FEDERAL COURT REJECTS CONSTITUTIONAL CHALLENGE TO MILITARY GAY BAN; ASSERTS THAT LAWRENCE V. TEXAS DOES NOT AFFECT THE ANALYSIS

U.S. District Judge George A. O'Toole, Jr., ruled on April 24 that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), does not affect the legal analysis of the Defense Department's "Don't Ask, Don't Tell" military policy. Following the lead of several federal decisions from the 1990s that found the policy to be rationally related to a legitimate governmental objective, Judge O'Toole granted the government's motion to dismiss a case brought by the Servicemembers Legal Defense Network (SLDN) and pro bono attorneys from Wilmer Cutler Pickering Hale & Dorr on behalf of a dozen lesbian or gay former military members who were discharged under the policy. *Cook v. Rumsfeld*, 2006 WL 1071131 (D. Mass., April 24, 2006).

The military policy provides that any service member who states that he or she is gay, engages in homosexual activity, or attempts to marry a person of the same sex, is subject to discharge from the service. In defending the policy against legal challenges, the government has insisted that the policy does not discriminate based on status, but is activated only by conduct or the presumption that somebody who says he is gay has a "propensity" to engage in prohibited conduct. The Uniform Code of Military Justice, Article 125, continues to make "sodomy" a crime in the military, despite *Lawrence*, as construed by military courts.

The closest that gay litigation groups have come to overturning the policy, which was enacted by Congress in 1993 in reaction to President Bill Clinton's initial suggestion to allow gay people to serve openly in the military, was a ruling by the late Judge Eugene Nickerson in *Able v. United States, 68 F.Supp. 850*, (E.D.N.Y. 1997), but Judge Nickerson's ruling, in a test case jointly brought by the ACLU and Lambda Legal, was overturned by the Second Circuit Court of Appeals in an opinion that heavily emphasized the deference that courts normally pay to military policies. *Able v. United States*, 155 F.3d 628 (2d. Cir. 1998)

In granting the government's motion to dismiss, Judge O'Toole rejected the plaintiffs' claims that the policy violates the 5th Amendment's guarantees of due process and equal protection of the law, and the 1st Amendment's guarantee of freedom of speech. O'Toole commented that his ruling said nothing about the wisdom of the policy, as that was a question for the political branches of government, but that assuming the truth of all of the plaintiff's allegations, no valid constitutional claim had been stated.

The Clinton Administration and congressional leaders touted the "Don't Ask, Don't Tell" policy as a "compromise" under which gay people could serve so long as they said or did nothing that might cause anybody to know that they were gay. This was a change from the policy established by the Defense Department in 1980 in response to adverse federal court rulings in the cases of Leonard Matlovtch (Army) and Vernon Berg (Navy). *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C.Cir. 1978); *Berg v. Claytor*, 591 F.2d 849 (D.C.Cir. 1978) The adverse rulings, interpreting a policy that prevailed during the 1970s, questioned why commanders had not exercised their discretion to retain in the service such exemplary officers as Matlovich and Berg. The 1980 policy eliminated such discretion, making discharge mandatory.

Discharges for "homosexuality" increased under the new policy, and didn't decline until the Bush Administration's Middle Eastern wars escalated military staffing needs. As in past conflicts, wartime needs have a way of trumping wasteful personnel policies, resulting in the so-called "stop loss" rules that retain needed service members who are subject to discharge. But the stop loss rules seem not to have been applied in the case of numerous gay students at military language schools who were specializing in Middle Eastern languages, provoking significant adverse press comment, and leading to the introduction of legislation in Congress to repeal the policy. But Republican congressional leaders and the White House have shown no interest in backing the legislation.

After losing the big test case in the 2nd Circuit in 1998, the LGBT public interest firms backed off from challenges to the military policy, but *Lawrence v. Texas* raised hopes that new challenges might be successful. In *Lawrence*, the Supreme Court found that the Texas Homosexual Conduct Law unconstitutionally abridged individual liberty without any legitimate justification, and that *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld the Georgia sodomy law, was wrongly decided because inconsistent with the Court's line of sexual privacy cases stretching back to the 1960s. The big question for lower federal courts interpreting and applying *Lawrence* is whether it significantly changed the legal calculus for future gay rights cases by requiring some form of heightened or strict scrutiny for government policies that burden the right of gay people to have private, consensual sex.

