that on two occasions, undercover inspectors were "discouraged" from going up to the second floor of the business, where "non-adult" materials were on display. The City argued that this effectively "banned" access to the non-adult materials. However, because there were no physical impediments to access, and the inspectors were able to see the non-adult materials, the court would not deem the non-adult material to have been rendered "inaccessible," which would have affected the calculations of floor space devoted to each kind of material.

Finally, the court noted that the City may well be trying to shut this business down, rather than regulating its conduct. "By regulating rather than making these businesses illegal, the zoning regulation recognizes that certain First Amendment rights attach even to these adult establishments. The city would do well to do the same, much as its antipathy to them is understandable." Look for this case to be revisited on appeal. *Steven Kolodny*

Massachusetts Court Rejects Tort Claims by Employees Discharged for Engaging in Same-Sex Harassment

Two employees who had been discharged for engaging in same-sex harassment failed in their attempt to sue for alleged defamation and emotional distress in *Barthelmes v. Martineau*, 2000 WL 1269666 (Mass. Super. Ct., May 22). Although the emotional distress claims were held to be blocked by the Workers' Compensation Act, the case does provide insight as to possible obstacles when suing for a wrongful charge of sexual harassment.

Plaintiffs Kimberly Barthelmes and Karin Lamagdaliene brought an action in the Massachusetts Superior Court against their former co-worker Paula Martineau and former employer Olympus Health Care Group, Inc. after being discharged for allegedly failing to comply with Olympus' anti-harassment policy. In substance, the plaintiffs alleged that Martineau made false statements about them to her supervisors that caused their termination and defamed them. They sought relief on grounds of intentional infliction of emotional distress, defamation and defamation-respondeat superior. Judge Fecteau granted summary judgment for the defendants.

In March 1997, Martineau reported to her supervisors that she was upset by the plaintiffs' conversation concerning Martineau's questionable sexual orientation, which she had overheard. The plaintiffs were questioned and admitted to the conversation, but stated the conversation was motivated by curiosity and interest and not malevolence. Martineau later reported that she felt unsafe, unprotected and uncomfortable in the workplace and that she thought Barthelmes was "prejudiced and mean." Plaintiffs were eventually fired for breach of Olympus's anti-sexual harassment policy.

On the court of intentional infliction of emotional distress, Judge Fecteau ruled that the defendants correctly argued that plaintiffs' claim is barred by the Workers' Compensation Act. The court found that the mental harm alleged to have been suffered by plaintiffs was in fact part of the "personal injuries" to which an employee waives the common law right of action in exchange for no-fault Workers Compensation protection. The court commented further that for plaintiffs to prevail under a common law theory, they would have to show that the conduct complained of was "extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community," *Agis v. Howard Johnson Co.*, 371 Mass. 140 (1976), a standard not met on these factual allegations. Turning next to the defamation counts, the court concluded that the reported facts fall far short of demonstrating actionable slanderous defamation against Martineau or Olympus. Contradicting testimony and affidavits of the plaintiffs and lack of personal knowledge cast doubt on whether there was a publication to a third party by either Martineau or Olympus of the allegedly defaming "prejudiced and mean" remark. As for Olympus, the plaintiffs assert that since Martineau reported her concerns to her supervisors for whom Olympus was arguably responsible, Olympus should be held accountable, but the court found that Olympus was covered by a "legitimate business interest" conditional privilege, as its reporting mandate protects its employees from unwanted and unprofessional behavior, and establishes an internal reporting procedure to eliminate potentially costly civil harassment or discrimination suits. Olympus' anti-harassment policy furthered such a legitimate business interest. *K. Jacob Ruppert*

U.S. Magistrate Lets Gay Prison Guard Sue Union for Breach of Representation Duty

In a belatedly published June 30 ruling, U.S. Magistrate Smith (N.D.N.Y.) found that David W. Martin, a gay corrections officer at Coxsackie Correctional Facility, had stated sufficient allegations of discriminatory conduct by the union that was represented the guards to withstand a motion for summary judgment on his duty of fair representation claim, as well as a claim of unlawful retaliation under Title VII. However, the court granted summary judgment on Martin's discrimination claim under Title VII and conspiracy claim under 42 U.S.C. section 1985. *Martin v. N.Y. State Dept. of Correctional Services & Union Council 82, AFSCME*, 2000 WL 1337074.

Martin began working at Coxsackie Correctional Facility in December 1992. Within six months, his co-workers began what Magistrate Smith calls "a persistent campaign of verbally harassing and abusing him," including routinely calling him "faggot," "pervert," "homo," and "queer," as well as other forms of mistreatment. Martin complained to his supervisors, who were not receptive and unwilling to help him. He also brought his grievances to the union, which, Martin claims, failed to provide him with the same level of

representation that was provided to other officers. Martin claims to have heard a lawyer for the union, who was supposed to be representing him in a grievance hearing, as "David Martin, the faggot." Finally, Martin filed suit with the EEOC claiming Title VII violations and, when he received his right to sue letter, filed in federal court, adding a retaliation claim and a claim under 42 U.S.C. section 1985, asserting a conspiracy of the union and the prison to subject him to equal protection violations.

The June 20 opinion embodies a ruling on the union's motion for summary judgment. Magistrate Smith agreed with the union that Title VII does not apply to claims of sexual orientation discrimination. Martin argued that he was also subjected to sex discrimination, on account of his failure to comply with gender stereotypes, but the magistrate held that he had fallen short on this count. "To prevail on his claims," wrote Smith, "Plaintiff must show that female DOCS employees were not subjected to the same manner of representation by Defendant as he was. Plaintiff does not do this. Plaintiff merely states that he was subjected to discriminatory conduct and that he believes that such conduct was motivated by the fact that he does not meet the stereotypes associated with his gender." Smith found this insufficient to meet the Second Circuit's precedents on same-sex harassment cases under Title VII.

The retaliation claim was a different story, however, for here Smith found that it is possible for an employee to state a retaliation claim based on the union's reaction to his complaints, even if his underlying discrimination claims would not be covered by Title VII. "Although Defendant cannot be held liable for this disparate treatment in and of itself, it may be held liable for implicitly condoning the treatment by failing to take action against it," concluded Smith. Since Martin was alleging that he was treated differently in the grievance process by the union from other union members, Smith found he had made sufficient allegations to state a retaliation claim, and denied the union's motion, since the union had not articulated any legitimate, non-retaliatory reason for its treatment of Smith.

Smith's sec. 1985 claim fell, as those brought by other gay public employees have fallen, on the rock of suspect class analysis. Smith found that under sec. 1985, a plaintiff must allege class-based, invidiously discriminatory animus based on class membership, and the only classes recognized for this purpose are those that have been accorded heightened scrutiny under Supreme Court equal protection jurisprudence. Smith found that under "current law, … homosexuality has only been afforded rational basis review, and it has not been given special protection by Congress." Thus, gay people encountering discrimination from the government may not resort to 42 U.S.C. sec. 1985 for protection.

However, turning finally to the Fair Representation claim, which is brought under New York State law because this was a New York State public employee union local, Smith found that Martin had sufficiently alleged discriminatory treatment by the union in how it dealt with Martin's grievances to withstand the summary judgment motion. Many of Martin's complaints about the handling of particular grievances turned out to be time-barred, since the N.Y. Civil Practice Law & Rules, sec. 217(2)(a), apparently imposes a 4 month statute of limitations on such claims, and Martin had waited longer than four months in asserting his fair representation case. Martin alleged that once he filed grievances, he had to plead with union officials to get them to follow up, that they required him to draft all his grievances himself (while providing assistance to other employees presenting grievances), that the files they kept on his grievances were disorganized and incomplete, and that they did not treat other DOCS employees in this manner. This was enough to convince Magistrate Smith that the fair representation case should proceed. A.S.L.

Washington Appeals Court Upholds Conviction of Anti-Gay Harasser

In an unpublished ruling issued Sept. 1 and available on Westlaw, the Court of Appeals of Washington, Div. 2, upheld the conviction of Johnathan D. Smith, a high school student, for malicious harassment of a gay man on a bus, as well as for intimidating a witness who was scheduled to testify against him on another charge. *State v. Smith*, 2000 WL 1250761.

On Nov. 12, 1998, Smith pled guilty to third degree theft for stealing a pager belong to Renee Lester, who had been listed by the state as one of its potential witnesses. The next day, Lester, her younger brothers, and her friend Jesse Ortiz, a cross-dressing gay man, boarded a bus in Tacoma on which Smith was riding as a passenger. According to Lester and Ortiz, Smith accosted them, made threatening remarks to Lester in connection with the theft charges against him, and threatened to kill Ortiz "because you're a faggot." Smith also claimed he had a gun, although Lester and Ortiz never saw one. Lester and Ortiz reported this incident to the police, and Smith was charged with intimidating a witness and malicious harassment.

