3rd CIRCUIT RECOGNIZES FEDERAL PRIVACY RIGHT FOR INFORMATION ABOUT SEXUAL ORIENTATION

Breaking new ground for the privacy rights of lesbians and gay men, the United States Court of Appeals for the 3rd Circuit has ruled that the Fourteenth Amendment of the federal Constitution protects against the unauthorized disclosure by public officials of a person's sexual orientation. The three-judge panel held that state actors may not reveal, or even threaten to reveal, a person's sexual orientation absent a "genuine, legitimate and compelling" state interest. *Sterling v. Borough of Minersville*, 2000 WL 1664909 (Nov. 6). As a result of the court's landmark decision, the estate of Marcus Wayman, an 18–year old man who committed suicide after two police officers allegedly threatened to "out" him to his family, may proceed with its 42 U.S.C. § 1983 federal civil rights lawsuit against the officers. A majority of the appellate panel agreed with the district court's conclusion that the officers were not entitled to qualified immunity, since their conduct violated Wayman's "clearly established" constitutional right to privacy. A dissenter, finding that the right had not been clearly established in the 3rd Circuit prior to this opinion, argued that the officers should enjoy qualified immunity from suit.

On the evening of April 17, 1997, Wayman and a 17–year old male (who was not identified in the court's opinion) were in a parked car in a lot adjacent to a beer distributor in Minersville, Pennsylvania. Two police officers spotted the vehicle and decided to question the youths, since the distributor had been burglarized in the past and since the car's headlights were turned off. The officers discovered that the teenagers had been drinking, and that they gave evasive explanations for their presence in the parking lot. After the officers searched the car and discovered two condoms, Wayman and the 17–year old admitted that they were gay and had come to the parking lot to engage in consensual sex. The officers arrested the youths for underage drinking.

At the county police station, Officer Scott Wilinsky lectured the two arrestees that the Bible condemns homosexual activity. Wilinsky also threatened to reveal Wayman's sexual orientation to his grandfather if Wayman did not do so himself. Wayman confided to his friend that he was going to kill himself, and committed suicide in his home soon after his release from police custody.

Wayman's mother, as executrix of her son's estate, filed suit against the Borough of Minersville, the two police officers in their official and individual capacities, and the Chief of Police of Minersville. The complaint alleged that the defendants had violated Wayman's 4th Amendment right against illegal arrest, his 14th Amendment rights to privacy and equal protection, and the Constitution of the Commonwealth of Pennsylvania. After discovery was complete, the defendants moved for summary judgment. The district court dismissed the plaintiff's 4th Amendment claims, but otherwise denied the defendants' motion, noting in particular that the officers were not entitled to qualified immunity as a matter of law.

On interlocutory appeal, the 3rd Circuit agreed. Setting forth the analytical framework for the majority, Circuit Judge Mansmann explained that the police officers could not rely on a qualified immunity defense if the plaintiff alleged "a deprivation of a clearly established constitutional right," and "if the unlawfulness of the alleged conduct would have been apparent to a reasonable official." The majority concluded as a matter of law that both prongs of this test were satisfied.

Citing a familiar string of privacy right cases including *Griswold v. Connecticut* (381 U.S. 479), *Loving v. Virginia*, 388 U.S. 1 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973) and *Whalen v. Roe*, 429 U.S. 589 (1977), the court noted that the federal right to privacy embodied in the 14th Amendment had grown to include "not only an individual's autonomy in intimate matters, but also an individual's interest in avoiding divulgence of highly personal information." Notwithstanding this common-law evolution, Judge Mansmann acknowledged that the Supreme Court's 1986 ruling in *Bowers v. Hardwick*, 478 U.S. 186, which upheld the constitutionality of a Georgia statute criminalizing consensual homosexual sodomy, "gives us pause." Ultimately, however, all three members of the panel found that *Bowers* concerned sexual conduct only, and not the right to be protected against the unauthorized disclosure of one's sexual orientation. "While *Bowers* indicates that the Court is resistant to bestowing the protection of the Constitution on some sexual behavior, its ruling focused on the practice of homosexual sodomy and is not determinative of whether the right to privacy protects an individual from being forced to disclose his sexual orientation We do not read *Bowers* as placing a limit on privacy protection for the intensely personal decision of sexual preference," Judge Mansmann wrote.

Comparing the disclosure of sexual orientation to the disclosure of medical information, HIV status, financial information and pregnancy status, the court went on to rule unanimously that information about one's sexual orientation falls within the 14th Amendment's "zone of privacy" and is entitled to constitutional protection. At the same time, the majority opinion emphasized that the right to privacy is not absolute: "If there is a government interest in disclosing or uncovering one's sexuality that is 'genuine, legitimate and compelling,' then this legitimate interest can override the protections of the right to privacy. In this instance, however, no such government interest has been identified. Indeed, Wilinsky conceded he would have no reason to disclose this type of sensitive information."

In what is perhaps the most unprecedented aspect of the court's opinion, the appellate panel ruled unanimously that the constitutional right to privacy not only encompasses the right to be free from actual disclosure of a person 's sexual orientation, but also from the mere threat of unauthorized disclosure. The majority opinion explained this rule expansively, apparently ruling that threats to divulge any information protected by the 14th Amendment is unconstitutional: "The threat to breach some confidential aspect of one's life is tantamount to a violation of the privacy right because the security of one's privacy has been compromised by the threat of disclosure." Circuit Judge Stapleton, while agreeing that Officer Wilinsky's threat violated Wayman's constitutional right to privacy, offered in a dissenting opinion a narrower test as to when threats in and of themselves violate the Fourteenth Amendment: "I believe that a threat to disclose private information violates the constitutional right to privacy only where, as here, an officer with no legitimate interest in effecting disclosure makes a threat, the intended and foreseeable effect of which is involuntary self-disclosure." Stapleton would have reversed the order of the district court and granted the officer's motion for summary judgment based on qualified immunity because "a person's right to privacy in his or her sexual orientation was not clearly established in April of 1997." The majority disagreed, pointing out

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that Wilinsky had not included his "suspicions of homosexual activity" in his police report precisely because he knew the information was personal and confidential. Judge Mansmann went on to explain: "Because the confidential and private nature of the information was obvious, and because the right to privacy is well-settled, the concomitant constitutional violation was apparent notwithstanding the fact that the very action in question had not previously been held to be unlawful. Accordingly, Wilinsky could not reasonably have believed that his questioned conduct was lawful in light of the established law protecting privacy rights."

The 3rd Circuit's ruling leaves certain questions unanswered for the time being. For example, the majority opinion took explicit note of the fact that Wayman was 18–years old, and thus legally an adult. Would the state have had a "compelling" interest in disclosing Wayman's sexual orientation to members of his family if he were a minor? Does the court's ruling open the door to the argument that any inappropriate questions by state actors concerning a person's sexual orientation are subject to strict scrutiny?

Some might argue that the newly-recognized constitutional right to remain in the closet does not advance the overall interests of lesbians and gay men, since it perpetuates the notion that one's sexual orientation is something to be hidden. Whatever one's position concerning this issue, the 3rd Circuit's ruling may protect against the type of "official blackmail" that resulted in Wayman's untimely death.

The borough of Minersville was represented by Marshall, Dennehey, Warner, Coleman & Goggin. Wayman's estate was represented by Kairys, Rudovsky, Epstein, Messing & Rau, and the Lambda Legal Defense & Education Fund. *Ian Chesir-Teran*

LESBIAN/GAY LEGAL NEWS

Virginia Appeals Court Rejects Constitutional Challenge to Sodomy Law

In *DePriest v. Commonwealth of Virginia*, 2000 WL 1725038 (Nov. 21), a 3–judge panel of the Virginia Court of Appeals rejected a facial challenge to the Virginia sodomy statute (Va. Code Sec. 18–2.361), ruling that the statute, as applied to men arrested for soliciting sexual activity in a public park, did not violate the right of privacy guaranteed under the Virginia constitution, that penalties under this felony statute did not constitute cruel or unusual punishment, and that enforcement of the statute did not violate prohibitions against establishment of religion under the state or federal constitutions. Ten men were charged and convicted under the statute for solicitation to commit the felony of sodomy.

This consolidated appeal arose out of a series of arrests made in response to complaints of sexual activity in public parks in the Roanoke area. The police launched an undercover investigation to see whether the complaints were justified. At an evidentiary hearing on a consolidated motion to dismiss, the commander of the vice squad of the Roanoke Police Department testified that several male undercover officers were sent out into the parks. He said their instructions were: (1) they were not to entrap anyone; (2) they were to investigate "based on their training and see if anyone would offer to commit an act against them, or pay to commit an act against them;" and (3) to be charged, a person "had to show a willingness to carry out the act in the park." Each of the ten men were arrested after soliciting sex in the park, or fondling the arresting officer in the park, or exposing himself to the arresting officer while masturbating in a public restroom in the park.

At the hearing, the defendants called a number of witnesses, including sex therapists, clergy and "lay people" who testified as to the "… prevalence, popularity and harmlessness of oral sex between consenting adults, married and unmarried, 'gay' and 'straight,' in their own lives and in modern American culture." The trial court rejected the challenge to the statute and denied the motion to dismiss. This opinion states that "nine of the appellants pled guilty and were tried jointly." A tenth pled not-guilty and was convicted at trial. After the convictions, this appeal ensued.

The trial court and the appellate courts each rejected the privacy argument because the sexual activity alleged or the sexual activity solicited occurred in a public place. Wrote Judge Willis for the appellate panel, "The activities underlying the charges against the appellants were not conducted in private. Their solicitations were made to strangers in public parks. They proposed to commit sodomy in the public parks." This opinion noted that an eleventh person had "proposed committing oral sodomy in a private place," but that person was not charged, pursuant to the vice squad commander's instructions..

The appellants argued that the disparity of punishment for sodomy as opposed to adultery or fornication constituted cruel and unusual punishment. The trial and appellate courts both rejected this argument. Willis asserted that it is the province of the legislature to define and classify crimes, and that the courts will not disturb such classifications unless the sentence prescribed was so severe for a comparatively trivial offense that it "shocked the conscience." "We find our consciences shocked neither by appellants' sentences nor by the five-year maximum sentence provided by the statute," wrote Willis.

The appellants' argument that the sodomy statute violated the establishment of religion clauses of the state and federal constitutions was rejected because, even though the sodomy statute had Biblical antecedents, the court found this was not dispositive of the issue. The legislature may adopt laws prohibiting conduct that was prohibited in the Bible for entirely temporal reasons. The court cited a U.S. Supreme Court case which cited theft, fraud, adultery and polygamy as examples of conduct was banned in the Bible and would be prohibited in contemporary society. The Court of Appeals then applied the U.S. Supreme Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in considering whether the primary purpose of the sodomy statute was to advance or inhibit religion or whether that statute fosters excessive government entanglement in religion. The court rejected this argument, stating, "To the contrary, the statute rests plainly on long established secular values concerning sexual conduct." The court failed to specify what those "secular values" are.

The trial court rejected a facial challenge to the statute because the Virginia courts have apparently adopted a very restrictive view of facial challenges to criminal statues, taking the position that one may not generally assert rights of third parties. The court ruled that this is not a case where individuals not a party to this action stand to lose by its outcome and yet have no effective means of preserving their rights by themselves. To the contrary, anyone prosecuted under this statute may assert his privacy rights when charged. Consequently, the court found that the appellants lacked standing to raise the constitutional privacy issue. No other exceptions to the restriction which would allow a facial challenge were found to apply.

A few days after the ruling was announced, Roanoke attorney Sam Garrison, who represents all ten appellants, announced he would seek an en banc review by the Court of Appeals prior to seeking review from the state's Supreme Court. *Roanoke Times*, Nov. 25. Various public interest groups had filed amicus briefs in the case, including a joint brief filed by the ACLU Lesbian and Gay Rights Project and Lambda Legal Defense and Education Fund. *Steven Kolodny*

Transgender Plaintiff's Sexual Orientation Discrimination Case Revived By Minnesota Appeals Court

Demonstrating analytical acuity and empathy that would be of credit to federal judges deciding Title VII cases, Presiding Judge Stoneburner, writing for a three judge panel of the Minnesota Court of Appeals, reversed summary judgement against a transgendered plaintiff's sexual orientation discrimination and hostile work environment suit under the Minnesota Human Rights Act (MHRA). The court also reversed a district court order compelling the plaintiff to answer questions about her genitals, holding that such discovery is not relevant to her claims. *Goins v. West Group*, 2000 Minn. App. LEXIS 1152 (Nov. 21).