The most important part of Judge O'Toole's opinion is his attempt to make sense of *Lawrence* and to figure out whether it would require imposing a more demanding level of judicial review than was used in the 1990s decisions. Taking the lead from a series of disappointing cases in which lower federal courts and some state courts have minimized the significance of *Lawrence*, O'Toole found that the Court had struck down the Texas law using the least demanding standard for judicial review, the rational basis test, and that this was the appropriate test for evaluating the plaintiffs' due process and equal protection claims.

Justice Anthony M. Kennedy's opinion for the Court in *Lawrence* did not specify what level of review the Court was using. The first part of his opinion, finding that *Bowers v. Hardwick* was wrongly decided, leaves the impression that the Court considered the right at stake to be important enough to merit heightened scrutiny. But in the second part of the opinion, addressing the constitutionality of the Texas law, the Court says that it lacks any legitimate justification and says nothing explicitly about whether the right at issue merited a more demanding judicial review. In his dissenting opinion, Justice Antonin Scalia observed that the Court had not declared gay sex to be a "fundamental right." Some lower courts have quoted Scalia's remark and left it at that, but Judge O'Toole took the further step of asserting that had Justice Scalia's statement been mistaken, surely the Court would have responded to it.

Once he had decided that this is a rational basis case, a decision confirmed by his similar review of the Supreme Court's holding in *Romer v. Evans*, 517 U.S. 620 (1996), for the equal protection point, O'Toole's conclusion followed logically that nothing had happened since

LESBIAN/GAY LAW NOTES **May 2006**

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those 1990s cases to justify a different result. Congress undertook a deliberative process in 1993, involving committee hearings in both houses, testimony by military leaders that allowing gay people to serve would be terrible for the military, and passage of the resulting bill by overwhelming margins. The rational basis test asks merely whether members of Congress could rationally have believed, based on the knowledge available to them, that excluding openly gay people from the military would advance the goals of high morale, discipline and order, and unit cohesion. O'Toole found no basis to question the statute in light of the legislative record.

The First Amendment argument, that the policy imposes adverse consequences on speech, has also been made and rejected by federal courts many times before, and as to this argument O'Toole found that *Lawrence* had no potential significance.

Although O'Toole's view of *Lawrence* is shared by many other federal judges, it is by no means undisputed, especially among legal scholars, and since the 1st Circuit Court has not previously addressed the question, it is possible that this ruling will be appealed after SLDN has had an opportunity to consult its clients and study the opinion.

Even if the 1st Circuit on appeal should reject O'Toole's conclusion that this is a rational basis case, there would nonetheless be the barrier of traditional deference to the military, which proved fatal to the prior challenge to the policy in *Able*. However, it is possible that a court would conclude that the level of deference is weaker when the right at stake has greater constitutional protection. And the validity of the "Don't Ask, Don't Tell" policy has not yet been determined in the 1st Circuit, so there is an outside chance that an appeal could produce the circuit split needed to get this question before the Supreme Court. Ultimately that is where it will have to be decided if the political branches continue to lack the will to reopen the question for a more rational consideration. Surely, the experience of U.S. troops working in the Middle East with openly-gay soldiers of our military allies should have some impact in persuading the Defense Department that a political change is merited. A.S.L.

LESBIAN/GAY LEGAL NEWS

Indiana Appeals Court Rules for Same-Sex Couple in Adoption Dispute

A lesbian couple who had cared for Infant Girl W. (referred to in the case report as "MAH") since she was two days old, filed a joint petition to adopt her in Marion County, Ind., Probate Court. The Probate Court granted the petition. However, a Juvenile Court, in parallel proceedings involving the same child, held that an unmarried couple may not jointly adopt a child in Indiana. Indiana's Fifth District Court of Appeals, in a 2–to–1 decision consolidating the appeals, held that the Probate Court, rather than the Juvenile Court, had jurisdiction over the adoption, and upheld the Probate Court's determination that Indiana's adoption laws do not prohibit unmarried couples from jointly adopting. *In re Infant Girl W.*, 2006 WL 947745 (Ind. App. April 13, 2006). Judge John G. Baker wrote the majority opinion; Judge Edward W. Najam, Jr., who believes that the state statute forbids this adoption, filed a strong dissent. Lambda Legal's Midwestern office in Chicago and Indianapolis attorney Barbara J. Baird represented the lesbian couple on appeal.

All parties and courts agreed that the couple (identified by the *New York Blade* as Becki Hamilton and Kim Brennan) provided an excellent home for Infant Girl W., and the appeals court was punctilious in referring to the adoptive parents as an "unmarried" couple rather than a lesbian, gay, or same-sex couple. The courts all insisted that this was not a gay case; rather, it was a case interpreting Indiana's adoption statute as to whether it permits an unmarried couple to file a joint petition for adoption.