At trial, Smith contended that he hadn't even been on the bus because he was in school, but the court concluded that he could have been on the bus after school, and found Lester and Ortiz to be the more credible witnesses. The Appeals Court affirmed Smith's conviction. Interestingly, Smith raised no free speech argument, pinning his whole case on his denial that the incident had taken place. A.S.L.

Court Rejects Discrimination Claim by Anti-Gay Employee

A U.S. district judge granted summary judgement in a discrimination claim due to lack of standing, *Williams v. Kaiser*, 2000 WL 1262657 (N.D.Cal. Aug. 22), but "for the sake of completeness" addressed and rejected claims of racial and religious discrimination.

Sharline Williams was employed by Kaiser, a research company, in 1993 and received "excellent" assessments. In November of 1995, she was promoted and worked under Laura Finkler as a research assistant in a cancer study. In October of 1997, Finkler said that Williams's productivity had declined. On April 22, 1998, Williams attended an optional program on "The Effects of Sexual Orientation on Health and Healthcare." Williams "interposed" her view that "God made male and female" and that such research was a waste of money. Another participant said, "Sharline, we don't want to hear your religious comments," and Williams walked out. While Finkler disapproved of her conduct, there was no formal discipline. In May of 1998 Williams, in preparing a profile for a computer test, created "Joseph Faggot" who "denies anal sex; bleeding," for which she was criticized. She left a meeting with Finkler and a representative from the Human Resources Department over the incident. After Williams left the room, she was asked for the test profile, which she refused. At a meeting the next day, she said that she threw it out. She was placed on administrative leave for the rest of the day and the day after, but refused to return her badge and keys. She was then suspended for two weeks. After returning, Finkler found her work unacceptable and gave her a final warning letter. Martha Preble, who was named in the suit, replaced Finkler. Following continuing problems, Preble fired Williams on July 14, 1998.

Williams filed a complaint with the Department of Fair Employment and Housing and the EEOC on August 30, 1998 claiming racial discrimination. Williams' standing to sue was rejected as she had filed for bankruptcy, but did not claim the suit as an asset. The court found that the bankruptcy trustee, not Williams had standing. For "the sake of completeness," the court addressed the discrimination claims.

Williams claimed religious discrimination before the court, but had not include that ground in her EEOC charge. Judge Jenkins found that the new allegations were not "like or reasonably related" to the original claim of racial discrimination. While Williams had established a prima facie case of racial discrimination, Judge Jenkins found, Kaiser had non-discriminatory reasons for dismissing Williams (unproductivity and unprofessionalism). Williams, the court found, was unable to show that the reasons were pretextual. *Daniel Schaffer*

Continuing Boy Scouts Saga Unfolds

The Supreme Court's decision in *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000), holding that the Boy Scouts of America, as a private organization, has a First Amendment right to maintain its membership policy excluding gays, continued to generate shockwaves throughout the country during September:

In an attempt to embarrass the Democrats, Republican House of Representatives leaders called up a bill to revoke the federal charter of the Boy Scouts for a floor vote on Sept. 13. The measure had been introduced by a small group of very pro-gay legislators, mainly as a symbolic gesture of support for gay rights, and had not even received a committee hearing. The measure was voted down 362–12, with 51 Democrats voting "present" rather than cast an anti-gay vote. Rep. John Conyers (D-Mich.) characterized the sudden, procedurally irregular vote as "part of a political stunt" by the Republicans. *Deseret News*, Sept. 13.

Attorney General Janet Reno moved quickly to put an end to a brief uproar over whether the Scouts would be barred from federal parkland as a result of a presidential executive order from last spring banning sexual orientation discrimination in federal training and education programs. Reno opined that letting the Scouts use the parks would not violate the order, because she construed the order as extending only to education and training programs run by the government. Republican leaders had immediately seized on news that the Interior Department sought a ruling from the Justice Department under the order to try to inject the Boy Scouts issue into the presidential campaign. *Washington Post*, Sept. 2.

Judge James R. Lambden of the California First District Court of Appeal in San Francisco has resigned as assistant scoutmaster of Boy Scout Troop 6 in Alameda, in a letter to the Boy Scouts on Sept. 8 which was released to the press. Lambden is the first California judge to take this public position in light of the Scouts' discriminatory policy, and is joining with the San Francisco bar association to try to get a change in the California Code of Judicial Ethics to end an existing exemption for the Boy Scouts from a rule generally barring judges from affiliating with organizations that discriminate on the basis of sexual orientation. (When the California courts amended their rules to add sexual orientation to the non-discrimination requirement, they specifically exempted youth organizations from the rule, at least partially because litigation was then pending in the California courts challenging the Scouts' exclusionary policies under the Unruh Public Accommodations Law. The California Supreme Court subsequently ruled that the BSA is not a place of public accommodation within the meaning of that law.) Lambden wrote to BSA Chief Executive Roy Williams that continuing an affiliation with Scouting had become "personally unacceptable to me and ethically questionable for judges everywhere" because of the arguments the organization made before the Supreme Court to sustain its discriminatory policy. *San Francisco Examiner*, Sept. 15. In Broward County, Florida, the Schools Superintendent sent a letter to the South Florida Council of the Boy Scouts of America on September 20, asking whether the Council will follow the anti-gay discriminatory policy espoused by the national organization. If so, wrote Superintendent Frank Till, the Scouts may be denied access to the county's public schools, which bar such discrimination. A spokesperson for the local Scouts council, saying "Our values are not for sale," indicated that they would continue to apply national policy. 48 out of the 293 Boy Scout and Cub Scout troops and packs now meet in Broward schools, and the Council has extended ties with the schools, including involvement in developing character-building curriculum. *Sun-Sentinel*, Ft. Lauderdale, Sept. 21. In a letter to Superintendent Till, Jeffrie Herrmann, the chief executive of the South Florida Council of the Boy Scouts, responded that the organization would take the school district to court if it was ejected, arguing that the schools allowed other discriminatory organizations to have access (relying on access being given to organizations that allow membership only to members of one sex, age group, or ethnicity). *Sun-Sentinel*, Ft. Lauderdale, Sept. 28.

The Broward County Commissioners voted Sept. 17 to deny the Boy Scouts of South Florida a $10,000 grant to conduct in-school programs for disabled and at-risk youth, on the ground that the Scouts maintains a discriminatory membership policy against gays. However, on Sept. 21, Truly Nolen of America, Inc., a large pest-control company (that has a non-discrimination policy including sexual orientation) announced it would make the $10,000 grant, because, according to a company spokesperson, they didn't think children should pay the price for the debate over letting gay people participate in the Scouts. *Orlando Sentinel*, Sept. 22.

The board of directors of the United Way of Palm Beach County, Florida, voted 23–9 against immediately cutting off the Boy Scouts as a grant recipient, but decided to inform the BSA that it would be excluded from future campaigns if it did not change its discriminatory membership policies. The organization decided it would be unfair to donors who were contributing to the current, 2000–2001 campaign, to change the rules while the campaign is underway. However, the board voted to add "sexual orientation" to its nondiscrimination clause that organizations will have to sign to participate in next year's campaign. *Sun-Sentinel*, Ft. Lauderdale, Sept. 22.

Orange County, California, supervisors unanimously approved a 30–year extension of a preferential rate lease for the Boy Scouts on a Newport Beach sea base owned by the county, despite arguments by opponents that the county should not subsidize a group with an official policy of discrimination on the basis of sexual orientation. An ACLU attorney who attended the supervisors meeting indicated that a lawsuit might be brought, similar to one recently brought against the city of San Diego over a lease of public parkland to the Scouts for $1 a year. *Los Angeles Times*, Sept. 27.

The United Way of Tompkins County, New York, has rescinded a $32,203 grant it had made to finance local Boy Scouts activities. *Syracuse Post-Standard*, Sept. 25.

The United Way in Austin, Texas, is advising donors that they can designate donations not to go to the Boy Scouts, but the agency does not now intend to discontinue its support for the Scouts. *Austin American-Statesman*, Sept. 18.

Wachusett, Massachusetts, Regional School Superintendent Alfred D. Tutela sent a letter to the Nashua Valley and Mohegan Boy Scout Councils in mid-September, informing them that the Boy Scouts' policies violate state law and the school district's non-discrimination policy, so they could no longer hold meetings in the public schools. *Worcester Telegram & Gazette*, Sept. 19.