In 1997, Julienne Goins agreed to relocate her employment with West Group (publisher of Westlaw) to West's Minnesota site. No inappropriate conduct has ever been alleged against Goins. Nevertheless, prior to her relocation, four women, none of whom has apparently been in the restroom at the same time as Goins, objected to Goins' use of the women's restroom because of their belief that Goins is biologically male. Goins was designated "male" on her birth certificate, but has taken female hormones since age 21, and obtained a name change and a Texas court order authorizing the change of gender from "genetic male" to "reassigned female" on any documents including birth certificate. Goins has not had reassignment surgery, but the parties do not dispute that she consistently identifies as female.

West directed Goins on pain of discipline to use an "inconvenient and dirty" single-occupancy unisex restroom rather than the women's restroom. Coworkers and supervisors monitored and reported on Goins' restroom use, discussed her biological status, and subjected her to "frequent staring and glaring." Goins' complaints of discrimination and harassment to West's human resources hierarchy went unanswered. In 1998, West offered Goins a promotion and raise, but Goins, who received another job offer on the same day, declined. In her written resignation, Goins stated that she left her employment with West voluntarily, because of the stressful environment created by the restroom policy.

The Court of Appeals reversed the lower court's rulings based on several errors, starting with misapplication of the MHRA. The MHRA prohibits employment discrimination based on sexual orientation, which is defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." While West concedes that Goins is a member of this protected class, the lower court rejected analysis of a direct claim, instead holding that Goins additionally had to show that she was qualified to use the women's restroom to make a case of indirect discrimination. "After a thorough discussion of non-jurisdictional case law on same-sex marriage, the district court found that a person's sex remains as designated on the birth certificate," therefore Goins was not "qualified" to use the women's restroom. In explaining the irrelevance of right-to-marry jurisprudence to the present case, Judge Stoneburner's opinion notes that the Minnesota legislature "has clearly stated that the prohibition on sexual orientation discrimination contained in the MHRA shall not be construed to authorize same-sex marriage." (Raising a question: Was the lower court's decision rejecting the direct discrimination claim informed by a fear of same-sex marriage?)

The court held that Goins made a prima facie case of direct discrimination, reasoning "the district court held that Goins can only use the women's restroom by demonstrating anatomy consistent with self-image. The MHRA, however, does not require an employee to eliminate an inconsistency between self-image and anatomy; it protects the employee from discrimination based on such an inconsistency." Unconvinced by West's preliminary defense that it legitimately segregated restrooms on the basis of sex rather than sexual orientation, the appeals court held that summary judgement was inappropriate.

Further, the court held that "'whether the work environment that resulted in and from appellant's exclusion from the women's restroom was sufficiently hostile to be actionable is a question of fact inappropriate for resolution by summary judgment." (The district court had also found that Goins did not report the harassment to her supervisors, despite evidence in the record noted by the Court of Appeals)

As to West's request for an discovery order compelling Goins to produce medical records and answer questions about her anatomy, Stoneburner wrote: "The district court found the requested discovery relevant because it held that only by proving she had at least an absence of male genitals could Goins qualify to use the women's restroom. Because we have rejected that standard the discovery relating to Goins's genitals is irrelevant and the discovery order is reversed." *Mark Major*

California Appellate Panel Revives Co-Parent Guardianship Claim

A guardianship petition brought by the non-biological lesbian co-parent of a minor child states a cause of action sufficient to survive the biological mother's motion to dismiss, according to a unanimous California Court of Appeal panel in *Guardianship of Olivia J.*, 2000 WL 1717102 (Oct. 17) (certified for partial publication). Jennifer J. is the biological mother of Olivia J. While living in the same household as a couple with Karen B., Jennifer gave birth to Olivia. During the relationship, Karen and Jennifer together took responsibility for raising Olivia. Olivia referred to Karen as "Mama" and Jennifer as "Mommy." Karen's relationship with Jennifer ended and Karen moved out of the family household. After Karen left the household, Jennifer told Karen she would never see Olivia again.

In March 1999, Karen filed a petition seeking to be appointed guardian of Olivia and for visitation rights. In her petition, Karen alleged that Jennifer should not have custody of Olivia because such custody is detrimental to the child. Specifically, Karen alleged that Jennifer denies the mother-child relationship between Karen and Olivia and is thus causing psychological harm to the child. The court granted Karen's initial, ex parte, motion for temporary visitation rights. Thereafter, Jennifer moved to vacate the visitation order and to dismiss the petition. Alameda County Superior Court Judge Stephen Dombrink granted Jennifer's motion finding that in the absence of an allegation of abuse, neglect or abandonment, Karen could not, as a matter of law, establish that parental custody was detrimental to the child. In addition, the trial court held that, as a matter of law, loss of a relationship with a non-parent could not form the basis of a claim that parental custody is detrimental to the child. However, Judge William Stein, writing for a three-judge panel of the First District Court of Appeal, revered and remanded the petition for a hearing on whether parental custody was detrimental to the child. It is important to note that for the purposes of this proceeding, Karen conceded that she did not have the legal status of parent of Olivia. However, the court held that a non-parent need not alleged abuse, neglect or abandonment to be appointed guardian of a minor child over the objection of the biological mother.

In making its decision, the court relied heavily on child custody cases in California holding that custody may be awarded to a non-parent when the parent is acting in a fashion incompatible with parenthood. *In re Agenia P.*, 28Cal.3d 908 (1981); *In re Carmeleta B.*, 21 Cal.3d482 (1978). The court held that the same standard applied in custody cases should apply in cases brought pursuant to California Probate Code Section 1514 by a non-parent, for appointment of a guardian over a minor child. Moreover, the court held that the petition for guardianship need not set forth the specific facts supporting the claim that parental custody is detrimental to the minor child.

In addition, specifically rejecting the holding of the trial court, Judge Stein held that, although Karen was faced with a very heavy burden of proof, she could base her petition solely on her claim that Olivia is suffering psychological harm due to her loss of relationship with Karen. Stein distinguished *Guardianship of*

Z.C.W., 71 Cal. App.4th 524 (1999), relied upon by the trial court, which had rejected the petitioner's claim that the court should make a custody award because the loss of relationship with a non-parent was causing psychological harm to the minor child. *Guardianship of Z.C.W.* was decided after an evidentiary hearing, and in that case, the court concluded that the facts did not support petitioner's claim. The court did not foreclose the chance that a different set of facts might support such a claim. However, the court noted, in dicta, that *Z.C.W.* illustrates the difficulty Karen will have in meeting her burden of proof on remand. As a result, the court held that loss of a relationship with a non-parent, who has acted as a de facto or psychological parent, is a factor the court may consider in determining whether parental custody is detrimental to the child.

In conclusion, the court commented as follows: "In the absence of a lawful marriage, or legal status as a parent, or some other statutory recognition of her role as a member of the child's family, we know of no principled was, under existing law, to distinguish appellant's status from that of any unmarried member of a household who forms a close attachment with another person's child. At the same time, we recognize that the facts may well bear out appellant's contention that, from the minor's point of view, she does indeed have 'two mothers.' Yet, only one of them is recognized under existing law, and she is entitled to preference in any decision regarding custody of the minor in accordance with Family Law Section 3041. Perhaps the repetition of this unfortunate scenario, in case after case, in which the appellant unsuccessfully avails herself of legal remedies not designed to suit the factual circumstances, will eventually lead to a legislative solution, if for no other reason than to protect the children involved from becoming pawns in the conflict of the adults who care for them."

Certainly Karen has an uphill burden to prove that her loss of relationship with Olivia is causing sufficient psychological harm to warrant appointment of Karen as guardian over the objection of the biological mother, Jennifer. However, the court has clearly shown that the argument is there to be made. *Todd V. Lamb*

Civil Disobedience Produces Another Jail Term for Gay Tax Protester

A panel of the U.S. Court of Appeals for the 7th Circuit ruled Nov. 1 that Robert Mueller was correctly thrown back in the clink for refusing to file federal income tax returns and make payments of taxes due for tax year 1997. *U.S. v. Mueller*, 2000 WL 1648146 (unpublished disposition).

Mueller was convicted of misdemeanor tax charges in 1997 and sentenced to 13 months imprisonment and a year of supervised release. Under the terms of the supervised release, he was required to file a tax return for 1997, accompanied by payment of taxes due. Mueller failed to do so by the applicable deadline, and the government moved the court to revoke his supervised release. At the revocation hearing, Mueller, a gay man, sought to excuse his compliance by arguing that the tax laws discriminate against homosexuals. The administrator was unpersuaded and threw the book at him, finding a willful violation, and sentenced him to a new 90–day prison term, and the federal district court affirmed the sentence.

The 7th Circuit pointed out that Mueller's attack on the tax code actually undermined his case, since it showed that he was very familiar with the tax code and its application to him, justifying the finding of willful violation. "Moreover," wrote the court per curiam, "whether or not he believes the tax laws are unconstitutional, Mueller does not have the right to simply disregard them, especially where his compliance is mandated by the conditions of his supervised release." A.S.L.

En Banc Pennsylvania Superior Court Rejects Second-Parent Adoptions

The Superior Court of Pennsylvania has rejected "second-parent adoptions," holding that the partners of gay and lesbian parents will not be able to adopt children they have helped to raise unless the other parent terminates his or her legal rights to the children. The court announced its ruling in two parallel cases: *In re Adoption of C.C.G. and Z.C.G.*, 2000 WL 1672904 (Nov. 8) and *In re Adoption R.B.F. and R.C.F.*, 2000 WL 1673363 (Nov. 8). C.C.G. and Z.C.G. dealt with a second-parent adoption of children by the partner of an adoptive gay male parent, and R.B.F. and R.C.F. concerned children who had been born to a lesbian via artificial insemination and whose other lesbian mother attempted to adopt them. The facts in each of the cases were otherwise substantially the same, and therefore Judge Stevens, writing for the en banc court, issued identical opinions in both matters. (The dissents were likewise identical, with only a slight variation in the ordering of paragraphs.) The vote in each case was 6–3.

The legally recognized parents in these cases filed joint petitions with their partners for adoption of their children. Under the Pennsylvania Adoption Act, 23 Pa. C.S.A. § 2711, in order for a parent to consent to the adoption of his or her child, he or she must state: "I understand that by signing the consent I indicate my intent to permanently give up all rights to this child." When filing their petitions, however, the parents consented to the adoption by their partners but omitted the language consenting to the termination of their parental rights.

Adopting a strict construction of the adoption statute, the court determined that unless the legal parents surrendered their rights to the child, the court could not approve the petitions. The court insisted that the only exception to the requirement that parental rights be surrendered prior to adoption was found in Section 2903, a "step-parent exception," which allows the spouse of the legal parent to adopt a child without terminating the legal parent's rights. The passage of the state's defense of marriage act (DOMA) made it clear that the state does not consider the domestic partners of gay men and lesbians to be the legal equivalent of heterosexual spouses. In light of this, the court refused to read the statute broadly so as to allow gay and lesbian partners to take advantage of this provision. Therefore, according to the court, the petitioners were not being penalized because they were homosexuals, but rather, they were simply ineligible for an exception to this rule because they were not, and could not be, the spouses of the legal parents under Pennsylvania law.

Petitioners had also requested that the court conduct a "best interests of the child" analysis pursuant to Section 2901 of the Adoption Code, which would allow the trial judge to waive the unqualified consent requirement if there were "good cause." The court rejected this argument, however, finding that a best interests analysis would not be triggered until the statutory prerequisites had been met — namely, that the legal parent had terminated his or her rights to the child. Finally, the court refused to hold that a joint petition for adoption established joint parental rights, insisting that the issue was one for the legislature to decide. Although recognizing that other states' courts have permitted second-parent adoptions under these circumstances, the court insisted that those decisions "are not binding on this Court."

Concurring in the judgment, Judge Ford Elliott suggested that *In re Adoption of E.M.A.*, 487 Pa. 152 (1979), controlled this case. In E.M.A., the court ruled that under Section 2903, the "qualified consent of the natural parent is only effective in favor of a spouse." Any attempt of the petitioners to proceed under Section 2901 was futile because the court was not "writing on a clean slate." Petitioners could not simply avoid the unqualified consent rule by proceeding under one section rather than another. Only the Legislature or the Supreme Court could expand the unqualified consent exception outside of a marital relationship.

In an extensive dissenting opinion, Judge Johnson explored four flaws in the majority's analysis. First, the majority's interpretation of Section 2711 was incorrect and incongruous with the purpose of the adoption law. Second, the majority erroneously relied upon case law involving the involuntary termination of parental rights. Third, the court improperly focused on the relationship between the petitioners

rather than on the parent-child relationship. Finally, in response to Judge Ford Elliot, *E.M.A.* did not control this case.