Infant Girl W. was born Sept. 22, 2004, to an unmarried mother, and her father is unknown. The mother decided to place the child for adoption, and the local Office of Family and Children (OFC) entrusted Infant Girl W. to Hamilton and Brennan, licensed foster parents. Hamilton and Brennan are both in their mid-thirties and have lived in Indiana in a committed relationship for over 11 years.

The Juvenile Court has jurisdiction over "children in need of services" (CHINS), while Probate Court has jurisdiction over adoption. Both courts share jurisdiction over the termination of parental rights. Juvenile Court, on its own motion, conducted a hearing under its CHINS jurisdiction in November 2004. Judge Matthew G. Hanson found that, under Indiana law, (1) a "couple" must be a man and woman married to each other; (2) since Hamilton and Brennan, both women, cannot be a couple, they must be individuals; (3) in practice, only hard-to-place children are placed with individuals, and non-hard-to-place children are placed with couples; (4) Infant Girl W. is not a hard-to-place child; (5) W. must be placed with a couple. The judge ordered the OFC to devise a plan for a married couple to adopt the child, rather than an individual, and to make greater efforts to find the unidentified father. Judge Hanson would not terminate the birth mother's parental rights until he received further information on the unknown father. However, he left the girl with her foster parents, Hamilton and Brennan.

Shortly thereafter, in January 2005, the Probate Court held a hearing on the adoption of Infant Girl W. by the couple. The Office of Family and Children, which had placed the child with the couple, objected to the adoption in Probate Court because it felt bound by the Juvenile Court's ruling. The OFC's perfunctory objection was the only one raised to the adoption. Judge Charles J. Deiter granted the adoption, stating that it was in the best interests of the child, and that "Indiana statutes do not require that a couple adopting a child be legally married." The father had forfeited his rights by his failure to register as the putative father, held the court.

Hamilton and Brennan then moved to dismiss the case in Juvenile Court because Infant Girl W. was no longer a child in need of services (CHINS), therefore, the court's jurisdiction terminated. Further, OFC's dispositional goal of adoption had been met, and the girl's birth parents were no longer involved. However, Juvenile Court refused to dismiss.

Jurisdiction and Comity After several procedural maneuvers, the Fifth District Appeals Court accepted consolidated appeals: the OFC appealed the Probate Court's grant of the adoption petition, and the couple appealed the orders of the Juvenile Court. The Appeals Court engaged in an extensive discussion of the issues of jurisdiction and comity (of interest primarily to Indiana trial attorneys). The court's conclusion was that comity did not prevent the Probate Court from exercising jurisdiction over Infant Girl W's adoption. The existence of other, related cases in other courts did not prevent it from ruling on the adoption, over which Probate Court has exclusive jurisdiction. Moreover, as the OFC had failed to object to the adoption in Probate Court on grounds of comity until after the Probate Court held a hearing, it thereby waived this objection.

The Appeals Court also held that Infant Girl W. no longer met the statutory definition of a child in need of services, because she is well cared for by the adopting couple. The Juvenile Court, therefore, is statutorily required to dismiss the CHINS case, as requested by the couple. In addition, the decree of the Probate Court could not be considered void by Juvenile Court. Judge Baker held that a final judgment of a court with subject matter and personal jurisdiction over the parties (which Probate Court had), even if irregular, is not void and not impeachable collaterally.

Indiana Adoption Statute The substantive issue of this case was whether the Indiana adoption statute permitted an unmarried couple (gay or straight) to jointly adopt a child. The dissent contends that a 2005 Indiana adoption statute was designed to prevent adoption of children by

unmarried couples, but the majority held that the 2005 statute pertained to second-parent adoption, which is unrelated to the case at hand. A "second-parent" adoption occurs when an unmarried partner of a parent adopts the child of the partner without terminating the partner's parental rights.

The OFC contended on appeal that the "the Indiana legislature has rejected joint parentage outside of marriage." However, the court notes that the OFC cannot point to statutory language saying this. Rather, Indiana Code Sec. 31–19–2–4 states that "a petition for adoption by a married person may not be granted unless the husband and wife join in the action," except that "if the petitioner for adoption is married to the biological or adoptive father or mother of the child, joinder by the father or mother is not necessary if an acknowledged consent to adoption of the biological or adoptive parent is filed with the petition for adoption."