The United Way of Evanston, Illinois, voted not to renew its regular $5,000 grant to the Boy Scouts for the 2001–2002 fiscal year, because of the group's discriminatory policies. *Chicago Tribune*, Sept. 22. (The city of Evanston has had a gay rights ordinance on the books since 1980.)

In New York City, Manhattan Community School Board No. 2 voted Sept. 26 to withdraw support from the Boy Scouts of America,

but the vote was largely symbolic since only one Scout troop meets in a district school, and will be allowed to continue meeting under central Board of Education policy. However, on Sept. 28 the *New York Times* reported that the central board is considering whether to take steps in light of its non-discrimination policy and the official discriminatory policy of the Scouts. A major in-school presence for the Scouts is a citizenship curriculum program, and the argument is made that this program is not affected by the official BSA discriminatory policy. In addition, the local Scout Council has signed non-discrimination statements in its contracting with city agencies, although it is uncertain whether such professions of non-discrimination are credible in light of the national organization's insistence that local chapters cannot vary national policy. Schools Chancellor Harold Levy stated on Sept. 27, "The Boy Scouts need to comply with their obligations to the City of New York, which is not to discriminate." A spokesperson for the Greater New York Council of the Boy Scouts stated that the group has not represented that it will repeal its policy on gays in its "traditional scouting programs," asserting: "We're not acting independently of the national headquarters." *N.Y. Daily News*, Sept. 28.

School administrators in Mechanicsburg, Pennsylvania, have stopped the Cub Scouts, a division of the Boy Scouts of America, from using the local school districts to distribute fliers and other information about Scout programs. The District Solicitor said this step was necessary to keep the district in compliance with the Pennsylvania School Code, which forbids school districts from discriminating on the basis of sexual orientation. *Harrisburg Patriot*, Sept. 27.

Reversing an earlier vote, the Bethel, Oregon, school district has rescinded a ban on Boy Scout recruiting in the schools. The passage of the ban by the school board on Sept. 11 caused a local furor, not least because of some complaints about lack of advance notice that the board was contemplating such an action. Ultimately, the Board's solicitor concluded that the ban could be illegal because of continued admission of the Girl Scouts and Kidsports programs, presumably under the federal Equal Access Act. *The Columbian*, Sept. 27.

On Sept. 28, the *Star-Tribune* in Minneapolis-St. Paul reported several local developments concerning the Boy Scouts and the gay issue. The company foundation of Medtronic, Inc., announced that it would specifically exclude support for the Boy Scouts from its anticipated $1 million-plus annual donation to the local United Way, because of the foundation's "commitment to nondiscrimination." On Sept. 26, the United Way of Greater Duluth decided to terminate its annual $30,000 grant to the local Boy Scouts council due to the Scouts' discriminatory membership policy. The Red Wing Human Rights Commission voted to ask area residents to continue supporting the United Way, but to exclude Boy Scouts from their donations. The Burnsville-Eagan-Savage School District announced that it will no longer allow its schools to charter Boy Scout troops or distribute BSA literature in the schools, although troops may continue to meet in schools and use student mailing lists for recruitment purposes.

In Forsythe County, North Carolina, the United Way decided that its way out of the dilemma (a non-discrimination policy that includes sexual orientation and a continuing commitment to fund the Boy Scouts) was to drop its requirement of non-discrimination on the basis of sexual orientation from its "partnership agreements" with recipient agencies. The local United Way President, Ron Drago, rationalized this move by pointing out that gays are not protected from employment discrimination under federal law. (What relevance that datum has to this decision is unclear, at least to this writer.) He said the agency did not want to take on a "policing or activist role." *Winston-Salem Journal*, Sept. 22. A.S.L.

Domestic Partnership Notes

Human Rights Campaign Foundation released a report Sept. 25 which sparked national media attention for the issue of domestic partnership benefits. The report documented a 25% increase in the number of employers offering domestic partnership compared to a year ago, as 716 employers had either implemented or announced future implementation of such benefits from August 1999 to August 2000. The totals include more than 100 of the Fortune 500 list of the largest U.S. companies. The report is available online at: http://www.hrc.org/worknet. BNA Daily Labor Report No. 187, 9/26/00, A–4–5.

The HRCF report triggered many articles in local newspapers mentioning local employers who have adopted domestic partnership benefits plans for their workers. For example, the *Charlotte Observer* in North Carolina reported that First Union Corp. in Charlotte, and "other companies with a strong Carolinas presence — such as US Airways Group Inc. and Verizon Wireless — will offer the benefits next year." (Sept. 27)

Tulane University, which is the largest private sector employer in New Orleans, has become the first private sector employer based in Louisiana to adopt a domestic partnership benefits program. Like many private sector employers, Tulane will limit its program to same-sex partners. The policy covers health, dental and life insurance, family and medical leave, and undergraduate tuition waivers worth $25,390 at present for one year's tuition. The decision by Tulane's board reversed a vote that had been taken three years ago. *Baton Rouge Advocate*, Sept. 27.

Wall Street Journal Managing Editor, Paul Steiger, speaking Sept. 9 at a meeting of the National Lesbian and Gay Journalists Association, announced that Dow Jones, the parent company of the *Journal*, is extending domestic partnership benefits to unmarried partners of employees (gay and straight). The NLGJA also reports that Bloomberg L.P., a news and information service, has announced that it would extend benefits to unmarried partners of employees effective Sept. 1.

The Town Board of Eastchester, New York, voted 5–0 on September 5 in support of a proposal to extend domestic partnership benefits to same-sex partners of town employees, according to an email report from a Law Notes reader who attended the hearing. The chief proponent of the measure was Town Supervisor Jim Cavanaugh, who is the Westchester County Republican Party Chairman. Reportedly, all the members of the Board are Republicans as well. So much for party labels and domestic partnership!

Major investment company Bear Stearns announced to its employees on Sept. 1 that it has adopted a domestic partner benefit program that will include medical and dental insurance, dependent life insurance, sick and bereavement leave, a company scholarship program, and use of emergency back-up child care services (in those offices where such a benefit is given). The program applies to all domestic partners, not just same-sex, and will go into effect January 1, 2001.

How's this for craven capitulation? Early in September, Grand Valley State University (Michigan) President Arend Lubbers announced the adoption of a domestic partnership benefits policy for University employees. After major GVSU donor and Amway co-founder Richard DeVos called Lubbers to state his opposition to the move, Lubbers reversed himself and said the benefits would not be given after all. *Grand Rapids Press*, Sept. 27.

As a consequence of the enactment of civil union legislation in Vermont, the University of Vermont decided that it should equalize the requirements of its existing benefits program by requiring that same-sex couples become civilly-united under the law if they want to qualify for benefits. The University had been providing benefits to same-sex domestic partners of employees previously under a policy adopted after a state labor board

decision ruled on a claim by a group of lesbian and gay employees back in the 1980's. The policy required employees to register their partnerships with the University in order to qualify for the benefits, and also required employees claiming spousal benefits to provide documentation that they were married. (Unmarried opposite-sex couples were not given benefits.) The University now takes the position that if it is requiring marriage for opposite-sex benefits, it should require civil unions for same-sex benefits, and has notified thirty employees who are currently receiving the benefits that they will have to formalize their relationships under the new law if they want to retain their benefits eligibility. This, of course, immediately raises a concern that has been voiced by some opponents of the battle for same-sex marriage within the lesbian and gay community: that once marriage or its equivalent is obtained, it will redound to the disadvantage of gay couples who decide not to marry. One employee complained that sending the notices now was bad timing, in light of the upcoming election, in which it is possible that Vermont will elect new legislators and a new governor who favor repeal of the civil unions law. *Rutland Herald*, *Boston Globe*, Sept. 28. A.S.L.

Litigation Notes

Jill Bacharach is appealing a decision by New Jersey Superior Court Judge Anthony J. Iuliani denying her petition for a name change to create a hyphenated last name that would link her with her lesbian domestic partner. Name change petitions are usually routinely granted unless the court finds that the change is being made to defraud creditors or for some other unlawful purpose. Iuliani stated from the bench that granting this petition would defraud the public into thinking that the same-sex couple is married. According to a spokesperson from the New Jersey Lesbian and Gay Coalition, Wendy Berger, the judge chastised Bacharach from the bench, stating: "You know, if you want to get married, you should go to Vermont." The ACLU of New Jersey is representing Bacharach on her appeal. *Associated Press*, Sept. 21.