Judge Johnson began by emphasizing that the purpose of the adoption law is to protect the rights of children but also to protect the rights of natural parents. Section 2711 was designed to ensure that prior to the termination of parental rights, which is the traditional outcome of an adoption, a parent has offered consent that is "intelligent, voluntary and deliberate." Section 2711 also guarantees that adoptions are final by ensuring that natural parents are aware of the consequences of their actions. These considerations, however, were not implicated in this case. "Clearly, requiring [the legal father] to relinquish his parental rights to two children he legally adopted does not serve the purpose of safeguarding his fundamental liberty interest as the children's legal father." The same was true in the case of the biological lesbian mother who consented to the adoption of her children by her partner. Therefore, once the legal parent "the only person possessing legal rights" to the children joined the petition of the prospective co-parent, the trial court's concerns should have been satisfied. In light of this fact, the majority's unwavering interpretation of Section 2711 as mandatory was unreasonable and inconsistent with the canons of statutory construction because it led to an absurd result.

Judge Johnson also noted that the Pennsylvania Adoption law does not expressly prohibit a joint adoption by an unmarried homosexual or by a heterosexual couple when the adoptee is not related to either petitioner. Therefore, if the gay couple in C.C.G. and Z.C.G. had simply petitioned to adopt the children jointly from the outset, they could have been permitted to do so. The majority's ruling led to another absurd result by preventing the couple from adopting the children jointly now when they could have done so earlier. The adoptive parent should not be required to surrender his rights only to have to re-petition for them in a "sham adoption proceeding," which would only be "a parody of the very stability in family life the Adoption Act attempts to achieve."

Second, the majority erred in limiting the discretion of the trial judge to waive the unqualified consent requirement for good cause shown. By making the surrender of parental rights mandatory, the court had now rendered the "[u]nless the court for cause shown determines otherwise" language mere surplusage. "If the legislature had wished to erect an absolute bar to adoption without giving consideration to a child's best interest, it would never have provided the discretion so clearly established in section 2901." The court, in reaching this determination, incorrectly relied on *In Interest of Coast*, 385 Pa. Super. 450 (1989), a case involving the involuntary termination of parental rights, which was clearly inapposite. When a legal parent seeks to add a parent, there is no governmental intrusion on the fundament rights of the parent, and no assessment that the parent is unfit to care for the child. Therefore, according to Johnson, *Coast* and its progeny had no bearing on this case.

Third, the dissent criticized the court for focusing its attention on the fact that the petitioners were not and could not be married in the state, rather than concentrating on the potentially salutary effects that a second-parent adoption would have on the child. "Courts should design rules to serve children's best interests. By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form." Judge Johnson and fellow dissenting Judge Todd rebuked the majority for calling the appellants "de facto families," instead of recognizing them as real, albeit non-traditional, families. In addition, Judge Johnson criticized the majority's characterization of the petitioners' claims as relying on Section 2903's stepparent exception, when the petitioners in fact had admitted in their brief that "Section 2903 is not at issue in this case," and had sought relief under Section 2901. The majority's discussion about the status of homosexual marriage in Pennsylvania served no other purpose than to "superimpose[] upon the Adoption Act a judicial gloss that favors adoptions by heterosexual married couples over homosexual unmarried couples."

Finally, Judge Johnson insisted that *E.M.A.* was inapposite because it did not proscribe same-sex partners from adopting and was handed down prior to enactment of Section 2901, which allows a trial judge to waive the requirement of unqualified consent for good cause shown. Judge Todd joined Judge Johnson's dissent, but, in addition, used his opinion to delineate the numerous benefits that these children would be denied because of the court's ruling, including dependent benefits, health care insurance and Social Security benefits. Todd also noted that New York, New Jersey, Illinois, Vermont, Massachusetts and the District of Columbia have interpreted their "equally broadly-written adoption statutes" as accommodating second-parent adoptions.

Numerous gay and lesbian legal organizations were involved in this case, including the Support Center for Child Advocates, Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the Gay and Lesbian Lawyers of Philadelphia's Women's Law Project, Center for Lesbian and Gay Civil Rights. *Sharon McGowan*

N.Y. Appellate Division Revives Sexual Orientation Discrimination Suit; Rejects Election of Remedies Defense

Partially reversing a decision of the trial court, a unanimous 4–judge panel of the N.Y. Appellate Division, 1st Department, found in *Acosta v. Loews Corp.* (Nov. 28), published in the *New York Law Journal* (pp. 25 & 42) on Nov. 30, that the Supreme Court has jurisdiction over a sexual orientation discrimination claim under the New York City Human Rights Law, even though the plaintiff had first filed his claim with the City Human Rights Commission. The trial judge had dismissed this claim reasoning that plaintiff had made an election of remedies under the law when he filed with the City Commission. The court also reinstated tort claims against the corporate employer that had been dismissed by the trial court.

According to the factual allegations as described in the opinion by Justice Tom, Mr. Acosta was a pantry cook at the Regency Hotel, who was subjected to various acts of sexual harassment and physical assault by co-workers due to his sexual orientation. Acosta was hired in 1980. The acts of which he complained took place from 1985 to August 1997, and included vicious name-calling, unwanted touching, co-workers exposing their genitals to Acosta and pulling down his pants. According to Acosta, several of these incidents were witnessed by management officials. Acosta claims that management was aware of this misconduct by his co-workers but did nothing to correct it. Acosta suffered a nervous breakdown as a result of this ongoing harassment in 1997 and was hospitalized.

Acosta filed a pro se complaint with the New York City Human Rights Commission in September 1997, but eventually hired counsel in order to file suit in Supreme Court, adding state law statutory and tort claims, the latter against co-workers in addition to the company. In July 1998 the Commission dismissed Acosta's complaint for "administrative convenience," and he pressed his case in Supreme Court. However, Judge Leland DeGrasse, accepting the employer's argument that Acosta's prior filing with the Commission constituted an election of remedies, granted a motion to dismiss the City Human Rights claim, and also dismissed the tort claims against the employer.

Justice Tom found that the Commission's administrative convenience dismissal, not an administrative ruling on the merits, effectively ended the election of remedy and made it possible for Acosta to file his lawsuit under the Human Rights Act. In this case, the existence of plausible state law claims as part of the lawsuit appears to have lent plausibility to the Commission's terse explanation that it was dismissing the case to make it possible for Acosta to bring an action combining all his claims in the state

court. There is authority that an administrative dismissal solely for the purpose to allow a suit under the Human Rights Act will not terminate the election of remedy, the court found here that it made sense to allow Acosta to pursue all his claims in one action as a means of conservation of resources in enforcement of the law.

On the tort claims, the court found that Acosta's factual allegations were sufficient to raise respondeat superior liability claims against the company in tort, and so also reversed the dismissal of some tort claims against the company. However, the court upheld Justice DeGrasse's dismissal of some claims on timeliness grounds, and also found there would not be respondeat superior liability for some intentional tort claims asserted primarily against co-employees.

Acosta is represented by Liz Schalet and John Ware Upton, with Robert D. Lipman on the brief. A.S.L.

Denver Federal Court Finds 1st Amendment Bar to Suit Against Church by Lesbian Youth Minister

U.S. District Judge Brimmer (D. Colo.) ruled on Nov. 15 that a "ministerial exception" to the application of civil rights laws, which was developed by the courts as a means of avoiding constitutional challenges to the application of such laws to churches, stands as a bar to claims under Title VII and other federal civil rights laws by a lesbian whose position as a "youth minister" was terminated after she had a commitment ceremony with her partner in a different church from the one in which she was employed.

St. Aidan's Church decided to create a part-time position of "youth minister" in order to undertake outreach to involve more children in the life of this Episcopalian Church located in Colorado. According to the proposal for the position that was approved by administrators of the Episcopal Diocese of Colorado, the youth minister would direct the program that would "seek to incorporate fellowship, education, service and worship." It was not required that the youth minister be a member of the Episcopalian Church, but it was required that he or she be a practicing Christian and "an ability to share that with youth in a constructive and non-oppressive manner." Lee Ann Bryce was hired for this position during the summer of 1997. The court's opinion does not indicate whether she was open about being a lesbian during this process. The opinion relates in some details her satisfactory performance of this job, the good evaluations she received, and many details of the projects and programs she devised and oversaw.

On November 21, 1998, Bryce had a commitment ceremony with her partner, Reverend Sara Smith, an ordained minister of the United Church of Christ. The ceremony was held at Rev. Smith's church. On Nov. 30, Bryce met with Rev. Henderson, the head of St. Aidan's Church, to inform him about this ceremony after the fact. The opinion details a series of meetings and memoranda, some involving Bryce, some between various members of the hierarchy of the church, involving the church's reaction to this information. Church leaders from around the world had previously met and approved a resolution concerning the attitude of the church toward homosexuality; that statement was generally affirming of gay people, but condemned homosexual practice as incompatible with scripture, urged celibacy for homosexuals, and opposed "the blessing of same-sex unions" or ordination of persons involved in such unions. (The United Church of Christ, by contrast, ordains openly gay ministers and approves of same-sex commitment ceremonies.) Ultimately, the church leaders concluded that they should terminate Bryce as youth minister effective in June 1999, and offer her a non-clerical position through the end of 1999. St. Aidan's convened membership meetings of its congregation to discuss these matters, during which Bryce and Smith were present and also spoke, and during which, according to the court's opinion, many congregants (including parents of youth members) spoke in support of Bryce and Smith. However, the church stuck to its position.

Bryce and Smith filed suit against the church leaders and the church. Bryce claimed she had been subjected to unlawful discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, particularly describing as "harassment" the treatment to which she had been subjected. Both Bryce and Smith also sued under 42 U.S.C. 1985(3) & 1986, claiming that various defendants had joined to deny them constitutional rights. The defendants moved to dismiss all claims based on a 1st Amendment Free Exercise argument. The court converted the motion into a summary judgment motion, finding that the issues it would have to decide required factual findings on the merits of the case (and most particularly the nature of Bryce's job), and granted summary judgment to the defendants.

Judge Brimmer found that many circuit courts of appeal have adopted a "ministerial exception" to the application of Title VII to disputes involving certain employees of religious institutions. Title VII itself provides certain exemptions for religious employers, relating primarily to their right to take into account religious affiliation, beliefs and practices in making employment decisions. However, Title VII does not necessarily exempt religious institutions from the requirement not to discriminate on the basis of other categories covered by that law, such as race, color, national origin and sex. Concerned about the 1st Amendment Free Exercise issues that could be raised by judicial scrutiny of employment decisions concerning employees charged with carrying out the religious mission of a church, many of the courts have developed a "ministerial exception" regarding these other Title VII categories of prohibited discrimination. Although the 8th Circuit has not ruled on the question, Judge Brimmer found persuasive the rulings of other circuit courts adopting such an exception, and applied it in this case, based on an evaluation of the youth minister position at St. Aidan's.

"The Ministerial Exception is not limited to ordained clergy," wrote Brimmer, finding that courts have extended it to "lay employees of religious institution 'whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order or participation in religious ritual and worship." The main distinction seems to be between employees whose functions are almost exclusively administrative or financial in nature, and those whose functions incorporate a significant aspect of advancing the spiritual life of the institution. As a policy justification for this exemption, "the Court finds the Ministerial Exception to be congruent with the Supreme Court's determination that the First Amendment limits a court's ability to meddle with a church's affairs, including its relations with its ministers."

Brimmer conceded that the designation of this position as "youth minister" was not conclusive of the question whether the position is covered by the exemption. But the court found that "Bryce acted as a significant figure in furthering the expression and realization of the beliefs held by St. Aidan's. Specifically, Plaintiff Bryce acted to build a cohesive youth group; such action was the desired result of the Youth Minister Proposal which envisioned a strong youth ministry that would help St. Aidan's attain other parish objectives." The court concluded that Bryce's job function fell well within the ministerial exemption, and thus that the church was entitled to summary judgment on the Title VII claim.

Turning to the other federal civil rights claims, the court relied on a 9th Circuit decision that had found that the same justifications for applying a ministerial exemption to Title VII claims would carry over "to any cause of action which would impinge a church's ability to select its ministers or to exercise its religious beliefs in the context of employing its ministers." "Plaintiff Bryce's claims under sections 1985 and 1986 relate to her status as an employee of St. Aidan's," wrote Brimmer, concluding that summary judgment was appropriate on these claims as well.