The majority held that the purpose of this statute was "to guarantee harmony on the part of the adoptive parents upon the question of adoption." "The decision by one spouse to adopt, without the other's participation, could reasonably lead to such a state of dissension over not only responsibility for the child, but also over support and/or heirship, that the household is no longer one the sovereign would find desirable for purposes of adoption." It does not follow, said the court, that requiring married couples to jointly adopt denies unmarried couples the right to adopt jointly. Under Indiana law, an unmarried couple may, therefore, adopt jointly.

The dissent would hold that Indiana Code Sec. 31–19–15–2 precludes adoption by unmarried couples: "If the adoptive parent of a child is married to a [biological or adoptive] parent of the child, the parent-child relationship of the [biological or previous adoptive] parent is not affected by the adoption." Because the legislature affirmed that a married parent's rights are *unaffected* by a second-parent adoption by his or her spouse, the parent's rights logically must be *affected* if the adoption is by an unmarried partner, reasoned the dissent. Thus, a second-parent adoption by an unmarried person would divest the first parent of parental rights. In effect, this would make second-parent adoptions by unmarried partners untenable: adoption by the second parent would necessitate divestiture by the first parent. By extension, stated the dissent, it would be illogical if a second-parent adoption were impermissible, while a simultaneous adoption by two unmarried persons were permissible. The legislature must, therefore, have intended to preclude unmarried couples from filing joint petitions to adopt. The dissenting judge notes that the legislature has enacted statutes permitting adoptions by single adults, married couples, and stepparents, and the only joint petitioners mentioned in the act are married petitioners. " It is the legislature's prerogative to establish what policies are to be furthered under the adoption statutes, including whether an unmarried couple may adopt," concludes Judge Vaidik.

However, notes the majority, the statute is silent on the issue of adoption by an unmarried couple, and the court should only be guided by what is in the best interests of the child. Adoption by Hamilton and Brennan clearly serves those interests, thus, the Appeals Court upheld the decree of the Probate Court. *Alan J. Jacobs*

Federal Appeals Court Rules for School District in Homophobic T-Shirt Dispute

In an important ruling preliminarily vindicating a school district's attempt to combat student homophobia, a panel of the U.S. 9th Circuit Court of Appeals, based in San Francisco, ruled in *Harper v. Poway Unified School District*, 2006 WL 1043082 (April 20, 2006), that Tyler Harper did not have a right to a preliminary injunction ordering the Poway Unified School District to allow him to wear his anti-gay t-shirt to classes at Poway High School. The opinion by Judge Stephen Reinhardt drew a spirited dissent from Judge Alex Kozinski, who argued that the boy's First Amendment rights were being violated.

School administrators walk a trickly line between permissible and impermissible censorship of student expression. The Supreme Court has ruled, in cases dating back to the Vietnam War era, that students are entitled to engage in a certain amount of political speech at school, provided that they are not disrupting the educational environment to the extent of preventing other students from receiving their education. In the leading case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court held that school administrators could not require high school students to remove armbands protesting the Vietnam War unless they could show that the armbands had the effect of disrupting the educational process. However, in a little-noted phrase, the Supreme Court also said that administrators could regulate student speech that would "impinge upon the rights of other students.". The majority of the 9th Circuit panel rested its ruling solidly on this little-noted phrase.

Tyler Harper was evidently offended when gay students at the school collaborated with the administration on a Day of Silence to promote tolerance for sexual minorities. According to the facts related in Reinhardt's opinion, Tyler's father is a deeply-religious man who teaches Bible classes and takes a "traditional" view of things, and Tyler apparently felt that somebody needed to speak out for the view that homosexuality is evil and sinful.

So Tyler rigged up his own special anti-gay t-shirt to wear on the Day of Silence on April 21, 2004. On the front of the shirt, he wrote "I will not accept what God has condemned," and on the back, "Homosexuality is shameful 'Romans 1:27'." Surprisingly, his shirt did not attract the attention of the school staff that day. Perhaps disappointed at the failure of his shirt to get a rise out of anybody, Tyler improvised a more forceful t-shirt to wear the next day, keeping the same legend on the back but replacing the front with the following text: "Be ashamed, our school embraced what God has condemned." Finally Tyler got his response, was sent to the principal's office, and had his confrontation with the powers that be at Poway High School.