In September, we reported that a New Jersey judge had entered a default judgment against Wal-Mart stores on a sexual harassment and discriminatory discharge claim brought by a pre-operative male-to-female transsexual, Rickey E. Bourdouvales. It appears that the default judgment caught Wal-Mart's attention, as it contacted the court to indicate its intent to enter a belated response to the complaint. Consequently, the judge vacated the $2.1 million default judgment. No doubt, Wal-Mart plans to argue that Title VII does not apply to the case. *Daily Labor Report* No. 185, 9/22/00, at A–13.

Within days of each other, the school boards in Salt Lake City and Orange County, California, agreed early in September to modify regulations of student groups to effectively end their bans on gay/straight alliances in the district high schools.

The Court of Appeals of Virginia upheld the murder conviction and life sentence of Elton Manning Jackson, accused of murdering Andre Smith on the night of July 21, 1996, by strangulation after having anal sex with him. *Jackson v. Commonwealth*, 2000 WL 1239938 (Sept. 5). Jackson's main ground of appeal was to argue that the trial court erred in allowing a witness to testify that Smith had told him he was going around to Jackson's house to get some money that night, and also erred in allowing three other men to testify about their sexual encounters with Jackson. The evidence at trial appeared to indicate that Jackson followed a pattern of offering young men money to have sex with them; he initiated anal sex, and then, apparently, attempted to strangle his partners by placing a thick strap or belt around their necks. All three witnesses testified to having escaped from Jackson at some point during this scenario. Jackson argued that there were enough differences in the details of their various stories to undermine the theory of a common pattern of behavior, and thus to require that their testimony be excluded as prejudicial in his trial for the murder of Smith. Jackson admitted having consensual sex with Smith, but denied murdering him. Forensic evidence confirmed that Smith was present and bled on Jackson's bed. The Court of Appeals found that the testimony of the three men showed enough of a pattern to justify admitting that evidence, and that the hearsay evidence about Smith's statement to a friend the night of his murder was admissible to show state of mind and, in any event, would be harmless error, since other evidence corroborated the statement, including Jackson's own testimony about having had anal sex that night with Smith.

BNA's Daily Labor Report (No. 171) reported Sept. 1 that Judge Susan R. Winfield of the District of Columbia Superior Court has upheld a jury verdict for $5 million in favor of a former chef employed by Daka, Inc., a food services contractor, who claimed he was sexually harassed by a male supervisor. Judge Winfield commented that the jury could reasonably conclude, based on the trial evidence, that the company's conduct in this incident was "outrageous," justifying the large punitive damage component in the award, only $187,000 of which was denominated as compensatory. *McCrae v. Daka*, D.C. Super Ct., No. 7505–97 (8/28/2000).

A U.S. District Court jury in Manhattan (New York City) heard testimony on Sept. 27 by openly lesbian police officer Elizabeth Bryant that she suffered harassment from fellow officers beginning in June 1977 after she held a commitment ceremony with her partner in Central Park. Bryant was suing under federal civil rights laws, seeking damages for violation of her equal protection rights by the police department in not taking action to address harassment and unequal treatment. The next day, after stories about her testimony appeared in local newspapers, she reached a settlement for an undisclosed amount with the City of New York. U.S. District Judge Lewis A. Kaplan made an unusual statement in open court when he dismissed the jury upon news of the settlement, saying that the Police Department's behavior in this matter was "outrageous." *New York Daily News*, Sept. 28; *New York Times*, Sept. 29; *New York Law Journal*, Sept. 29.

In *Kosilek v. Nelson*, 2000 WL 1346898 (D. Mass., Sept. 12), U.S. District Judge Wolf ruled that the Massachusetts Corrections Commissioner was entitled to qualified immunity from personal liability to a transsexual prisoner who claims to have been denied appropriate treatment while incarcerated in the Massachusetts system. The court found that relating back to the time when Kosilek was demanding treatment in 1996, it was not clearly established as a matter of law that a transsexual prisoner was entitled to any particular form of treatment. The court also found a local sheriff, in whose jail Kosilek had been confined while awaiting trial, enjoyed immunity as well.

Morgan Stanley Dean Witter & Co. and Christian Curry have settled their pending discrimination lawsuit, pending in the U.S. District Court (S.D.N.Y.), on undisclosed terms, although it was announced that Curry will not receive any money as part of the settlement. Curry had alleged that he encountered discrimination at Morgan Stanley and was discharged after people there found out he had posed nude for a gay skin magazine. He claimed that he had the pictures taken to make some money while he was in college, and that he was not gay. He charged Morgan Stanley with discrimination on the basis of race and perceived sexual orientation (a supplemental N.Y. city law claim to his Title VII claim). Morgan Stanley claimed he was discharged due to expense account irregularities. Two of Morgan Stanley's lawyers were discharged when it came out that they had been involved in a payment to a police informant to manufacture evidence against Curry, according to a report on the settlement published Sept. 15 in the *Wall Street Journal*. As part of the settlement of the case, Morgan Stanley will donate $1 million to the National

Urban League, a non-profit group that works to help African-Americans achieve economic equality.

A settlement has been announced in Michael Hartwig's discrimination suit against Albertus Magnus College in Connecticut. Earlier this year, a federal district court upheld Hartwig's cause of action in *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200 (D. Conn., March 3, 2000). Predictably, the defendant preferred to offer a settlement rather than go through a highly public trial about its decision to dismiss the popular openly-gay professor. Although the terms of the settlement mandate confidentiality about the details, Hartwig's lawyer, Maureen Murphy, told the *Hartford Courant* (Sept. 28) that Hartwig is "happy" with the settlement. A.S.L.

Legislative Notes

The Common Council in Madison, Wisconsin, unanimously voted September 19 to include "gender identity" in the city's equal-opportunity ordinance. According to the *Milwaukee Journal Sentinel* (Sept. 21), this makes Madison the 29th municipality in the U.S. to extend protection against discrimination to transsexuals.

On September 26, the Fort Worth, Texas, City Council voted 6–1 to amend the city's civil rights law to add "sexual orientation" to the prohibited bases for discrimination in employment and public accommodations. Fort Worth joins Austin as the only municipalities in Texas that prohibit private employers from engaging in anti-gay discrimination. Houston and Dallas have ordinances that forbid such discrimination, but only for public employment. *Ft. Worth Star-Telegram*, Sept. 27. ••• Speaking in Dallas on Sept. 27, President Bill Clinton lauded the passage of the Ft. Worth ordinance, and called on Republican congressional leaders to drop their opposition to the federal hate crimes law. Each house has separately passed the law, most recently the House in a non-binding vote to add it as an amendment to a pending defense appropriations bill, but the leadership has announced plans to detach the hate crimes legislation when the appropriations bill goes to conference committee. *Ft. Worth Star-Telegram*, Sept. 28.

Maryland Governor Parris N. Glendening has appointed a commission to draft legislation to forbid discrimination on the basis of sexual orientation, and to recommend executive actions he could take to ban such discrimination administratively. "We must value the gay and lesbian members of Maryland's family as we value all members of our family," he said at a press conference announcing the commission on Sept. 26. The commission's preliminary report is due by Dec. 15, to allow time for introducing a bill in the General Assembly session that begins in January. The commission's final report is due by July 1. A prior bill passed the House of Delegates during the previous term, but died in the Senate. Glendening became a vocal advocate of gay rights after his gay brother, a career military officer, died from AIDS. *Baltimore Sun*, Sept. 27. A.S.L.

Law & Society Notes

Campaigning on an MTV program aimed at younger voters, Vice President Al Gore announced his support for recognition of same-sex partners under U.S. Immigration law, at least for those partners who enter into governmentally-recognized partnerships such as a Vermont civil union. *New York Post*, Sept. 27.

A mini-same-sex marriage boom seems to be happening in Bexar County, Texas. Seizing upon the Texas 4th Court of Appeals decision in *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), rev. denied, March 2, 2000 (Tex. Sup. Ct.), petition for certiorari filed 7/00, holding that sex at birth is permanent and unalterable for purposes of Texas marriage law, lesbian couple Jessica and Robin Wicks of Houston obtained a marriage license from County Clerk Gerry Rickhoff upon providing proof that one of them was a male-to-female transsexual and thus legally male. After news of their pending nuptials hit the national press, another lesbian couple, Lori Killough and Cynthia Young of Corrales, N.M., took themselves across the border to Bexar County to get their marriage license, Killough producing her original birth certificate attesting to her sex at birth. And Rickhoff immediately issued the license. *San Antonio Express-News*, Sept. 21. Leading transgender Houston attorney Phyllis Frye has put out the word through various transgender networks to come to Texas and get their marriage licenses. (This actually appears to be a neat stratagem to show up the silliness of the *Littleton* ruling, which denied a surviving widow's right to sue her deceased husband's doctor for malpractice on the ground that she was born a he and thus never legally married to him, even though a legal marriage ceremony had been performed for the couple and a Texas county clerk had granted Christy Littleton a new birth certificate showing her sex as female. Frye worked on the cert. petition in Littleton. If cert. is granted and the decision is reversed by the U.S. Supreme Court, what will become of these lesbian marriages?)