Finally, the court addressed Rev. Smith's claims that her rights had been violated during this process, particularly by comments made about her during the congregational meetings that were held to discuss this issue. Smith had complained "that Defendants published har-

assing and damaging materials about Plaintiffs and discussed Plaintiffs' relationship in front of the parish." Judge Brimmer characterized this as just another aspect of the "religious dispute" between the church and Bryce. Smith sought to rely on cases holding that church's are not exempt from liability when they cause injuries to "third parties" (i.e., non-church members) in violation of law, but Brimmer asserted that the dispute from which the church's conduct arose here involved "resolution of a controverted question of faith," and thus found those precedents inapplicable, granting summary judgment on Smith's claims as well.

The plaintiffs are represented by Patricia S. Bangert of Powers & Phillips, PC, of Denver, Colorado. A.S.L.

Federal Appeals Court Dismisses Gay Plaintiff's Claim of Hostile Work Environment

The U.S. Court of Appeals for the 7th Circuit dismissed a gay plaintiff's claim that the harassment he endured at work was actionable under Title VII of the Civil Rights Act of 1964. *Spearman v. Ford Motor Co.*, 2000 WL 1646288 (Nov. 3).

Edison Spearman alleged that he encountered harassment of an anti-gay nature from his co-workers at Ford Motor Company, who were mainly male. They often made offensive statements to him, such as saying that they hated his "gay ass," posted notes and wrote homophobic graffiti near the toilets, such as "Spearman is a fag and has AIDS." Spearman also alleged that they stole items from him and destroyed his tool box. Spearman complained to Ford about all of these incidents. Each time, Ford apparently took immediate action, such as having labor relations representatives investigate the matter and meet with all concerned, and cleaning the graffiti off the walls. The final straw came after Spearman complained to Ford about a co-worker who he believed, rightly or wrongly, was obliquely referring to him when he named a hypothetical gay aggressor "Ed" during a workshop on gay sexual harassment in the workplace. The same co-worker offered to give him a hug on two separate occasions. After Spearman filed this last complaint with Ford, the co-worker assigned him the task of washing windows. Spearman believed this was punitive and in retaliation for filing the complaint. He left work and went on medical leave for five months, during which he was treated for depression.

Spearman then sued Ford for alleged violations of Title VII. His main claims were that the actions of his fellow employees constituted sexual harassment; that Ford knew of this sexual harassment, continued to subject him to a hostile work environment; and that Ford retaliated against him for filing complaints. Ford filed a motion to dismiss Spearman's claim, arguing that the hostile behaviors and slurs that he suffered did not constitute sexual harassment, but rather were based solely on his sexual orientation, which is not actionable under Title VII. The main question before the court was whether the plaintiff's basis for his claims stemmed from treatment he allegedly received because he is gay or because he is male.

Judge Manion, writing for the court, cited *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which held that a Title VII violation existed in a situation where a male employee suffered from a hostile working environment created by his male co-workers who mistakenly believed he was gay. Manion further cited *Oncale* to the effect that "While sexually explicit language may constitute evidence of sexual harassment, it is not 'always actionable, regardless of the harasser's sex, sexual orientation, or motivations.' The plaintiff must still show that he was harassed because of his sex." Another case cited by the court was *Price Waterhouse v. Hopkins*, 490 US 228 (1989), holding that evidence of sexual stereotyping may provide proof that an adverse employment decision or an abusive environment was based on gender. If so, the harassed employee would be entitled to relief under Title VII. But, the court noted, *Oncale* and *Price Waterhouse* also stand for the proposition that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on the plaintiff's gender in making its decision."

With those cases in mind, the court analyzed Spearman's argument. Plaintiff's position was that the sexually explicit insults, such as calling him "bitch," or associating him with RuPaul, a drag queen, were motivated by sex stereotypes because his fellow employees thought him too feminine to fit the masculine environment at the Ford plant. The court disagreed and found that the employees harassed and insulted Spearman because they were angry with him over work-related disputes, not because he is a man. The court also ruled that the record showed that Spearman's co-workers harassed him because they did not like gay people, not because of his sex.

To prevail on a claim of retaliation, one must show that he complained about conduct prohibited by Title VII and that he suffered a significant adverse employment action as a result, which constituted a significant change in employment status. The court found that the plaintiff could not show either of these. Since Spearman regularly performed housekeeping duties, assigning him the task of window washing was not a significant change in duties. Moreover, the court found that the conduct complained of did not violate Title VII. Because the plaintiff did not allege sufficient evidence of the existence of a hostile working environment based on sex to state a claim under Title VII, the court granted the defendant's motion to dismiss. *Elaine Chapnik*

Sixth Circuit Rejects Male Prisoner's Claimed Right to Feminine Appearance

In *Lee v. Young*, 2000 WL 1720930 (Nov. 6), the U.S. Court of Appeals for the 6th Circuit affirmed the district court's dismissal of Prisoner Warren Antonio Lee's complaint about denial of his "constitutional right" to wear a woman's hairstyle and makeup in the general population of a prison as frivolous. Lee originally filed his complaint, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Warden Young and Captain Taylor of the Federal Correctional Institution at Memphis, TN. Lee also made a legally baseless claim that the district court had a duty to inform him that he should have brought suit under 28 U.S.C. § 2241 rather than proceeding under *Bivens*.

Lee claimed that the defendants violated his due process rights, the 1st Amendment, the 8th Amendment, the Federal Tort Claims Act, and state tort law by making derogatory comments about his choice of a flamboyant and effeminate hairstyle and by placing him in administrative segregation because of his refusal to comply with an order to change his hairstyle. Lee stated that he was not a transsexual and had no medically-documented need to wear a certain hairstyle or makeup.

The 6th Circuit addressed each of Lee's claims and dismissed them on the ground that a warden could require an appearance that was "in keeping with … the security, good order, and discipline of the institution," 28 C.F.R. § 551.1, that the prison rules and policies were related to legitimate penological interests, and that prisons may discriminate on the basis of even a suspect classification if the unequal treatment was "essential to prison security and discipline." As such, Young and Taylor's actions in trying to warn Lee about the possible dangers of lifestyle choices in a prison environment did not rise to the level of a constitutional or tort violation under any of Lee's claims. *Leo L. Wong*

Massachusetts Appeals Judge Rejects School District Appeal of Preliminary Relief in Case of Cross-Dressing Student

In a short opinion issued on November 30, Judge Jacobs of the Massachusetts Appeals Court rejected an attempt by the Brockton School Committee to block implementation of a preliminary injunction requiring them to allow a cross-dressing youth to continue attending school dressed according to her preference. *Doe v. Brockton School Committee*, No. 2000–J–638. The trial judge, who is openly lesbian, had rejected a motion by defendants to

recuse herself, and had granted preliminary relief in an opinion carefully balancing the likelihood of plaintiff's success on the merits and possible harms to the defendant from granting relief in advance of a full trial.

The school board appealed both of these rulings. Addressing the recusal issue, Judge Jacobs wrote that "the defendants have not demonstrated that the judge's impartiality in this case might reasonably be questioned as a result of her organizational memberships or her past association as an attorney with the organization representing the plaintiff." ("Pat Doe" is represented by Gay & Lesbian Advocates & Defenders, a public interest law firm.) On the preliminary injunction issue, Jacobs noted that the school board's appeal continually referred to the plaintiff's misbehavior at school and the disruption it had caused, and found that this was rather beside the point, since the injunction did not in any way require the school authorities to tolerate misbehavior from Doe or any other student, it merely required that they allow her to attend school in feminine garb as she desired, despite her male sex from birth. The trial judge made her decision on a record that included expert testimony concerning plaintiff's gender identity and the psychological harm she would suffer either by being forced to dress as male or to be relegated to home schooling. Next to these harms, the school board's testimony seemed relatively insignificant, and the board was not complaining on appeal that it was precluded from presenting any testimony it might want to offer in support of its claim of irreparable harm.

Jacobs concluded, "The judge appears to have applied proper legal standards and the record discloses reasonable support for her evaluation of relevant factual questions. Accordingly, I conclude that she did not abuse her discretion in granting the preliminary injunction in question and therefore deny the defendants' petition for interlocutory relief." Jacobs did acknowledge in a footnote that a comment by the trial judge in her opinion concerning the public interest in the case "gratuitously reflects a personal viewpoint," but concluded from reviewing the record that "no showing of harm to the public interest has been made."

Jennifer Levi of GLAD is representing Doe in this proceeding. A.S.L.

Boy Scouts Developments

The Supreme Court's decision last term finding 1st Amendment protection against the application of state anti-discrimination law to the Boy Scouts of America in the context of the BSA's policy of excluding openly-gay men from being Scout leaders continued to reverberate, perhaps most spectacularly on Dec. 1, when New York City School Chancellor Harold O. Levy announced the New York City schools may no longer sponsor Scout troops, that the BSA may no longer use the public schools as a site for recruiting new members, and that the organization is barred from bidding on school contracts. Scout troops may continue to hold meetings in public schools, but only on the same basis as all other organizations that have access to use public school buildings as meeting places. Because Levy did not order the cancellation of existing contracts, the earliest effect of his order is likely to be some time off. Further, Levy determined that the Scouts' "Learning for Life" curricular program would not be affected by this policy. Levy's move came in the wake of actions by three community school boards that had passed resolutions imposing limitations of varying degrees on the organization for its anti-gay policy. Levy took this action despite an assertion by Daniel Gasparo, chief executive of the BSA's New York Councils, that the local Scout organizations do not discrimination based on sexual orientation. The position that Levy took, and that the community boards had taken, was that the national organization of the BSA, which charters local organizations, has set the anti-gay policy and by terms of local troop charters mandates that they follow national policy. *New York Times*, Dec. 2.

The NYC schools developments capped a month of further developments around the country. On Nov. 14, the Broward County, Florida, School Board unanimously voted to ban the BSA from the public schools, a much broader action than that taken in New York, and local BSA leaders vowed a lawsuit on 1st Amendment grounds. The school board action followed by 6 weeks an announcement from the United Way of Broward County that beginning in 2002 the Scouts would be ineligible for program grants due to the discriminatory policy. *Washington Times*, Nov. 18; *South Florida Sun Sentinel*, Nov. 15 & 16. In Rhode Island, a state whose public accommodations law covers discrimination on grounds of sexual orientation, Cub Scout Pack 88 and Boy Scout Troop 28, both of Providence, have informed Scout officials that they will ignore the national policy, even if it means that their charters will be yanked by the national organization. *Providence Journal*, Nov. 7; Nov. 27. The *Albany Times Union*, Nov. 7, published in Albany, N.Y., reported at length about several church leaders who were considering severing ties with local Scout organizations because of the discriminatory policy. Novell, Inc., a Provo, Utah, computer software firm, announced that it will no longer match employee contributions to the BSA, in line with its policy of not making charitable donations to discriminatory organizations. *Salt Lake Tribune*, Nov. 11.

Perhaps the most dramatic individual story was that of Leonard Lanzi, a longtime Scout executive in Santa Barbara and San Luis Obispo Counties, California. Lanzi, himself gay but not particularly open about it, held a full-time position overseeing 249 Scout units in the Central Coast area of California as executive director of the Los Padres Council of the BSA. During a public meeting of the Santa Barbara County Board of Supervisors, at which the members were debating whether to sever county ties with the Scouts, Lanzi testified in support of the discriminatory policy. But, he said, "I could not speak up here without feeling hypocritical," so he announced at the meeting that he is gay. A week later, the BSA fired him, leading to the resignations of several members of the local Scouts executive board. Lanzi is reportedly planning to sue under a California statute banning employment discrimination on the basis of sexual orientation. (The California Supreme Court has ruled that the BSA is not a "public accommodation," so state law does not ban its exclusionary policy for members or volunteers, but it is an employer subject to state laws.) *Los Angeles Times*, Nov. 6. A.S.L.

Civil Litigation Litigation Notes

The Connecticut Human Rights Commission issued a declaratory ruling in November that state laws prohibiting sex discrimination would apply to discrimination against transgendered persons. The declaration was issued in response to a request filed by Stamford attorney Bruce Goldberg, accompanied by a brief drafted by Jennifer Levi, a staff attorney for Gay and Lesbian Advocates and Defenders, on behalf of a group of lesbian/gay and women's rights organizations. GLAD Press Release, Nov. 15.