The principal told Tyler he could not go back to class wearing the shirt. Tyler, defiant, demanded that he be suspended. The principal refused to rise to the bait, restricting Tyler to spend the rest of the day in the administrative office doing his homework, with instructions to get off the campus at the end of the day. He was not disciplined and received attendance credit for the day.

Tyler did not attempt to wear his t-shirt during ensuing days, instead contacting the Alliance Defense Fund, a right-wing outfit that specializes in suing schools to advance an anti-gay agenda. The Alliance Defense Fund sued the school district on behalf of Tyler and his parents, claiming that Tyler's rights of freedom of speech, free exercise of religion and equal protection of the laws were violated, and demanding injunctive relief and damages. (The complaint also claimed an unconstitutional establishment of religion and a violation of due process, claims that quickly fell out of the case.)

The lawsuit took aim at the school's dress code and harassment policies, as well as the individual action that had been taken against Tyler wearing his anti-gay t-shirt. Shortly after the lawsuit was filed, the school responded with a motion to dismiss the case, and Tyler's lawyers replied with a motion for a preliminary injunction, seeking to bar the school from "continuing its violation of the constitutional rights of plaintiff Tyler Chase Harper" pending a trial on the merits of the case.

The trial judge, U.S. District Judge John A. Houston, did dismiss parts of the lawsuit, leaving only Tyler's three First Amendment claims and demand for injunctive relief, and rejected Tyler's motion for preliminary injunctive relief, opining that Tyler's chances of prevailing on the merits were poor. Judge Houston relied on the disruption theory of *Tinker*, finding that based on past incidents at the school, administrators were warranted in banning Tyler from wearing a t-shirt that, in their view, was calculated to cause disruption.

Tyler appealed the denial of the preliminary injunction. A majority of the appeals panel upheld the trial judge, but not on the basis of the disruption theory. Instead, Judge Reinhardt's opinion focuses on the idea that Tyler's t-shirt would "impinge upon the rights of other students," in particular, LGBT students. According to Reinhardt, statements such as those found on Tyler's t-shirt was "speech capable of causing psychological injury."

"We conclude that Harper's wearing of his T-shirt 'collides with the rights of other students' in the most fundamental way," wrote Reinhardt. "Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."

"The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being," continued Reinhardt, "but also to their educational development." The court cited studies showing that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.... One study has found that among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems and 28% dropped out of school." Reinhardt also quoted statistics showing that gay teens "suffer a school dropout rate over three times the national average."

Based on these studies and statistics, the court concluded that a school has a compelling interest in maintaining a respectful atmosphere that justifies a certain amount of censorship. "Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our must vulnerable teenagers and interfere with their educational development," Reinhardt asserted. "To the contrary, the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn."

The court decided that it was not necessary to address Tyler's claim that the school's harassment policy was unconstitutional in order to uphold the denial of a preliminary injunction, so long as there was a constitutionally defensible basis for the administrators to ban Tyler's T-shirt. It also decided that the school was not violating Tyler's right to maintain his religious beliefs, merely restricting the time and place at which he can voice those beliefs in order to preserve the right of other students to benefit from public education.

In his lengthy dissent, Judge Kozinski, who positions himself as a First Amendment defender against attempts by public schools to enforce political correctness, pronounced total disagreement with the majority's view, and argued vehemently that Tyler had "raised a valid facial challenge to the school's harassment policy," whose operation Kozinski believed the trial judge should have enjoined. Kozinski was very critical of a policy that, as he characterized it, seemed calculated to shelter students from the hotly contested issues that are at the heart of public debate. In his description, the school's harassment policy essentially prohibits any speech that any member of the school community might find irritating or offensive, and this goes way beyond the limits proscribed by the *Tinker* decision. Indeed, Kozinski suggests that if *Tinker* means what the majority says it means, maybe it's time for the Supreme Court to reconsider it.

The 9th Circuit's decision upholding the denial of preliminary relief does not end the case, of course, but it sends a strong signal to the trial judge that a majority of the appellate panel does not think there is much merit to the plaintiff's case.

Meanwhile, news reports indicated that the 2006 edition of the Day of Silence has generated a fair amount of controversy around the country and may generate more lawsuits. The *Sacramento Bee* reported on April 27 that thirteen so-called Christian students were suspended on April 25 at Oakmont High School in Roseville, California, when they wore t-shirts stating "Homosexuality is sin" during the Day of Silence at their school and refused to remove them. The students hired a lawyer who filed an appeal of their suspensions with the school district. The newspaper reported suspensions of several other students at area schools on similar grounds. A.S.L.