The *Wall Street Journal* published a lengthy article by staff reporter Jess Bravin on September 22, titled "Courts Open Alternate Route to Extend Job-Bias Laws to Homosexuals," noting the interesting trend in recent months of federal appeals courts suggesting that anti-gay workplace harassment may be actionable as sex discrimination under Title VII if the plaintiff can credibly allege that he (it's usually a he) was targeted for harassment because of actual or perceived gender-nonconforming behavior and presentation. The line of cases derives from the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding that evidence of gender stereotyping by an employer can be probative of discriminatory intent in a Title VII sex discrimination case. In some of the recent cases, the courts upheld dismissal or summary judgment against the plaintiff, but commented in dicta that had the plaintiff made the necessary allegations, they would not have dismissed or granted summary judgment, instead letting the case get to a jury, where presumably the reprehensible harassment to which the plaintiffs were subjected would probably carry the day against the defendant.

Ronald Edward Gay suffered intense ridicule about his last name. A Vietnam veteran who allegedly suffered from post-traumatic stress disorder and schizophrenia, and who had experienced several recent reverses in his life, walked into a gay bar in Roanoke, Virginia, on Sept. 22 and opened fire, shooting seven people, one of whom, Danny Lee Overstreet, died from his wounds. Gay was charged with murder and held without bail. A police department spokesperson told a local newspaper that Gay confirmed witnesses reports of the event and said that he wanted to shoot gay people. *Raleigh News & Observer*, Sept. 24. Gay also told investigators that he resented the derogatory comments people made about his surname, and that some of his children changed their last names to escape such joking. The head of the criminal investigations unit told reporters that Gay said he was trying to get rid of homosexuals. *Washington Post*, Sept. 26. A hate crime, or the actions of a deranged man? A.S.L.

European Parliament Calls For National Gay Rights Legislation in Member States

On Sept. 26, the Parliamentary Assembly of the Council of Europe, which consists of members of the national legislatures of the 41 member states, adopted "Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states," http://stars.coe.fr/ta/ta00/erec1474.htm, based on a Report of the Committee on Legal Affairs and Human Rights (June 6), http://stars.coe.fr/doc/doc00/edoc8755.htm, which was in turn based partly on testimony of lesbian and gay individuals at a hearing of

the Sub-Committee on Human Rights in Paris on Oct. 14, 1999. Recommendation 1474 (2000) goes well beyond the Assembly's last comprehensive recommendation on lesbian and gay issues, Recommendation 924 (1981). It calls upon the 41 member states: "a. to include sexual orientation among the prohibited grounds for discrimination in their national legislation; ... d. to apply the same minimum age of consent for homosexual and heterosexual acts; e. to take positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the bar by means of basic and further education and training, as well as in sport; ... g. to take disciplinary action against anyone discriminating against homosexuals; h. to ensure equal treatment for homosexuals with regard to employment; i. to adopt legislation which makes provision for registered partnership; j. to recognise persecution against homosexuals as a ground for granting asylum ..." *Robert Wintemute*

Other International Notes

The lower house of the Dutch parliament has approved the governing coalition bill to open the institution of marriage to same-sex couples. The measure passed by a vote of 107–33, and is expected to pass the upper chamber and become law in 2001. The Netherlands had already adopted a far-reaching domestic partnership registration system a few years ago, but the new law would erase almost all of the differences between marriage for heterosexual and homosexual couples. A few minor differences will remain, most significantly involving adoptions and the requirement that one member of the couple be a Dutch citizen, according to some press reports we've seen. *Associated Press*, Sept. 12.

The *Scottish Daily Record* reported Sept. 28 that Roderick Macdonald, a former flight lieutenant in the British Air Force, has become the first gay person to win a sex discrimination case against the Ministry of Defence in a British court, winning a reversal of the Employment Tribunal's dismissal of his case in the Appeal Tribunal on Sept. 27. He is seeking compensation for loss of his career in the Air Force in the amount of 100,000 pounds. In a previous ruling, the European Court of Human Rights held that Great Britain's anti-gay military policies violated European treaty obligations. Beginning in October, those obligations will become directly enforceable in British courts. The Appeal Tribunal appears to have accepted that proposition a few days early.

After studying the experience of integrating openly gay members into the Australian defense forces, the University of California's Center for the Study of Sexual Minorities concluded that the ending of the ban in Australia had no real impact on the fighting qualities or discipline of those armed forces. The study found that openly gay members (including officers) had served successfully with Australian forces in East Timor, and the gay members said that since the ban was lifted they had experienced a more supportive environment. *Canberra Times*, Sydney Morning Herald, Sept. 21.

Bowing to a request from the Supreme Rabbinic Court, Israel's High Court of Justice (Supreme Court) has agreed to refer to the Attorney-General the question whether the rabbinic courts have authority to order that a mother exclude her lesbian partner from any contact with her children. The matter arose out of a dispute between a divorced couple. The ex-husband sued in a district rabbinic court (the rabbinic courts in Israel decide matrimonial matters) for a reduction in his alimony obligations on the ground that his ex-wife is now living with a lesbian partner. He also asked for an injunction barring his ex-wife's partner from any contact with his children, including living in the same house with them. The rabbinic court acknowledged in the hearing that it could not reduce the alimony payments, but issued the requested injunction, which was upheld by the Supreme Rabbinic Court, which stated that it "was obvious to any rational person and there is no need to elaborate" on its reasons for doing so. In arguments before the High Court, the lesbian couple, represented by the Association for Civil Rights in Israel, argued that the rabbinic courts do not have authority to interfere in this way. The three members of the High Court panel indicated that if the rabbinic courts do not have jurisdiction, the High Court ruling would automatically go in favor of the lesbian couple on this issue. *Jerusalem Post*, Sept. 12.

The Tourism Minister of Turkey, Erkan Mumcu, issued a formal apology after hundreds of gay tourists were prevented by local police from entering the coastal town of Kusadasi and the nearby Roman ruins at Ephesus as part of a gay cruise and tour. The Mayor of Kusadasi also apologized for the actions of the police, and local merchants, who profit from the gay vacation business in the area, were reportedly furious. After news reports spread about the incident, the U.S. Embassy contacted Turkish officials to protest the police action. *Chicago Sun-Times*, Sept. 8.

Slowly but surely, Romania is putting its legislative house in order on gay rights as part of its campaign for acceptance into the European Union. Prime Minister Constantin Isarescu signed a new law on Aug. 31 that bans discrimination based on sexual orientation and other factors, according to a Romanian gay rights group. In late June, the lower house of the Parliament voted to decriminalize private consensual homosexual behavior, and the bill is pending in the Senate. However, a law passed in 1996 forbids same-sex relations "in public" or which could cause a "public scandal." *Washington Blade*, Sept. 22. A.S.L.

Dohrn Resigns As Lambda Legal Director; Harlow Appointed as Successor

Beatrice Dohrn has resigned as Legal Director of Lambda Legal Defense & Education Fund, Inc., effective in mid-November, at which time the organization's deputy legal director, Ruth Harlow, will be promoted to be the new Legal Director.

Lambda Legal Defense Fund, started in 1973, is the nation's oldest and largest lesbian and gay rights public interest law firm. In her seven years as legal director, Dohrn presided over a tripling of the legal staff as Lambda went from two offices (New York and Los Angeles) to four (Chicago and Atlanta, with a fifth office opening in Dallas planned for 2002). This period also saw a dramatic expansion in Lambda's trial docket. (During its early years, Lambda was primarily an amicus party, with some appellate work.)