In *Conway v. City of Hartford*, 760 A.2d 974 (Nov. 7, 2000), the Appellate Court of Connecticut rejected an attempt by Trevor Conway, a transsexual, to revive his state law discrimination suit against the city. Conway, hired in 1983 as a woman named Tracey Conway, legally changed his name to Trevor in 1990 and underwent sex reassignment surgery in 1991, becoming a man. On Aug. 17, 1993, Conway filed complaint with the human rights commission, alleging discrimination on the basis of sex, sexual orientation, and gender dysphoria, and subsequently commenced suit in the Superior Court. There followed a prolonged period of wrangling through discovery. According to this per curiam opinion, it was marked by frequent non-compliance with discovery requests by Conway, which ended when Conway brought a four foot stack of papers constituting a long over-due response to discovery requests into the judge's chambers for a final pre-trial conference. The judge nonsuited Conway at the defendant's motion. Rather than appeal the nonsuit, Conway waited several months, then moved the Superior Court to reopen the case and was denied. The Appellate Court held that the Superior Court did not abuse its discretion

in nonsuiting Conway, and there was no basis for reversing that action, especially inasmuch as the court found that Conway's failure to comply with valid discovery requests was intentional and voluntary, and not due to mistake, mental disorder, or some other problem.

Middlesex (Massachusetts) Superior Court Judge James F. McHugh ruled Nov. 2 that a Cambridge ordinance authorising health benefits for domestic partners of city employees is invalid. McHugh's decision was predictable in light of a state supreme court ruling last year finding that localities do not have authority under current law to enact such benefits plans. *Boston Herald*, Nov. 3.

In a letter released Nov. 15, Major General John L. Scott, commanding officer of an Arizona Army Reserve Unit, rejected an appeal by Arizona State Representative Steve May of the Army's decision to dismiss May from his reserve unit because he stated on the floor of the Arizona legislature during a debate that he is gay. The announcement came a week after May was easily re-elected to the legislature. May had always been open about being gay, but the Army didn't become concerned until he said he was gay during the legislative debate. May, a Republican, has stated he will contest his dismissal in court. *Atlanta Constitution*, Nov. 16.

U.S. District Judge John Shabaz, in Madison, Wisconsin, ruled early in November that a group of former University of Wisconsin students may continue the lawsuit challenging the University's funding of student organizations out of activity fees charged to all students, despite a U.S. Supreme Court ruling last term rejecting a constitutional challenge to the system. The plaintiffs contend that the Supreme Court issued a conditional approval of the fee system, leaving open the possibility of a challenge on whether the system is being administered in a manner that is content-neutral. The plaintiffs insist that the school's attempt to be content neutral masks a reality of content-based decision-making. A trial is set for Dec. 8. *Capital Times*, Nov. 16. Meanwhile, in Minnesota, U.S. District Judge Paul Magnuson reportedly has dismissed a similar lawsuit against the University of Minnesota, finding that the Supreme Court's decision in the Wisconsin case is dispositive. The plaintiffs' attorney in that case, who also represents the Wisconsin students, announced he would not appeal. *Star-Tribune*, Nov. 16.

Nick and Rick Batres, cute twin brothers, saw a way to make some easy money when a photographer who had seen their high school yearbook photos offered a modeling opportunity. At the time, the twins were 16 years old. A few years later, they discovered that their photographs had appeared in an issue of XY Magazine, a publication aimed at gay youth, and that the headline over their picture read "Young and Gay." Young they may have been, but gay they claim they are not, and the brothers, now 24, have filed suit against the photographer and the magazine in Sonoma County, California, Superior Court, claiming misappropriation of their likeness, libel, and infliction of emotional distress. The case has quickly achieved local notoriety because the complaint alleges that before the photos were taken, the twins were introduced to the landlord of the building where the photographer had his studio, former Congressman Doug Bosco. It turns out that Bosco, a lawyer, has represented the photographer, Steven Underhill, in another, unrelated lawsuit in which he was charged with selling somebody else's photo for use in an advertisement for a 1–900 phone sex line for gay men! What a tangled web... *Santa Rosa Press Democrat*, Nov. 26.

Legislative Notes

On Nov. 30, a committee of the New York City Council gave unanimous approval to a proposed Gender-Motivated Violence Protection Act, which would create a civil remedy for individuals who suffer gender-motivated violence in the City of New York. The measure has cosponsorship from 33 members of the Council, so its passage in December seems highly likely, and there are indications that Mayor Rudolph Giuliani is inclined to sign the measure. A similar federal civil remedy was declared unconstitutional by the Supreme Court last term in *U.S. v. Morrison*, 120 S.Ct. 1740 (2000), the Court holding that Congress did not have legislative authority under the Commerce Clause to enact such a law, which was within the exclusive jurisdiction of states and localities. Several other jurisdictions are entertaining similar legislative proposals, but New York City's will most likely be the first to be enacted. Significantly, the proposal takes a broad view of "gender-motivated violence," specifically including coverage for sexual orientation-related violence, recognizing in particular the problem of domestic violence within same-sex relationships. *New York Times*, Dec. 1.

Lauderdale Lakes, Florida, City Commissioners have tentatively approved a proposed non-discrimination ordinance (including sexual orientation) that its proponents claim would make the city a model of anti-discrimination policy. The ordinance was expected to be approved on final reading by the end of November, having survived a first vote at mid-month. The ordinance is targeted at contractors doing business with the city. *South Florida Sun-Sentinel*, Nov. 16.

U.S. Election Notes

As we went to press, the outcome of the presidential contest was still uncertain, with George W. Bush having been certified as the winner of Florida's 25 electoral votes by state officials, which would provide him with a narrow electoral victory, but Al Gore pursuing a court contest of the certification, based on the belief that a complete count of all disputed ballots would put him ahead in the state's popular vote. The consequences of a Bush victory for lesbian and gay concerns became immediately apparent with press speculation about potential cabinet nominees including viciously anti-gay former Georgia Senator Sam Nunn for Secretary of Defense, and outspoken anti-gay Kansas Governor Frank Keating for Attorney General. (Of course, the GOP has no monopoly on homophobes, as the press also speculated that Gore might appoint Nunn as defense secretary.) The more long-term implications of the presidential contest for gay rights were difficult to discern as of now, especially with the national congressional results producing an even 50–50 split between the major parties in the Senate, the body that must ratify all presidential appointments (including judicial appointments). We speculate that in light of the Senate split, neither Gore nor Bush would be able to get confirmation of court appointees who were perceived as other than centrist in their judicial philosophy.

All three openly-gay members of the House of Representatives, Barney Frank (D-Mass.), Tammy Baldwin (D-Wis.), and Jim Kolbe (R-Ariz.), were re-elected in the November 7 election. However, eight openly lesbian or gay candidates for election to Congress were defeated, including Ed Flanagan (D-Vt.), the first openly-gay Senate candidate of a major party, and Gerrie Schipske (D-Cal.), the challenger who was widely seen as having the best chance at election, whose run at Republican incumbent House member resulted in a very narrow loss.

In races for state offices, according to a post-election roundup in *The Washington Blade* on Nov. 10, almost all the openly gay or lesbian incumbent state legislators were re-elected, as were most openly gay incumbents in county or municipal offices. Several new openly-gay members of state legislatures were also elected: Scott Dibble (D-Minn.), Robert Dostis (D-Vt.), Karla Drenner (D-Ga.), Jackie Goldberg (D-Cal.), Christopher Hughes (D-N.H.), Christine Kaufmann (D-Mont.), Christine Kehoe (D-Cal.), Sheila Kuehl (D.-Cal. [a lower house incumbent elected to the state senate]), Joe McDermott (D-Wash.), Nick panagopoulos (D.-N.H.), and Ed Poelstra (R-Ariz.) Several candidates were also newly elected to local government and school board positions.

Gay rights did not fare well in ballot initiatives. A Maine ballot question seeking voter ratification of a new state law banning sexual orientation discrimination, which was leading in polls through the campaign, was defeated by surprisingly wide margin, suggesting that many

voters who intend to vote no on gay rights measures are reluctant to appear discriminatory when they are questioned by pollsters. In Nebraska and Nevada, ballot questions placing anti-same-sex marriage provisions in state constitutions were overwhelming approved by identical margins of 70–30%. This seems to track what national polls say about public opinion concerning same-sex marriage; at this point, only about a third of the public is willing to voice support for the concept. (The Nebraska chapter of the ACLU promptly announced that it would file a lawsuit claiming that the amendment, which was more wide-ranging than the Nevada measure in actually appearing to outlaw any public recognition for domestic partnership, violates the Equal Protection Clause. *Omaha World-Herald*, Nov. 19.) Finally, in the one bright spot (albeit defensive rather than affirmative), voters in Oregon rejected a ballot measure that would censor affirmative or non-condemnatory speech about homosexuality in public schools.

Also, voters in the city of Weston, Florida, passed an amendment to their city charter banning bias based on age, race, religion, color, national origin, physical or mental disability, creed, sexual orientation or gender. *South Florida Sun-Sentinel*, Nov. 8.

Law & Society Notes

More evidence has surfaced to refute the argument by U.S. military commanders and their Congressional sympathizers that allowing openly lesbian or gay members to serve would seriously undermine morale and negatively affect enlistments. In England, a Defense Ministry study of the impact of having ended the ban in the U.K. forces produced a conclusion that there has been no discernible effect on morale or on enlistment rates. The *London Observer* obtained a copy of the study, sent inadvertantly to an American military policy researcher at the University of California, Aaron Belkin, who made it public. The Defense Ministry had not intended to make the report public. The *Observer* published the results late in November, with several U.S. newspaper republishing the *Observer* story on Nov. 22. Quoting the report: "The services reported that the revised policy on homosexuality had no discernible impact, either positive or negative, on recruitment… There is widespread acceptance of the new policy. It has not been an issue of great debate. In fact, there has been a marked lack of reaction. Generally there has been a mature, pragmatic approach, which allowed the policy to succeed. The change in policy has been hailed as a solid achievement." These conclusions also seem to describe the result of ending the ban by Canadian and Australian forces.

At its annual shareholder meeting on Feb. 6, shareholders of Emerson Electric Company will vote on whether to amend the companies equal opportunity policy to add sexual orientation. The measure has been raised by the Pride Foundation, a lesbian and gay group that purchases shares in corporations in order to raise shareholder proposals to ban anti-gay discrimination and extend domestic partner benefits. The company is opposing the measure, stating that it is in compliance with all applicable anti-discrimination laws where it operates. Emerson does not currently offer benefits for domestic partners of its employees.

The Booth newspaper chain, operating in Michigan, has given its constituent newspapers the option to adopt domestic partner benefits plans, and 6 of the 8 have done so, the Ann Arbor News, the Bay City Times, the Flint Journal, the Jackson Citizen Patriot, the Kalamazoo Gazette, and the Saginaw News. The holdouts are the Grand Rapids Press and the Muskegon Chronicle. the publishers of the two holdout papers are still considering the matter. *Detroit News*, Nov. 15.

Chatham College in Pittsburgh, Pennsylvania, will offer health coverage to same-sex partners of employees effective Jan. 1, under a policy approved by the trustees of this private women's college by a vote of 22–2. Neighboring Carnegie-Mellon University has also adopted such a plan, but the University of Pittsburgh, the target of legal action seeking such benefits, has firmly resisted adopting such a policy. *Pittsburgh Post-Gazette*, Nov. 10.

Representatives of a variety of Christian denominations met in Washington during the U.S. Catholic Bishops fall conference to issue a "Christian Declaration on Marriage" on Nov. 14, which calls for legal marriage to be limited to opposite-sex unions. The signers represented the National Conference of Catholic Bishops, the Southern Baptist Convention, the National Council of Churches of Christ in the U.S.A., and the National Association of Evangelicals. This action followed a protest ceremony in which 100 supporters of same-sex marriage were arrested by police. One of the signers, Robert Edgar of the National Council of Churches, ran into flak from his organization, and on Nov. 17 withdrew his signature from the declaration, stating he realized he had made a mistake to sign without getting the approval of the council's 26 member denominations, some of which actually support same-sex marriage and provide holy union ceremonies for their congregants. *Chicago Tribune*, Nov. 18 Alarmed at the extraordinary progress gay rights advocates are having in advancing the cause of legal recognition for same-sex relationships in Europe, the Vatican issued a lengthy document on Nov. 21 by its department on family matters, titled "Family, Marriage and 'De Facto' Unions," calling same-sex unions "a deplorable distortion" of the concept of marriage. The document criticized same-sex unions as embracing a "conception of love detached from any responsibility" and "inherently unstable." "Marriage cannot be reduced to a condition similar to that of a homosexual relationship. This is contrary to common sense." The document also stated that allowing gay couples to adopt children contained "an element of great danger" and would damage families. *Associated Press*, Nov. 22. A.S.L.