Federal Court Rejects Law School Recognition Suit by Christian Legal Society Chapter

The Hastings College of the Law, a unit of the University of California, did not violate any federal constitutional provisions when it refused to grant official student organization recognition to a chapter of the Christian Legal Society (CLS), ruled U.S. District Judge Jeffrey S. White in *Christian Legal Society Chapter v. Kane*, 2006 WL 997217 (N.D. Cal., April 17, 2006). The San Francisco law school denied official recognition to CLS because the organization's by-laws prohibited membership to gay people and non-Christians.

Hastings, in common with most of the nation's law schools, has a non-discrimination policy that extends to religion and sexual orientation, and provides official recognition only to student organizations that comply with the non-discrimination policy. Recognition has many tangible benefits at Hastings, including eligibility for activity funds, use of the school's electronic communications system, and listings in the student guidebook and admissions publications.

A predecessor version of CLS had existed at Hastings as a non-discriminatory organization for almost a decade, but a new group of students took office for the 2004–2005 school year and decided to affiliate with the national Christian Legal Society, which requires all of its student chapters to adopt by-laws that deny voting membership or officer positions to anybody who does not subscribe to an orthodox Christian code of beliefs, and exclude gays from membership or officer positions.

When CLS applied for recognition for the 2004–2005 school year, they were turned down based on these discriminatory provisions in their new by-laws. They were also denied funding, which had previously been set aside for them, to support the officers attending the national convention of CLS. However, the law school allowed CLS to meet on campus and to publicize its meetings through bulletin boards and chalkboards.

This lawsuit against Hastings is actually just one among many such lawsuits filed around the country in which the national CLS is bringing the "culture wars" to higher education by attempting to persuade the courts that school policies barring anti-gay discrimination are themselves discriminatory against Christian students. CLS argues that the schools are trying to suppress anti-gay arguments on campus, and that anti-discrimination polices are a content-based restriction on speech and association. As part of these culture wars, the national CLS vigorously supports local chapters in litigating over denial of official recognition.

Outlaw, the LGBT student group at Hastings, intervened in the case to help defend the law school's position, represented by the National Center for Lesbian Rights and the law firm of Heller Ehrman, White & McAuliffe.

CLS argued that the denial of recognition violated its rights under the First and Fourteenth Amendments of the Constitution, relying specifically on freedom of speech, freedom of association, free exercise of religion, and equal protection. A year ago the court had granted a defense motion to reject claims of unconstitutional establishment of religion and violation of due process, and had required CLS to refine its equal protection claim in an amended complaint. The April 17 ruling is a final decision on the merits, subject to a likely appeal by CLS.

Ironically, Judge White relied on the Supreme Court's recent decision in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 126 S.Ct. 1297 (2006), a gay rights de-

feat, in support of the law school's position that it was not violating CLS's First Amendment rights by denying recognition. In *Rumsfeld*, the Court rejected a First Amendment challenge to the Solomon Amendment, a federal statute that disqualifies for federal financial assistance any school that fails to provide access to military recruiters equal to that provided to other employers. Overturning a lower court ruling, the Court said that requiring a law school to let military recruiters on campus did not violate the law school's First Amendment rights, because the law school remained free to state its disagreement with the military's anti-gay personnel policies.

Writing for the unanimous Court in *Rumsfeld*, Chief Justice John Roberts Jr., asserted that a school's application of its non-discrimination policy to exclude military recruiters is conduct, not speech, and thus there is no violation of a school's free speech rights by conditioning eligibility for federal grants on allowing access for military recruiters. He further held that the equal access policy did not restrict the law schools from criticizing the underlying anti-gay policy of the military, and indeed that protests against the presence of military recruiters would be fully protected by the First Amendment.

Drawing on *Rumsfeld* for analogies, Judge White (an appointee of George W. Bush), pointed out that requiring CLS to have a non-discriminatory membership policy if it wanted the advantages of official recognition was not compelling CLS to articulate any particular views on religion or homosexuality. CLS could continue to articulate its views about homosexuality and religion and maintain full student organization recognition, so long as it did not exclude anybody from membership based on their religion or sexual orientation.

White rejected CLS's attempt to compare its case to *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where the Supreme Court voted 5–4 to upholding BSA's refusal to let James Dale , an openly gay man, be a scoutmaster. While conceding CLS's point that it is an "expressive association," an organization whose core function includes propagating certain beliefs, like the Boy Scouts, and thus may not be compelled to adopt and broadcast a government-approved message, White disagreed that conditioning official recognition on a non-discriminatory membership policy was analogous to the state of New Jersey ordering the Boy Scouts either to have an openly gay scoutmaster or be subject to penalties under the state's anti-discrimination law.