In addition to directing the growing staff, Dohrn also participated directly in significant litigation, successfully arguing for the right of second parent adoption before the New York Court of Appeals in *Matter of Jacob*, 86 N.Y.2d 651 (1995), and representing a gay father in a victory against unwarranted restrictions on the visitation rights of gay parents in *Boswell v. Boswell*, 701 A.2d 1153 (Md. App., 1997). She was also co-counsel and argued in the 2nd Circuit in *Able v. United States*, 155 F.3d 628 (2d. Cir. 1998), a case challenging the "don't ask, don't tell" policy of the U.S. Defense Department, which was successful at the trial level but was, unfortunately, reversed on appeal. Lambda's Marriage Project, which participated in historic litigation in Hawaii and Vermont, was formed during her tenure as legal director, and Lambda participated in the Supreme Court success of *Romer v. Evans*, 517 U.S. 620 (1996), and the Supreme Court defeat (overturning a triumphant victory in the New Jersey Supreme Court) in *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000).

Harlow has been a leading attorney on Lambda's staff, having previously served with distinction as a staff attorney at the ACLU's Lesbian & Gay Rights and AIDS & Civil Liberties Projects. A.S.L.

Other Professional Notes

Lambda Legal Defense Fund has announced the hiring of Susan Sommer as supervising attorney in its New York Office. Sommer is a graduate of Yale Law School, clerked for U.S. District Judge William Schwarzer (N.D.Cal.), and practiced at Davis Polk & Wardwell and Lankler Siffert & Wohl in New York prior to joining the faculty at Brooklyn Law School, where she has taught legal writing, appellate advocacy, and client counseling. She lives in Brooklyn with her husband, attorney Stephen Warnke, and their three children. *Lambda Press Release*, September 12. A.S.L.

AIDS & RELATED LEGAL NOTES

2nd Circuit Finds N.Y. Would Allows Emotional Distress Claims for False HIV+ Diagnoses

In a decision affirming a jury award of damages for legal malpractice, the U.S. Court of Appeals for the 2nd Circuit confirmed that under New York law, individuals who are falsely diagnosed as HIV+ may bring a cause of action for negligent infliction of emotional distress. *Baker v. Dorfman*, 2000 WL 1233349 (Sept. 1). The panel rejected the attorney's arguments that his client had not actually suffered any damage when he missed deadlines in a case against New York City because his claims were without merit.

In 1993, Ricky Baker went to Cabrini Hospital in New York City to take an HIV test after learning that one of his prior partners had tested positive. Baker's blood was sent to the Department of Health (DOH), which tested the sample and informed Baker that he was HIV+. Baker sunk into a deep depression after learning that he was seropositive. Months later, however, the DOH advised Baker's physician at Cabrini Hospital that Baker should be retested because his blood had been tested by DOH "on a bad day." Nine months after his original test, in January 1994, Baker learned from DOH that he was, in fact, not HIV+. Baker took numerous retests to confirm this diagnosis. Although he was not infected with HIV, Baker still suffered from ongoing depression and anger, and despite psychiatric counseling, was no longer able to resume his prior life as an interior designer. By the end of 1994, Baker had quit his job and returned home to Iowa.

Baker retained Dorfman as his lawyer in February 1994, and proceeded in state court against the City for damages resulting from the false positive diagnosis.. Although the statute of limitations for filing a claim against the City (90 days under N.Y. Gen'l Mun. Law § 50–e(5)) had already run by that time, New York law allows a party to file a motion for late notice of claim within one year and ninety days after a claim against a municipality has accrued. However, Dorfman did not file the late notice of claim, and waited almost two years after Baker's misdiagnosis to file the complaint (March 31, 1995). The state court granted summary judgment on behalf of the City, and although Baker obtained new counsel and appealed, the decision was affirmed. See 250 A.D. 477, 671 N.Y.S.2d 663 (1st Dep't 1998).

Baker then sued Dorfman for malpractice and fraud in federal court. The district court granted summary judgment for Baker on the issue of malpractice liability, and allowed the issues of fraud and calculation of damages to proceed to a jury. The jury awarded Baker $360,000 in compensatory damages and $25,000 in punitive damages. Dorfman moved for a new trial, but the motion was denied. The district judge added some additional damages to the jury award, bringing the total above $400,000.

The 2nd Circuit, in an opinion by Judge Dennis Jacobs, affirmed the decision of the trial court to deny a new trial with regard to the fraud claims, finding that there was sufficient evidence to support the judgment based on the numerous patently false representations Dorfman had made in his resume about his education and experience. The court also addressed Dorfman's defense to the malpractice allegation, which consisted of an argument that Baker's claim for negligent infliction of emotional distress against New York City was without merit, and therefore, Baker suffered no harm as a result of Dorfman's incompetence.

Under New York law, a plaintiff can bring a claim for negligent infliction of emotional distress under one of three theories. First, a plaintiff can show, under the "bystander" theory, that he experienced injuries as a result of the shock or fright resulting from watching a member of his immediate family suffer harm due to the defendant's negligence. Second, under the "direct duty" theory, a plaintiff can recover if the defendant breached a duty of care owed specifically to the plaintiff. Finally, a plaintiff can recover damages in New York where there is "an especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious." Although New York's highest court has not yet ruled whether a false diagnosis as HIV-positive qualifies as a "special circumstance," Jacobs noted that at least one appellate division panel has held that such allegations state a cause of action, in *Schulman v. Prudential Ins. Co.*, 226 A.D.2d 164, 640 N.Y.S.2d 112 (1st Dep't 1996), and referred to other cases where trial courts have cited *Schulman* positively.

Furthermore, Jacobs noted that "[i]t is settled in New York that people who are negligently exposed to HIV may recover for the emotional distress resulting from their fear of contracting AIDS." Although Dorfman had argued that "actual exposure" is a prerequisite to recovery, the panel insisted that the "actual exposure" requirement was primarily designed to stave off frivolous claims by individuals who would otherwise sue over every accidental cut or prick. In this case, Baker received a positive test result, and his emotional distress was much more "direct and predictable" than individuals unsure of their HIV status after an accident. Therefore, in deciding that Baker's claims were not meritless, the court issued a prediction "that the New York Court of Appeals would hold that a cause of action lies for negligent infliction of emotional distress in the case of a negligent positive result on an HIV test."

Finally, in affirming the district court's decision in its entirety, the court upheld the award of attorney's fees and the calculation of prejudgment interest that the trial judge had added to the jury verdict. *Sharon McGowan*

Federal Court Slams Deficiencies in New York City AIDS Services

In an extraordinarily detailed opinion issued on September 19, U.S. District Judge Sterling Johnson, Jr. (E.D.N.Y.), found that New York City and State had violated federal, state and local law in its maladministration of the Division of AIDS Services and Income Support (DASIS), an agency within the City's Human Resources Administration that was established to facilitate access to services for people with AIDS. Ruling on a case brought by Housing Works on behalf of a class of persons with AIDS in the city, *Henrietta D. v. Giuliani*, No. 95 CV 0641 (SJ), Johnson found violations of constitutional dimension under the federal and state constitutions, violations of federal disability discrimination laws, and violations of state and local laws mandating the timely provision of benefits. Johnson appointed U.S. Magistrate Cheryl Pollak to be a judicial monitor of DASIS's operations for the next three years, with power to resolve complaints about the agency. The city's chief attorney, Michael Hess, vowed to appeal the decision.

This case has had an extensive history, with many interim rulings, virtually all against the defendants. In his opinion, Judge Johnson summarizes the detailed testimony of several named representatives of the class,

all of whom sought the assistance of DASIS, and all of whom found that such "assistance" was not appropriately available. Johnson also related the testimony of two attorneys who have assisted people living with AIDS in their dealings with the agency.

The evidence indicated that DASIS frequently violated both the procedural and substantive requirements of its own authorizing statute, Local Law 47, which was passed overwhelmingly by the City Council at the prodding of then-Councilmember Tom Duane, in response to the Giuliani Administration's attempts to disband the then-existing Division of AIDS Services and require persons with AIDS to follow the same system of all other social service applicants. Facing up to the veto-proof majority by which the bill passed, Giuliani signed it, thus agreeing that the City had to provide benefits as specified in the law.

The theory behind DASIS, according to Johnson, was to provide the "reasonable accommodation" necessary to make benefits accessible to people with AIDS, recognizing the particular difficulties that many such individuals would have in the rather complicated system of welfare benefit distribution in New York City. But such accommodation, required by Title II (public services) of the Americans With Disabilities Act and Section 504 of the Vocational Rehabilitation Act, requires adequate staffing of DASIS so that caseworkers can actually provide the "intensive case management" that is specified in the local law.