International Notes

Tthe Blair Government in England has invoked the emergency process of by-passing the House of Lords on the issue of lowering the age of consent for gay male sex to be the same as for heterosexual sex, 16, and that Royal Assent was anticipated. We will have full details on this next month. The House of Commons has repeatedly passed the government's bill on this subject, only to be rebuffed by the Lords, where sufficient conservative strength remains to mount a challenge to Labour legislation on emotionally challenging issues. *New York Times*, Dec. 2.

The British government has undertaken to compel five of its territories in the Caribbean to repeal their criminal laws penalizing consensual sex between adults. The Foreign Office, relying on England's obligations under the European Convention on Human Rights, was reported to be planning to take such action by the end of 2000. The affected territories are British Virgin Islands, Montserrat, the Turks and Caicos Islands, Anguilla, and the Cayman Islands. Although these laws are rarely invoked, some of them prescribe draconian penalties, including life imprisonment in the Turks and Caicos. The Foreign Office is planning action because local governments were unwilling to repeal the laws at London's suggestion. *London Sunday Times*, Nov. 18.

Fear controversy in the run-up to new national elections next year, the Blair Government has set aside plans to review the issue of reforming the marriage laws respecting marriages involving post-operative transsexuals. Under present British law, a post-operative transsexual is considered to retain his/her original sex for purposes of being able to marry. *The Independent*, Nov. 18. The issue had been brought into focus on Nov. 2 when Mr. Justice Johnson of the High Court ruled that Elizabeth Bellinger, a male-to-female transsexual, had not been lawfully married to Michael Bellinger, her late husband. *Guardian*, Nov. 3. Johnson, professing sympathy for Elizabeth, who had lived as a marital partner with Michael for nearly 20 years and brought up his daughter, concluded: "The law and the evidence I have of the present state of medical knowledge lead inexorably to my dismissing her petition" to be recognized as Michael's widow.

The British High Court has refused to overrule a determination by a Home Office adjudicator denying political asylum to a gay native of Romania. Although the court found credible Gabi Ragman's testimony about the mistreatment he received at the hands of university authorities and others, it concluded that unless one were to find all homosexuals in Romania eligible for asylum in Britain, it could not overrule the determination. The court noted that Romania repealed its sodomy law because the country wanted to join the European Union; in that sense, Ragman could not meet the standard of proving that he would be subjected to official persecution if he returned to his homeland. *Guardian*, Nov. 2.

For the first time there is an openly-gay person sitting in the cabinet of a Canadian province, with the appointment of Tim Stevenson as Employment and Investment Minister in British Columbia. Stevenson, who represents a Vancouver district in the provincial legislature, is an ordained United Church minister, who was first elected in 1996. His partner of 18 years is also a minister in the church. *Globe and Mail*, Nov. 6.

Both houses of Germany's parliament have now approved legislation that would extend legal recognition to same-sex couples. Beginning in 2001, same-sex couples will be able to register their relationships and have many of the same rights as heterosexual couples, including inheritance and tenancy rights, treatment as relatives for many purposes, insurance benefits, and so forth. (The Green Party, which sponsored the legislation, posted a summary in English that was distributed on the internet.) Foreign-born same-sex partners of German citizens will be eligible for permanent residence permanents, similar to the non-German spouses of German citizens. However, the extent of legal recognition will fall short of the full same-sex marriage rights expected to go into effect next year in the Netherlands. The lower house acted on Nov. 10, the upper house on Dec. 1. *Chicago Tribune*, Nov. 11; *New York Times*, Dec. 2.

The *Jerusalem Post* reported Nov. 2 that a recent criminal law reform had effectively lowered the age of consent for gay sex in Israel from 18 to 16. The change was contained in a complex, lengthy amendment that addressed a multitude of issues, and received no press attention when it was passed many months ago, at least in part because there was no overt reference to "homosexuality" in the measure.

The *Turkish Daily News* reported Nov. 18 that Interior Minister Sadettin Tantan has announced that regulations for brothels in Turkey will be amended so that anyone who wishes to practice the profession of prostitution, regardless of sexual orientation or gender identity, will be able to work at brothels. The move is being promoted so that "the streets and nightclubs will be rid of transvestites."

In Austria, a recent appeals court ruling upheld the conviction of a 19–year-old man for having a sexual relationship with a 16–year-old man, under Criminal Law Statute Article 209, which maintains an age of consent for same-sex relations between men of 18, as compared to an age of consent of 14 for heterosexual sex. The Platform Against Article 209, a coalition of more than thirty organizations working for repeal of the differential age of consent, which posted news about this case to the internet, is supporting an appeal to the European Court of Human Rights, which has been notably friendly to attacks on gay discriminatory national laws in recent years. Helmut Graupner, a spokesperson for the coalition, is also defense counsel in this case. ••• Meanwhile, a gay rights group in Austria, Rechtskomitee LAMBDA, announced in an internet posting that the Upper Regional Court of Graz acquitted a man who had been charged under a criminal law for selling gay pornography. The law forbids trade in "lewd" material, which is defined generally as depiction of criminal sexual acts; although consensual homosexual sex is legal in Austria, the Supreme Court has in the past included depiction of homosexual conduct as "lewd." The Appeals Court ruled that the term "lewdness" must be interpreted consistent with prevailing attitudes, and that the court may not ignore changes in society. Noting numerous changes in Austrian law, the court vacated the conviction. Mr. Graupner also represents this defendant.

The Finnish government has reportedly accepted a proposal by the Justice Ministry to bring that country into line with the other Scandinavian countries by enacting a law extending legal recognition for gay and lesbian couples on substantially the same basis as heterosexual couples, with some limitations relating, among other things, to adoption of children. The government is expected to begin discussions on actual legislation in the parliament beginning in December. The parliament narrowly defeated a similar bill in 1996, due to resistance from conservative elements in Finnish society. *Reuters*, Nov. 30.

The state of Tasmania, Australia, has repealed a 1935 statute that banned men from wearing female apparel in public between sunset and sunrise. (Daytime cross-dressing was OK with the Tasmanians...) A local gay rights leader, Rodney Croome, told the press that the law had been used in the past by police to harass cross-dressers. *Lethbridge Herald*, Nov. 16.

In New Zealand, the parliament voted by an "overwhelming majority" to place property rights for same-sex couples on an equal status with such rights for unmarried heterosexual cohabitants, after having previously voted to increase substantially the property rights of such unmarried cohabitants. In a free vote not subject to party discipline, the count was 74–39 for extending the provisions of the pending Matrimonial Property Act to same-sex couples, even though the prior vote on extending property rights to "de facto" heterosexual couples had been quite narrow. The reason was that members of the opposition on the first vote decided, so long as Parliament was going to extend property rights to unmarried cohabitants, there was no valid reason to do so for opposite-sex couples but not for same-sex couples, since this would make the law inconsistent. (A pity many U.S. legislators don't routinely manage this degree of logic in their statements and voting behaviors.) A final vote to pass the bill was expected to take place during the last week of November. The main impact of the law is to empower the courts with discretion to make property divisions between partners whose relationships fail. *The Press*, Nov. 22.

Protests by Muslim women have led Kenya's President, Daniel arap Moi, to announce public opposition to the enactment of pending legislation that would have banned sexual orientation and sex discrimination. The legislation was intended to conform domestic law to various international human rights treaties to which Kenya is signatory. Muslims protested, among other things, that banning discrimination based on sexual orientation would "encourage homosexuality." *The Guardian*, Nov. 21.

In the Australian state of Victoria, the government has announced a proposal to amend the definition of "spouse"in 45 different laws, creating a new legal term of "domestic partner" to extend equality to committed same-sex couples and unmarried heterosexual couples. The Statute Law Amendment (Relationships) Bill would implement recommendations from an Equal Opportunity Commission report that was released in 1998. It would extend to issues of medical treatment, superannuation, property transfers and wills. Attorney-General Rob Hulls said that further legislation would be introduced next year to amend 40 more statutes in the quest for equality of treatment. The bill does not address the currently controversial topics in Australia of adoptions of children by same-sex couples or legal access to in vitro fertilization for lesbians. *The Age*, Nov. 24. A.S.L.

Professional Notes

Broward County, Florida, Judge Robert W. Lee, who was at the center of the recount controversy, was the first openly gay judge in Broward County when he was appointed by former Florida Governor Lawton Chiles. Lee, a Democrat, is a member of the Broward County Canvassing Board in Fort Lauderdale. He had initially voted against a hand recount of ballots, based on a ruling by the Florida Secretary of State, but reversed his vote in response to a subsequent

ruling by the state's Attorney General that local canvassing boards had discretion to conduct such recounts. Lee is a past president of the Broward County Hispanic Bar Association. According to local gay attorneys who were interviewed by the *Washington Blade* (Nov. 17), Lee is well known in the gay community, belongs to gay organizations and attends community events. Last year, Lee was under consideration for appointment by Gov. Jeb Bush to the circuit court, but another candidate was named for the position. Prior to his appointment to the bench, Judge Lee was a member of the Dolphin Democratic Club, a gay group.

AIDS & RELATED LEGAL NOTES

Texas Appeals Court Upholds Conviction of Man For Spitting at Police Officer

In an unofficially unpublished ruling, the Court of Appeals of Texas upheld the conviction of a man who spit at a peace officer, claiming that he was HIV+. *Murphy v. State of Texas*, 2000 WL 1659683 (Tex.App.-Dallas, Nov. 6). Bobby Joe Murphy was arrested by Ron Bledsoe, a City of McKinney peace officer, for public intoxication. Because of his intoxication, he was taken to a hospital by Bledsoe and another officer in handcuffs. Murphy told Bledsoe, "I'll spit blood all over you, I'm HIV positive, you'll die motherfucker." Bledsoe took the handcuffs off Murphy so he could give a urine sample. When they tried to handcuff him again, Murphy spit at the officers and continued to make similar statements as above. The Court of Appeals rejected Murphy's claim that there was insufficent evidence to support the charge. There was no indication in the decision of the officers or Murphy being tested for HIV. *Daniel R Schaffer*

HIV+ Inmates Win ACLU Representation

On Nov. 20, the U.S. Court of Appeals for the 5th Circuit permitted HIV+ Mississippi prisoner plaintiffs in a class action suit to dump their counsel for the more responsive attorneys from the ACLU National Prison Project, to represent them in a fight to end alleged discrimination against HIV+ inmates in the Mississippi prison system. *Gates v. Cook*, 2000 WL 1725014. The court's decision also ended a no-contact order against the ACLU and permitted the possibility for ACLU to seek attorney's fees.

Mississippi prison inmates brought a 42 U.S.C. section1983 action challenging the prison system's treatment of HIV+ inmates. The inmates alleged poor medical care, segregation from the general prison population, inferior housing and denial of participation in certain prison programs because of their seropositive status. The U.S. District Court for the Northern District of Mississippi dismissed the complaint as frivolous, and an appeal was taken. The Court of Appeals reversed and the District Court, on remand, entered a consent decree certifying the class of HIV+ inmates, appointing Ronald Welch as class counsel and settling class claims. Subsequently, a group of class members complaining about Welch's performance as counsel moved to intervene, and two class members moved that the ACLU be substituted as counsel and that the court grant them attorney's fees. The District Court denied the motions and entered an order barring the ACLU from contacting class members. Movants appealed.

Writing for the court, Circuit Judge Benavides reversed in part, vacated in part and remanded. The court found that substitution of counsel was warranted because the class members articulated a clear preference for the ACLU, and also due to Welch's nonfeasance and the constraints upon his ability adequately to prosecute the sub-class' case. Evidence revealed that Welch, a solo practitioner with limited resources, over-extended himself as he was also the counsel for another Mississippi class action prison case as well as several other class actions by subgroups of inmates. Also, an overwhelming percentage of the class members signed a petition calling for his removal from the case, alleging inaction on their demands for new HIV therapies not available to the inmates, and that the settlement of class claims made earlier did not address the original pro se plaintiffs' concerns, including integration into programs and privileges available to non-HIV+ prisoners. Most importantly, the court found based on Welch's own statements that his advocacy was in fact impaired, as he feared that members of the general prison population whom he represents in another class action would object to some of the HIV+ prisoners' demands. Although granting the motion for substitution, the court made it clear that "[m]ere dissatisfaction with class counsel's strategy or obtained results does not adequately support a motion for substitution of counsel."

Turning to the lower court's no-contact order preventing the ACLU from contacting class members, the court found that it contradicts the principles set forth by the Supreme Court, which has ruled that such orders must be based on a clear record and "specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties," (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)). The court found no clear record for the no-contact order and vacated the order, reasoning that preventing class members from seeking counsel of their choice is a restraint on speech, association and the inmates' rights to counsel. As for attorney's fees, the court remanded the issue for reconsideration in light of the court's ruling that substitution of counsel was warranted.