The difference, of course, is that CLS is free to maintain its discriminatory policy without any penalties, it merely foregoes certain benefits. And it appears that it needn't forgo its existence at Hastings, since the school allowed it to meet on campus and publicize its events without penalty. By contrast, New Jersey sought to impose penalties and to compel the Scouts to accept Dale as a member.

CLS also sought to rely on an older U.S. Supreme Court case, *Healy v. James*, 408 U.S. 169 (1972), in which a university refused to allow an anti-war group to meet on campus during the Vietnam War era. In that case, however, the denial of official recognition was accompanied by total exclusion from the campus, and it was clear from the evidence that the group was excluded precisely because of its message, not because of any discriminatory membership policies. Thus the court found *Healy* to be essentially irrelevant to CLS's claims.

White's ruling is a major setback for the national CLS in its struggle to chip away at gay rights protections in higher education, since it resoundingly affirms the right of Hastings Law School to maintain its non-discrimination policy and to apply it to student organizations. The court cited prior decisions holding that the government has a "compelling interest" in preventing sexual orientation discrimination, which would overcome any incidental burden on free speech or free religious exercise of religion that might flow from the decision in this case. The ruling was consistent with a decision last year by Chief Judge Murphy of the U.S. District Court for the Southern District of Illinois, denying preliminary injunctive relief to a CLS chapter at Southern Illinois University School of Law in a similar lawsuit, which was subsequently reversed 2–1 by a 7th Circuit panel. See *CLS Chapter v. Walker*, 2005 WL 1606448 (S.D.Ill., July 5, 2005) (not officially published), reversed, No. 05–3239 (Unpublished disposition, Aug. 22, 2005) (not available on Westlaw or Lexis). A.S.L.

1st Circuit Denies Asylum for Gay Man from Uganda

Due to a failure to present enough evidence to convince the court that he is gay, Robert Kibuuka, a native of Uganda, where homosexuality is illegal, lost his petition seeking asylum in the United States. *Kibuuka v. Gonzalez*, 2006 WL 964746 (April 14, 2006). The 1st Circuit affirmed the order of removal by the Board of Immigration Appeals (BIA) against Kibuuka, despite Kibuuka's testimony that he was beaten by Ugandan police because of his sexual orientation.

Kibuuka testified at his BIA hearing that while attending a gay wedding in Uganda, he was severely beaten by police officers who raided the clandestine wedding. Six months after the beating, Kibuuka obtained a student visa and fled to the United States. Soon after his arrival in the United States, Kibuuka could no longer afford University tuition and left school, thus terminating his student status. A year later, the Immigration and Naturalization Service (INS) issued a notice to appear at a removal hearing for not complying with the terms of his visa. Thereafter, Kibuuka applied for asylum, withholding of removal, and relief under the Convention Against Torture — based on the fact that he is a homosexual and thus a victim of persecution in his homeland.

At his BIA hearing, the immigration judge asked Kibuuka if "he was presently involved in a romantic relationship with a man." Although Kibuuka was currently seeing a man romantically, he testified that he was not. At this hearing, Kibuuka also submitted a report from a psychologist that stated that he suffered from a major depressive disorder as a result of the maltreatment he faced in Uganda because of his sexuality. Kibuuka's request for withholding of removal was based on his assertion that due to his depressive state, he was unable to apply for asylum within the required first year of residence in the United States. The immigration judge gave several reasons for the denial of Kibuuka's petition, the most disturbing of which was because Kibuuka failed to persuade him that Kibuuka was a "member of the gay community."

In his appeal before the 1st Circuit, Kibuuka sought to present new evidence that he was involved in a gay relationship at the time of his BIA hearing; obviously an attempt to persuade the court of his sexual orientation. However, the court denied Kibuuka's request to submit the evidence stating that "Kibuuka's admission that this evidence was available at the initial hearing undermines his claimed entitlement to reopening." This procedural ground for denying Kibuuka a chance to prove his sexual orientation appears to contradict the essence of the Convention Against Torture, which should provide a thorough evaluation of the petitioner's case before deporting a potential victim of persecution. Oddly, the court appears to stonewall any of Kibuuka's attempts to prove and justify his request for asylum. Kibuuka's testimony and psychological report would appear to provide ample evidence supporting his proclaimed homosexuality, but the court disagreed. Which begs the broader question, what type of evidence is sufficient to prove sexual orientation? *Ruth Uselton*

Kansas Sex Reporting Policy Ruled Unconstitutional

Kansas Attorney General Phill Kline overstepped constitutional bounds and exceeded statutory authorization when he issued an opinion in 2003 stating that health care providers, school officials and emergency service providers had a duty under state law to report to the state Department of Social and Rehabilitation Services (SRS) the name of any person under 16 who was sexually active, according to U.S. District Judge J. Thomas Marten's ruling in *Aid*

For Women v. Foulston, 2006 WL 1008417 (D. Kans., April 18, 2006).