Johnson found that provision of such case management appears to be more of a myth than a reality, that qualified benefit recipients experienced undue delays, that the agency failed in its mandate to locate suitable housing (and delayed so long in approving housing found by benefits recipients on their own that apartments were lost or evictions or lock-outs occurred due to non-payment of rent), and as a result, some beneficiaries ended up living on the street or at inappropriate public shelters for various periods of time. Johnson found that the agency as a whole failed to meet its own statutory deadlines for providing benefits at least a third of the time, and that when data were broken down by individual offices, there were some at which almost half of all benefits applications were dealt with in an untimely manner, sometimes stretching out to hundreds of days past the deadlines.

Furthermore, Johnson found that the agency not only closed cases and terminated benefits without notice, in violation of federal constitutional due process requirements as well as statutory requirements, but even followed a policy, admitted by its own defense witness, of defying administrative hearing and court decisions with which the administrators disagreed. Termination of benefits frequently resulted in recipients going without medication. Although Johnson doesn't make the point explicitly in his opinion, such gaps in medication are clearly contrary to the public interest, since they could contribute to the development of drug-resistant strains of HIV, rendering available treatments useless.

Under the U.S. Constitution, as interpreted by the Supreme Court, qualified recipients of public benefits are entitled under the due process clause to notice and a hearing before being deprived of benefits they have been receiving, and the New York State Constitution creates entitlements to certain basic necessities, including housing for the homeless. In finding federal and state constitutional violations, Judge Johnson also found that the state was at fault for lax supervision of the city in its administration of AIDS benefits. He cited a panoply of federal and state statutory provisions that DASIS had violated.

From reading the opinion, it appears that some of the problems DASIS has in complying with these requirements have to do with endemic understaffing of the agency. Mayor Giuliani's attempt to eliminate the agency was stymied by the City Council, but apparently the city administration determined to accomplish the same end, on the backs of persons with AIDS, by starving the agency instead of eliminating it. Johnson cites unrealistically high caseloads, making it impossible for the agency to provide efficient service. (In many cases, for example, recipients did not receive notices that were crucial for their benefits because the notices were mailed to obsolete addresses, even though the agency had been informed of new addresses. The ability to keep track of such individuals is fundamental to intensive case management, but appears beyond the ability of the agency.)

The immediate response of the city's chief lawyer was to criticize the opinion as being based on outdated information that was not applicable to present-day operations of the agency. But Johnson's opinion cites testimony about relatively recent events, and bases its conclusions about untimely action on a city statistical report for the fourth quarter of 1999, so this criticism appears ill-informed.

The plaintiff class is represented by pro bono attorneys Susan J. Kohlmann, Karen B. Dine, and David W. Oakland of Winthrop Stimson Putnam & Roberts, Armen H. Merjian and Virginia G. Shubert of Housing Works, Inc., and Victoria Neilson for the HIV Law Project. A.S.L.

Virginia Appeals Court Upholds Rejection of Defense Evidence of AIDS-Related Depression in Criminal Trial

In *Thomas v. Virginia*, 2000 WL 1239937 (Sept. 5), the Virginia Court of Appeals rejected Clarence Thomas's appeal of a conviction after jury trial for operating a motor vehicle after having been declared a habitual offender under the state's DUI laws. Among the arguments raised on appeal that the court rejected was a challenge to the trial court's refusal to admit evidence that the defendant was suffering from AIDS-related depression at the time of the charged offense.

The defense's proffer showed that Thomas was diagnosed with HIV in 1992. He was thrown out of his mother's house thereafter, because she was afraid he would infect her, and endured a period of homelessness. Since his release from a drug rehabilitation program after a 1994 conviction under the habitual offender statute, he was abusing drugs and alcohol. He had "full blown AIDS" at the time of his arrest, and was then, it is claimed, suffering from extreme depression. The defense also pointed out that his medical condition was one for which he would suffer severe adverse consequences as a result of incarceration.

The appellate court deemed the denial of the proffer to be harmless error, at most. Thomas was initially declared a habitual offender in 1981, had four additional convictions under the habitual offender statute prior to his diagnosis with HIV, and had served significant jail time. He had also been convicted of other crimes, including two felonies. Given Thomas's poor record prior to his diagnosis with HIV, his alleged "suicidal mindset" was deemed "insubstantial explanation" for his behavior, which would have had "no effect" on the jury's determination. The defense proffer concerning adverse consequences to the defendant was deemed "irrelevant to the sentencing function of a jury." (Thomas raised two other arguments on appeal, not discussed here.) *Steven Kolodny*

Federal Court Rejects Claim on False AIDS Diagnosis

In a Federal Torts Claim Act suit against the government, U.S. District Judge Woods (E.D. Mich., Southern Div.) ruled against the plaintiff, finding that a misunderstanding had occurred rather than a misdiagnosis of HIV infection by a physician at a veterans hospital. *Ives v. United States*, 2000 WL 1279164.

Geraldine Ives was admitted to the Veterans Administration Medical Center in Allen Park, Michigan, on February 10, 1996, suffering from a variety of ailments, including difficulty swallowing. Based on initial tests,

she was diagnosed as having gastritis and esophageal candidiasis. Her attending physician was Dr. Farrow. During a consultation in her hospital room with other medical staff present, Dr. Farrow told her (or so she testified) that having ruled out all other causes of her candidiasis, he concluded she had HIV. Ives claimed that she told Dr. Farrow she had not had sex in ten years because of her fear of contracting HIV, and did not know how she could have contracted it. A blood sample was drawn for testing, and three weeks later Ives was told that she was not infected with HIV. Dr. Farrow testified that he would never tell a patient that she was HIV+ without having the results of a blood test, and other medical staff present agreed that Farrow had not told Ives that she was HIV+. Farrow did order an HIV test in an attempt to determine the cause of Ives's condition.

Ives claims that she lost weight, sleep and appetite as a result of the emotional distress generated by learning she was HIV+, and filed suit for medical malpractice, seeking damages.

Judge Woods concluded that Ms. Ives may have genuinely believed she had been told she was HIV+, but the weight of the evidence showed that Dr. Farrow had not made such a statement. This was confirmed, in the court's view, by Ms. Ives signing a consent form for an HIV test after she claims to have been told that she was already diagnosed HIV+. It was also confirmed by prior history, as it seems Ms. Ives had previously misunderstood what she was told about a cancer diagnosis. Although Judge Woods was too polite to say so, the conclusion seems to be that Ms. Ives, a fearful soul, is prone to misinterpret and magnify what doctors say to her, and then to obsess about it to the point of exhibiting physical symptoms of distress.

Under the circumstances, Wood concluded that Ives had not proven medical malpractice by Farrow, and thus was not entitled to damages from the government for her emotional distress. A.S.L.

AIDS Litigation Notes

The Equal Employment Opportunity Commission has filed a rare lawsuit in support of an individual discrimination claim, on behalf of a grocery store employee in Westport, Missouri, who claims to have been fired because he is HIV+. The agency claims that the discharge of the employee, a dishwasher and food server, violates the Americans With Disabilities Act. The owner of the store declined to comment on the suit. *EEOC v. Marsh*. In addition to unlawful termination, the suit alleges violations of privacy rights and unlawful disability-based employment inquiries. In an earlier state court suit, Timothy Ray Williams asserted similar claims under the Missouri Human Rights Act; this suit was filed while the EEOC was considering whether to pursue the case, in order to preserve the timeliness of filing, which might otherwise run afoul of Missouri's two-year statute of limitations for civil rights claims. *Kansas City Star*, Sept. 28

The *Las Vegas Review-Journal* reported Sept. 12 that the Nevada Supreme Court issued a decision Sept. 8 reversing a life sentence for sexual assault imposed on Brian Lepley, an HIV+ substitute public school teacher in Nye County, Nevada, on grounds that he engaged in sex with two teenage boys without revealing his HIV status. According to the newspaper report, the court's brief opinion stated: "The record shows that the victim of the assault charge consented to have a sexual encounter with Lepley. During rebuttal closing argument, however, the district court permitted the prosecution to argue to the jury that 'you can't give total consent without total disclosure.' We conclude that this argument misstates the law. Even if Lepley affirmatively stated that he did not have HIV, his fraudulent statement would only amount to fraud in the inducement. For these reasons, we conclude that Lepley cannot be convicted of sexual assault merely because he failed to disclose his HIV positive status." Neither of the boys with whom he has admitted having sex have subsequently tested HIV+. The court left intact Lepley's convictions on several other counts, for which he has been serving prison time and is close to qualifying for probationary release. Now he will be entitled to a new trial on the sexual assault charge. We were unable to confirm this report, as the opinion was not posted to Westlaw or the court's website as of our press deadline.