In a lengthy dissent, Judge Edith H. Jones drops a bombshell, stating that the court does not have jurisdiction to review the interlocutory order denying substitution of counsel. According to Jones, the court should be bound by a Tenth Circuit decision, following a Supreme Court precedent, that these orders are not appealable. Jones refers to *Arney v. Finney*, 967 F.2d 418 (10th Cir. 1992), a nearly identical prison case, which applies the Supreme Court case *Firestone Tire & Rubber Co., v. Risjord*, 449 U.S. 368 (1981), holding that an order denying disqualification of counsel is not appealable. She accuses the majority of invoking pendent appellate jurisdiction (PAJ) when the facts of the case do not support it. Under the theory of PAJ, an appellate court may, on review of an appealable interlocutory order, also assume jurisdiction over an otherwise non-appealable order conditioned upon the pendent claims being coterminous with or subsumed in the claim before the court on interlocutory appeal. "[T]he interlocutory denial of substitution of counsel," she states, "may not be appealed on the coat-tails of the non-contact order." In her analysis, she explains that the elements of the constitutional claim challenging the no-contact order are distinct from the elements of the substitution of counsel challenge. First, there are different parties: ACLU alone is aggrieved by the no-contact order, while the denial of substitution order bears only upon the prisoners. Second, the constitutionality of the no-contact order is entirely unrelated to the merits of the class action attorney's performance, a fact easily proven by the possibility to lift the no-contact order and keep Welch as attorney. Jones further warns that this decision will encourage dissident prisoner groups to second-guess class counsel and seek separate representation, effectively harassing class counsel and wasting public resources on tangential issues. "Properly applied standards of appellate jurisdiction would eliminate this problem," she concludes. *K. Jacob Ruppert*

Oregon Appeals Court Rejects Emotional Distress Claim Against Doctor and Hospital for Fear of Contracting HBV or HIV

In *Rustvold v. Taylor*, 2000 WL 1728429 (Nov. 22), the Court of Appeals of Oregon voted 6–4 to sustain the grant of summary judgment against Jeri Rustvold, who sought damages for emotional distress from fear of contracting hepatitis B or HIV due to the negligence of Dr.

Lee Taylor, and anesthesiologist at co-defendant Legacy Emanual Hospital & Health Center.

During what is described in Judge Landau's opinion for the majority as a "routine rib resection" procedure, Dr. Taylor administered an anesthetic by inserting a syringe into intravenous tubing connected to Rustvold. While cleaning up after surgery, Taylor noticed that there were two used syringes on his instrument tray, both of which had been used to administer the same anesthetic. Since Taylor could not tell which had been used on Rustvold, and whether one had been used on a prior patient, he informed Rustvold that he was uncertain whether the syringe he had used to administer her anesthetic had previously been used on another patient, and advised her to seek testing and prophylactic treatment for potential exposure to HBV or HIV.

Rustvold, initially dubious, ultimately agreed to undergo testing and some prophylactic treatment, and doctors determined that she was not infected with either virus. However, she sued Taylor and the Hospital for medical malpractice and negligent infliction of emotional distress. The trial court granted summary judgment against her on both claims.

In voting to uphold the summary judgment, the court found that under Oregon law, as most recently developed by the state supreme court in *Curtis v. MRI Imaging Services II*, 956 P.2d 960 (1998), a medical patient seeking damages for "psychological harm" (emotional distress) arising from alleged medical malpractice would have to show "that there is a duty to guard against that psychological harm," which the majority ruled that Rustvold had failed to do in this case. In a dissent joined by three other judges, Judge Edmonds argued that Rustvold had satisfied the *Curtis* standard by arguing that psychological harm would be a reasonably foreseeable result from informing a surgical patient that she may have been exposed to HBV or HIV due to carelessness with syringes. But the majority insisted that "mere foreseeability of emotional harm" is insufficient under *Curtis*, in the absence of a showing that a doctor has a specific duty to prevent the emotional harm that would arise from this sort of incident.

However, the majority did accept Rustvold's argument that she could seek recovery for the physical injuries she suffered as a consequence of this negligent incident as a result of having to submit to testing and prophylactic treatment, concluding that the trial court erred in granting summary judgment on the malpractice claim to the extent that it claimed damages for these injuries.

Pressing on with her alternative claim of negligent infliction of emotional distress, Rustvold countered the hospital's argument that Oregon does not recognize such a claim in the absence of an actual physical injury by arguing that she suffered actual physical injuries from the testing and treatment she underwent after being informed of her possible exposure. Here her physical injuries did not suffice, in the majority's view, because of the purpose for the physical injury requirement in a negligent infliction of emotional distress claim: to help establish the veracity of the claim by providing some objective evidence to accompany the allegations of psychological harm. In this case, the alleged injuries came well after the alleged exposure, and thus could not serve this confirmatory purpose. "She does not claim emotional distress associated with that treatment and testing," wrote Judge Landau, "only as a result of learning about the possibility of infection during her operation. Thus, the physical injuries on which she relies have nothing to do with the genuineness of her claimed emotional distress and fails to satisfy the physical injury requirement."

However, Landau noted, Oregon has recognized an exception to the physical injury requirement where the defendant's alleged actions infringe on a "legally protected interest" that arises independently from the general duty to avoid foreseeable risk of harm. In *Curtis*, for example, where there was an emotional distress claim by a patient subjected to an MRI procedure who alleged he had not been properly prepared for the claustrophobia induced by that procedure, the court found that the pleadings had identified an independent duty when administering an MRI to avoid the possible emotional trauma associated with that procedure. But Landau found that Rustvold failed to establish such a duty in this case. "Her argument is that her fear of contracting life-threatening diseases is a foreseeable consequence of defendants' negligence. But, as we have noted, that is not enough. Her claim must be predicated on a duty independent of the duty to avoid foreseeable risk of harm."

Thus, ultimately the court sustained summary judgment on the negligent infliction of emotional distress claim, but sent the medical malpractice claim back to the trial court, limited to the issue of liability for the physical injuries Rustvold allegedly suffered during the testing and prophylactic follow-up to Taylor's informing her of her possible exposures. A.S.L.

Court Rejects Summary Judgment in HIV Transfusion Case

In *Kotofsky v. Albert Einstein Medical Center*, 2000 WL 1618475 (E.D. Pa., Oct.30)(not officially published), U.S. District Judge O'Neill denied the defendants' motion for summary judgment on Morris Kotofsky's negligence claims stemming from his becoming infected with HIV as a result of a transfusion he received during heart bypass surgery in November 1991. The defendants had contended that Kotofsky's failure to designate an expert witness prior to trial was fatal to his case.

While he was an inpatient at defendant Medical Center, Kotofsky was given a document created by the center entitled "Consent to Transfusion of Blood and Blood Components and Release." This form, devised by the hospital, was its method of recording consent for transfusions by patients. According to Kotofksy, the form contained no discussion about alternatives to blood transfusion or the use of blood components supplied by the hospital. On Nov. 14, his surgeon performed the operation and transfused Kotofsky with one unit of red blood cells supplied by the Red Cross. Kotofsky was diagnosed HIV+ in 1996 as a result of a look-back program by the Red Cross, under which whenever the agency learns that a former blood donor is HIV+, it contacts recipients of the donor's blood for testing. Kotofsky sued his surgeon, the Medical Center and the Red Cross. (Federal jurisdiction was based on the Red Cross being a defendant, since a special federal law creates jurisdiction on suits against that agency. The claim against the Red Cross has been dismissed by stipulation, but the judge decided to retain jurisdiction over the state tort law claims against doctor and hospital.)

Kotofsky's case alleges that the surgeon and medical center were negligent in failing to provide him with alternatives to regular blood transfusion when seeking his consent. The defendants moved for summary judgment, arguing that this is a medical malpractice case and that Pennsylvania law requires the plaintiff to present an expert on the issue of standard of care, which Kotofsky has not done. Judge O'Neill found that "Kotofsky's claim is closer to ordinary negligence than to medical malpractice," because the duty Kotofsky is alleging to have been violated by defendants is not, strictly speaking, an issue of medical practice. In any event, the court found that as Kotofsky had attached to his response to the summary judgment motion excerpts from a deposition of the director of the center's blood bank at the time of the transfusion, he had met his burden of showing that there are genuine issues of material fact about whether defendants breached a duty of care to Kotofsky.

However, the court denied Kotofsky's counter-motion to reopen or extend time for discovery, stating: "It is not my role to keep the claims of parties alive indefinitely." The problem seems to be that a former medical center employee whose deposition Kotofsky has been trying to take is working on a restricted army base in the Marshall Islands. Written interrogatories have been submitted to her, but not answered yet. Judge O'Neill decided to treat discovery as closed with the exception that the attempts to depose this witness through written questions can be continued. A.S.L.

AIDS Law Litigation Notes

In the long-running negligence trial against Yale University brought by a former medical student who claims to have been infected by HIV due to inadequate supervision and training, Superior Court Judge Sheldon has ruled against the University's attempt to have the case moved to the Complex Litigation Docket. The case had originally been tried in 1997 in the Superior Court in New Haven before a jury, which ruled for the plaintiff, but the matter was appealed and the verdict reversed by the Connecticut Supreme Court in *Doe v. Yale University*, 252 Conn. 641, 748 A.2d 834 (2000), which held, inter alia, that the trial court erred, as a matter of law, in ruling that a joint venture such as the Yale University and Yale-New Haven Hospital relationship, could not be considered an "employer" under the state's Workers' Compensation Act, and had also erred in its instruction of the jury on issue of expert testimony in the case. Yale sought now to move the case to the complex litigation docket, which would mean further delay in trying it, but the plaintiff argued that this was unnecessary and might deprive her of her day in court, depending upon the impact of her HIV infection. Judge Sheldon opined that "the case is not particularly complex, either legally or factually," and was no less complex than other medical malpractice cases pending in the New Haven Superior Court, including some in which Yale is involved as a defendant. *Doe v. Yale University*, 2000 WL 1683401 (Conn. Super., Oct. 13).

A panel of the U.S. Court of Appeals for the 7th Circuit has refused to allow several HIV+ hemophiliacs to bring suit against clotting medication manufacturers, holding that such suit is precluded by the settlement of the multi-district settlement and the plaintiffs' failure to have opted-out of that settlement in time. One of the plaintiffs argued that he didn't know he was HIV+ until after the deadline date for opting out. This didn't impress the court, which stated, per curiam: "The reason he didn't know is that, though he had every reason to believe that he had not only HIV but indeed full-blown AIDS, having had seizures as early as 1987, he delayed being tested until 1997, at which time he discovered his infection had already proceeded to the AIDS stage. This was an ostrich tactic equivalent to knowledge." *Factor VII or IX Concentrate Blood Products Litigation*, 2000 WL 1716435 (Nov. 15) (unpublished disposition).

In *P.A. v. State of New York*, 2000 WL 1710376 (N.Y.App. Div., 3rd Dept, Nov. 16), the court upheld the Court of Claims decision denying a former state prisoner's petition for permission to file a late claim against the state concerning his HIV infection, which he claims to have contracted in prison. According to the facts stated in Justice Rose's opinion for the court, P.A. alleges that he contracted HIV by carelessly using his cellmate's raiser, and that his cellmate was HIV+. He attempted to file his claim more than a year after the incident in which he claims to be have been infected, arguing that his ignorance of the law, his medical condition, and his transfer to another facility should, cumulatively, be held to excuse the lateness of his petition. In upholding the Court of Claims' refusal to grant the petition, the appellate division found P.A.'s excuses insufficient, and further noted that he failed to make necessary allegations to state a claim against the state, having failed to show that prison authorities knew his cellmate was HIV+ and having failed to offer expert testimony that HIV could be transmitted in the manner alleged.

Two members of ACT UP/San Francisco who were tried on a variety of charges stemming fr om their allegedly disruptive demonstration during a meeting of the city Board of Supervisors Finance and Labor Committee on Aug. 9 have been convicted on some of the charges, acquitted on some, and as to some winning a hung jury. The ACT UP chapter is led by HIV+ people who dispute the common belief that HIV causes AIDS or that the current medications should be used by people who are HIV+. They were charged with violating a restraining order to stay away from Judy Leahy of Project Inform, who was intending the meeting. Among other things, the demonstrators sprayed Silly String on Public Health Director Dr. Mitchell Katz, as well as throwing pamphlets at him. Both Jason Swindell and David Pasquarelli were convicted of disturbing the peace, but acquitted of more serious battery charges. *San Francisco Chronicle*, Nov. 23.