In *Patino v. Apfel*, 2000 WL 1357746 (Sept. 20), U.S. District Judge Thomas Griesa (S.D.N.Y.) ruled that a Social Security Disability administrative judge must provide some analysis in support of the conclusion that Kathleen Patino, an HIV+ woman who suffers from depression and fatigue, is employable and thus not eligible for disability benefits. Patino testified that her fatigue problems are so severe that she cannot hold down a regular job. Forms submitted by her psychiatrist indicated a range of disability from slight to moderate, and her treating physician for HIV indicated she could do light work. The administrative judge's opinion engages in no explicit analysis of the various forms of evidence presented at the disability hearing, merely stating that Patino had not proved sufficient disability to qualify for benefits. Finding that there was a conflict in the evidence that needs resolution, Judge Griesa remanded that case for a more detailed explanation by the ALJ, cautioning that the court was not making any ruling on the merits of Patino's benefits claim. A.S.L.

AIDS Legislative Notes

California has enacted a new law that requires HMO whose members are HIV+ to provide referrals to AIDS specialists without having to go through a general practice doctor. *The Business Press*, California, Sept. 25. A.S.L.

AIDS Law & Society Notes

The Food & Drug Administration convened a scientific advisory panel to consider revising the existing regulations that ban blood donations by any man who has had sex at least once with another man since 1977, a rule that excludes virtually all gay men from being blood donors, regardless of their HIV status. The panel, consisting of 13 scientists, voted 7–6 to recommend maintaining the current policy, a bare majority concluding that there was not enough evidence yet to show that existing screening procedures can totally ensure the safety of the blood supply. Although the FDA is not bound to follow this advice, it would be most unusual for it to reject the recommendation of the advisory panel it created. *Atlanta Constitution*, Sept. 15.

The Institute of Medicine of the National Academy of Sciences released a report that was sharply critical of the U.S. government's ongoing response to the AIDS epidemic. The report called for more effective public health prevention activities, including government-funded explicit safer-sex education (including information about condoms) and needle exchange programs. In presenting its recommendations, the Institute pointed out that government policies — especially in the areas of education and needle exchange — are not always supportive of the kind of programs needed to make a major dent in new HIV infections, reporting that a plateau has been reached with about 40,000 new cases each year, a stable annual number since 1992. *New York Times*, Sept. 28.

In *Conant v. McCaffrey*, 2000 WL 1281174 (U.S.D.C., N.D.Cal., Sept. 7), District Judge Alsup ruled that the federal government's threat to punish physicians who recommend marijuana to patients by suspending the physicians' licenses to prescribe controlled substances was not authorized by any statutory authority and would violate the First Amendment rights of doctors and patients. Many physicians have found that smoking marijuana can alleviate side-effects of some common AIDS treatments, and availability of medicinal marijuana has become a major

treatment issue for some people living with AIDS.

The Kentucky Medical Association's members approved a resolution calling for all pregnant women in Kentucky to be tested for HIV, regardless of their risk factors. Since 3/4 of the doctors in the state are members of the Association, it is expected that they will treat the resolution as ethically binding in their practices and routinely order testing. The outgoing president of the KMA, Dr. Harry Carloss, stated that the measure was a public health issue, and that many women might be HIV+ and not know it, thus depriving their children of the protection that prophylactic treatment during pregnancy could give. *Louisville Courier-Journal*, Sept. 21. A.S.L.

AIDS International Notes

Canada's Immigration Minister, Elinor Caplan, announced Sept. 21 that she has asked immigration officials to devise a plan for routine testing of all prospective immigrants into Canada for HIV and hepatitis-B. Caplan described this as a measure to protect the public health of Canadians. Under existing law, immigrants who are known to be HIV+ are barred from entry, similar to the policy followed in the U.S. *Globe and Mail*, Sept. 21.

South African President Thabo Mbeki continues to spark headlines with his on-going questioning of the centrality of HIV in attacking the AIDS problem in his country. Mbeki stirred discontent among public health officials by conferring with some scientists who have expressed doubt about whether HIV "causes" AIDS, in advance of this year's international AIDS conference that was held in Durban, South Africa over the summer. Mbeki has announced that he does not doubt the evidence linking HIV to AIDS, but has stated that he believes that poverty, malnutrition and malaria may have as much to do with South Africa's AIDS epidemic as HIV. However, he did issue a statement late in September agreeing that condom, safer-sex and awareness campaigns about HIV were a necessary part of combating the epidemic. Mbeki was quoted as saying he was advised that a virus cannot cause a "syndrome." *South Africa Business Day*, September 21.

An AIDS action group from Venezuela reported via the internet that a Venezuelan court has invalidated a mandatory HIV-testing policy adopted by the Pedagogical University where public school teachers in Venezuela receive their training. The University sought to justify the policy by arguing that its resources should be devoted to training people who can devote a lifetime to a teaching career, and should not be spent on those infected with HIV, who could be expected to sicken and die within 5 to 8 years without having conferred any substantial benefit on the country. ACCSI, the activist group that brought the lawsuit to have the policy invalidated, argued that it violated principles of international human rights law as well as the Venezuelan constitution and various national laws and regulations. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

Lambda Legal Defense and Education Fund, Inc., the country's oldest and largest lesbian and gay legal organization, currently has a number of attorney positions open in offices across the country. For details, please see their website, www.lambdalegal.org.

The ACLU is accepting applicants for a new legal fellowship position with the Lesbian & Gay Rights and AIDS Projects in the New York City office. The fellows will help with litigation and legislative/policy work, doing legal research, writing policy and legal memos, briefs and other litigation documents, and may also participate in conferences and do public speaking. Recent law graduates and third year law students are invited to apply. Familiarity with and commitment to lesbian and gay rights, AIDS/HIV law and civil liberties in general are expected of candidates. The position will be covered with regular ACLU scale staff salaries and benefits. The deadline for applications is November 1, 2000. Cover letters, resumes and writing samples should be sent to: Matt Coles, Director, ACLU Lesbian & Gay Rights & AIDS Projects, 125 Broad Street, 18th Floor, New York ANY 10004–2400; 212–549–2650 (fax); lgbthiv@aclu.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Beh, Hazel Glenn, and Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 Mich. J. Gender & L. 1 (2000).

Bradley, Gerard V., *Same-Sex Marriage: Our Final Answer?*, 14 Notre Dame J. L. Ethics & Pub. Pol. 729 (2000).

Eskridge, William N., Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 McGeorge L. Rev. 641 (2000).

Harding, Major B., Mark J. Criser & Michael R. Ufferman, *Right to be Let Alone? — Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides For a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens?*, 14 Notre Dame J. L. Ethics & Pub. Pol. 945 (2000).

Havins, Weldon E., and James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 McGeorge L. Rev. 673 (2000).

Lynd, Paul R., *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 William & Mary J. of Women & L. 561 (Spring 2000).

Price, Melanie D., *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issue of Sexuality*, 33 Indiana L. Rev. 863 (2000).

Strasser, Mark, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 Notre Dame J. L. Ethics & Pub. Pol. 753 (2000).

Strauss, Paul, *Handling a Plaintiff's Sexual Harassment Case*, 26 Litigation No. 4, 35 (Summer 2000).

Yamada, David C., *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 Georgetown L.J. 475 (March 2000). Suffolk Law School, where Prof. Yamada teaches, will be holding a conference on the subject of workplace bullying on Oct. 27 & 28. For information, visit the school's website at www.law.suffolk.edu/als.

Student Notes & Comments:

Garrity, Amy, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain — A Proposed Model Statute for Louisiana*, 60 La. L. Rev. 809 (Spring 2000).

Habegger, Dee Ann, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 Indiana L. Rev. 991 (2000).

Rundell, Martha, *Decisions Between Consenting Adults Made in Private — No Place for the Government to Tread*, 60 La. L. Rev. 877 (Spring 2000).

Specially Noted:

In its July/August issue, *The Sciences*, a journal published by the New York Academy of Sciences, includes an article by Anne Fausto-Sterling titled "The Five Sexes, Revisited," reviewing the accumulated movement in recognizing sexual diversity, including intersexuality in particular, by the scientific community. This is an excellent re-

view and summary of the latest information, written in a style accessible to non-scientists.

AIDS & RELATED LEGAL ISSUES:

Hermann, Donald H. J., *The Development of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons Infected with Human Immunodeficiency Virus*, 33 Indiana L. Rev. 783 (2000).

Student Notes & Comments:

Duncan, Allison, *Defining Disability in the ADA:* Sutton v. United Airlines, Inc., 60 La. L. Rev. 967 (Spring 2000).

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.