The *Des Moines Register* reported Nov. 21 that David Lamont Porter has been sentenced to 25 years in prison for having infected his girlfriend with HIV. Porter, 27, was charged with having become involved with the woman at a time when he knew he was infected, but that he didn't disclose his HIV status to her or, apparently, restrict their activities to safer sex. The victim urged the court not to sentence Porter to prison, telling Iowa District Judge George Stigler at a Nov. 16 hearing, "I don't see any reason for him to go sit behind bars." Instead, she wanted him to come home and live with her so they could continue their relationship and start a family together. But the prosecutor, Joel Dalrymple, urged a prison sentence, arguing that "there's no question the victim is going to die from the act of the defendant," a nonsensical claim in the current state of HIV treatment and mortality statistics.

In a straight-forward application of *Bragdon v. Abbott*, 524 U.S. 624 (1998), a federal district court in Dallas ruled Nov. 2 that a man with chronic hepatitis C infection is an individual with a disability under the Americans With Disabilities Act. *White v. Bank of America Corporation*, 2000 WL 1664162 (U.S.Dist.Ct., N.D. Tex.). Gregory White had argued that the impact of his HBC infection on reproduction met the statutory requirement of a substantial limitation on a major life activity. District Judge Fish suggested that this argument is unconvincing as a matter of logic, but felt compelled to accept it under *Bragdon*, the case of the HIV+ female dental patient who was denied treatment in her dentist's office, and who persuaded the U.S. Supreme Court that the impact of her infection on her reproductive choices was sufficient to constitute a statutory disability, thus bringing her under the protection of the ADA. Fish found that White had made out a prima facie case under the ADA, but granted summary judgment to the defendant bank, finding that the bank had articulated a nondiscriminatory reason for White's discharge, and that White's evidence on the issue of "pretext" was insufficient to keep his case alive. A.S.L.

AIDS Law & Society Notes

The world press reported at the end of November that the South African government, apparently now accepting that anti-HIV medications may be beneficial in dealing with the AIDS crisis in that country, has struck deals with drug manufacturers to make various drugs available through public health clinics, in particular AZT for pregnant women and protease inhibitors for others battling HIV infection. There was some criticism from AIDS groups about the details of these transactions, including the limitation of provision of free drugs to public health clinics, but overall there was praise for the newly proactive approach of a government that had been hobbled by President Thabo Mbeki's prior public expression of doubts about the generally-accepted view in the medical community that HIV causes AIDS.

The Allegheny County, Pennsylvania, Board of Health approved rules on reporting HIV+ test results on November 15. Under the rules, all positive results must be reported to county health officials, but the patient will have the right to decide whether the physician or lab should use a "unique identifier" or the patient's name in making the report. This was a change from an earlier proposal, which appeared to leave the choice of method to the physician. The proposed rules now go to the County Council and the County Chief Executive, who have 30 days to act on the proposal. Under operative rules, the legislators have no right to modify the recommendation, only to approve or reject it. *Pittsburgh Post-Gazette*, Nov. 16.

The U.S. Drug Enforcement Agency has approved letting San Mateo County, California, health officials to run a study using government-grown marijuana to test its therapeutic effects for a group of 60 persons with

AIDS. County Supervisor Mike Nevin told the Associated Press, "What we could end up with is scientific proof that this is a medicine that should be prescribed by doctors." Dr. Dennis Israelski, chief of infectious diseases at the county's hospitals and clinics, will oversee the study. *Los Angeles Times*, Nov. 24. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Servicemembers Legal Defense Network (SLDN) seeks two Staff Attorneys. SLDN is the sole legal aid and watchdog organization for those harmed by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." Ideal candidate should have 3–7 years legal experience with significant client contact and strong writing skills. Military law, civil rights law, legal aid, policy or public affairs experience and/or prior military service is ideal, though not required. Candidate must have a Juris Doctor from an accredited law school and must be admitted to the Bar in some state. Competitive salary, based on experience, with benefits. People of color encouraged to apply. SLDN is an equal opportunity employer. Please send resume and cover letter citing demonstrated interest to SLDN, Senior Staff Attorney, P.O. Box 65301, Washington, D.C. 20035–5301. For more information: www.sldn.org.

Lambda Legal Defense & Education Fund, the nation's largest public interest law firm devoted solely to lesbian and gay and AIDS legal work, has attorney positions open in several offices, including Deputy Legal Director in the headquarters office in New York City. For information about specific openings and deadlines, consult Lambda's website: www.lambdalegal.org. Applications can be sent to Ruth Harlow, Legal Director, LLDEF, 120 Wall Street, Suite 1500, New York NY 10005.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Amar, Akhil Reed, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (Nov. 2000) (Includes discussion of alternative constitutional bases for protecting the right of gays to serve in the military, see p. 129).

Aumueller, Francine, *Hate Propaganda Law and Internet-Based Hate*, 44 Crim. L. Q. (Canada) 92 (2000).

Bates, Frank, *Same-Sex Marriages, Conflict of Laws and Public Policy - A Modern Commentary*, 21 Liverpool L. Rev. 49 (1999).

Cameron, Edwin, *A 'Single Judiciary'? Some comments*, 117 S. African L. J. pt. 1, 141 (2000) (commentary by South Africa's openly gay high court judge).

Dillof, Anthony M., *Lawrence: Punishing Hate: Bias Crimes Under American Law*, 98 Mich. L. Rev. 1678 (May 2000) (review essay).

Duffy, Shannon P., *Pushing the states on gay unions: Vermont law will lead to suits elsewhere, advocates say*, Nat'l L. J., Dec. 4, 2000, p. 1. (Extended consideration of interstate effects of Vermont civil unions, including comments by leading gay legal experts).

Eskridge, William N., Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327 (Nov. 2000).

Frank, Sally, *A City Council Examines Pornography: A Role-Play for a Law School Class*, 21 Women's Rights L. Rep. 169 (Summer 2000).

Garrick, Sandra A., Sex, Preference, and Family: Essays on Law and Nature *edited by David M. Estlund and Martha C. Nussbaum*, 21 Women's Rights L. Rep. 217 (Summer 2000) (review essay).

Kirby, Justice Michael, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 Melbourne U. L. Rev. 1 (April 2000) (commentary by openly-gay Australian supreme court justice).

Massaro, Toni M., *Eskridge: GayLaw: Challenging the Apartheid of the Closet*, 98 Mich. L. Rev. 1564 (May 2000) (review essay).

Mazur, Diane H., *Halley: Don't: A Reader's Guide to the Military's Anti-Gay Policy*, 98 Mich. L. Rev. 1590 (May 2000) (review essay).

Michaelson, Jay, *On Listening to the* Kulturkampf, *Or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 Duke L. J. 1559 (April 2000).

Norrie, Kenneth McK., *Constitutional Challenges to Sexual Orientation Discrimination*, 49 Int'l & Comp. L. Q. 755 (Oct. 2000).

Pantazis, Angelo, *Lesbian and Gay Youth In Law*, 117 S. African L. J., pt. 1, 51 (2000).

Reece, Helen, *The Development of Family Law in the Twentieth Century: Informed Reform or Campaigns and Compromises?*, 63 Modern L. Rev. 608 (2000) (review article).

Saunder, Kevin W., *The United States and Canadian Responses to the Feminist Attack on Pornography: A Perspective from the History of Obscenity*, 9 Indiana Int'l & Comp. L. Rev. 1 (1998).

Stoner, Edward N., II, and Catherine S. Ryan, Burlington, Faragher, Oncale, *and Beyond: Recent Developments in Title VII Jurisprudence*, 26 U. Coll. & Univ. L. 645 (Spring 2000).

Strasser, Mark, Loving *in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. Chi. L. Sch. Roundtable 61 (2000).

Suffredini, Kara S., *Which Bodies Count When They Are Bashed? An Argument for the Inclusion of Transgendered Individuals in the Hate Crimes Prevention Act of 1999*, 20 Boston Coll. 3rd World L. J. 447 (Spring 2000) (book review).

Student Notes & Comments:

DeVos, Pierre, *Sexual Orientation and the Right to Equality in the South African Constitution:* National Coalition for Gay and Lesbian Equality & another v. Minister of Justice & others, 117 S. African L. J., pt. I, 17 (2000).

Eischen, Heidi, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. Toledo L. Rev. 527 (Spring 2000).

Helms, Richard W., Air Transport Association of America v. City and county of San Francisco*: Domestic Partner Benefits Upheld, Except Where Preempted by ERISA*, 27 West. St. U. L. Rev. 323 (1999–2000).

Hillis, Lisa, *Intercountry Adoption Under the Hague Convention: Still An Attractive Option for Homosexuals Seeking to Adopt?*, 6 Indiana J. Global Leg. Stud. 237 (Fall 1998).

Hitchings, Emma, M v. H *and Same-Sex Spousal Benefits*, 63 Modern L. Rev. 595 (2000) (Canadian Supreme Court spousal benefits decision).

MacDougall, Bruce, *Case Comment on* M. v. H., 27 Manitoba L. J. 141 (1999).

Schroeder, Andrew B., *Keeping Police Out of the Bedroom: Justice John Marshall Harlan,* Poe v. Ullman*, and the Limits of Conservative Privacy*, 86 Va. L. Rev. 1045 (Aug. 2000).

Shail, Scott A., Reno v. ACLU*: The First Congressional Attempt to Regulate Pornography on the Internet Fails First Amendment Scrutiny*, 28 U. Balt. L. Rev. 273 (Fall 1998).

White, Walter James, *Exploring the Constitutionality of Subsidizing Political Speech with Mandatory Student Activity Fees:* Board of Regents of the University of Wisconsin v. Southworth, 69 Miss. L.J. 1221 (Spring 2000).

Specially Noted:

The *University of Chicago Law School Roundtable*, vol. 7 (2000), includes the following to symposium discussions with multiple participants: *Should the Government Recognize Same-Sex Marriage?: Session One: Social, Cultural, and Philosophical Issues*, with the following participants: Rev. Gregory Dell, Dwight Duncan, Hannah Garber-Paul, Martha Nussbaum, Vincent Samar, and Rabbi Arnold Wolf (1–32), and *Session Two: Legal, Equitable and Political Issues*, with the following participants: Teresa Stanton Collett, David Orgon Coolidge, George Dent, Andrew Koppelman, Mark Strasser and Cass Sunstein (33–60). The article by Mark Strasser, noted above, accompanies this symposium.

The Supreme Court issue of the *Harvard Law Review*, 114 Harv. L. Rev. No. 1 (Nov. 2000), includings commentary on several of last year's Supreme Court decisions that may be of par-

ticular interest to students of lesbian and gay law: *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000), covered on pages 179–189, may be significant as undermining the authority of Congress to pass laws against employment discrimination, which would be relevant to the future passage of the Employment Non-Discrimination Act; *Troxel v. Granville*, 120 S. Ct. 2054 (2000), covered on pages 229–239, may be relevant to courts considering visitation petitions in cases involving lesbian or gay parents; *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), covered on page 259–269, in which the editors are critical of the Court's doctrinal grounding of its opinion but opine that alternative theories might support the Boy Scouts' right to exclude openly gay men from leadership positions; *Board of Regents of the University of Wisconsin v. Southworth*, 120 S.Ct. 1346 (2000), covered on pages 279–289, relevant to ongoing attempts by conservative groups to defund progressive student organizations (including lesbian/gay and women's organizations) by attacking mandatory student fee systems at state universities.

In a new law school casebook, *Domestic Violence Law* (West, 2001), Nancy K. D. Lemon of Boalt Hall Law School (U.C. Berkeley) devotes a chapter to the topic of "Gay and Lesbian Battering" (pages 190–231). The material consists entirely of selections from law review articles, but that is characteristic of much of the book, which marks a distinctive departure from the usual law school text norm of minimal text and maximization of court opinions.

AIDS & RELATED LEGAL ISSUES:

Student Notes & Comments:

Olsky, David, *Let Them Eat Cake: Diabetes and the Americans With Disabilities Act After* Sutton, 52 Stanford L. Rev. 1829 (July 2000).

Salmon, Sharron, *The Name Game: Issues Surrounding New York State's HIV Partner Notification Law*, 16 N.Y.L.S. J. Hum. Rts. 959 (Summer 2000).

Watkins, Trey, *Torts — Negligent Infliction of Emotional Distress — Fear of AIDS Claim Requires Showing of Actual Exposure Unless Defendant Destroys Evidence of Exposure Creating a Rebuttable Presumption Against Defendant*, 69 Miss. L. J. 1243 (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.