Judge Marten issued a permanent injunction against any enforcement of Kline's opinion, finding that a state law intended to mandate the reporting of cases of injurious sexual abuse was not intended by the legislature to turn doctors and teachers into informants about the sex lives of teenagers in general. Given the circumstances and history of this case, it is likely that Attorney General Kline will appeal it to the U.S. Court of Appeals for the 10th Circuit, which had previously overturned Judge Marten's preliminary (pre-trial) injunction against enforcement of Kline's interpretation.

The dispute dates to June 18, 2003, when Kline issued Attorney General Opinion No. 2003–17, 2003 WL 21492493, purportedly in response to a question posed to him about the reporting obligations concerning pregnant teenagers. Under a 1982 statute, Kan. Stat. Ann. Sec. 38–1522, licensed professionals who provide medical or counseling or emergency services in Kansas are obligated to report whenever they have "reason to suspect that a child has been injured as a result of sexual abuse." Prior attorneys general had taken the position that the reporting duty was activated only if the professional determined that the child had been injured, and they did not treat all sexual activity of minors as necessarily injurious.

Kline took a different approach. Observing that under the Kansas criminal laws all sex involving minors is illegal, Kline announced that all such sexual activity could be presumed to be injurious as well, and that because a minor cannot legally consent to having sex, all such sexual activity could be classified as "sexual abuse." This would mean that any time a teenager under 16 sought medical assistance in connection with pregnancy, contraception, or venereal disease, or sought counseling from a teacher about their sexual activity, the teacher would have an obligation to report. The reporting obligation would be mandatory, and if such activity came to the attention of state authorities in some other way, a professional who had failed to satisfy the reporting requirement could theoretically lose their license and their job and be subject to other sanctions, including fines.

A coalition of professionals, led by the organization Aids for Women and other public interest organizations, quickly filed suit to block any enforcement of Kline's opinion. In 2004, Judge Marten rejected Kline's motion to dismiss the case and issued a preliminary injunction, 327 F. Supp. 2d 1273 (D. Kan. 2004), finding that the plaintiffs had a good chance of prevailing on their legal claims and that allowing the opinion to remain in force could cause irreparable injury to Kansas teens. The injunction was reversed by the 10th Circuit on Jan. 27, just days before the scheduled hearing on the merits, in an unpublished opinion.

The major concerns with the reporting requirement are that minors might delay confiding in teachers or counselors or avoid obtaining health care out of concern that they would be "turned in" for engaging in illegal sex, and that the looming reporting requirement would cast a chill on counseling and doctor-patient relationships, since as an ethical matter all care-givers and counselors would have to advise their minor clients that anything they said related to sexual activity would have to be reported to the state. Doctors and counselors cannot provide effective assistance if their patients and clients are deterred from disclosing relevant information.

Although the 10th Circuit overturned the preliminary injunction, the parties agreed to go ahead with the scheduled hearing, which provided an opportunity for the plaintiffs and the state to present testimony about the scope of Kline's opinion and the views of experts as to the impact it might have.

Marten concluded that Kline's opinion went far beyond the requirements of the statute, and that in doing so it violated the informational privacy rights of Kansas teens. Turning first to the statute, Marten found that the legislature had not equated sexual abuse and injury, but rather, by its plain language, had recognized that some consensual sex among teens was not injurious, even though it was illegal. The purpose of the reporting statute was to make sure that incidents of serious sexual abuse came to the attention of responsible public authorities, who could then take action to protect the minors from further abuse.

Marten especially noted testimony about the practices followed by SRS, which apparently screens out any reports they receive of consensual sex between teenagers and takes no action to provide services in those cases. Marten also noted evidence from other jurisdictions that have attempted broad reporting requirements. In California, something along the lines of Kline's opinion was enacted and then quickly repealed after government agencies were flooded with reports of harmless sexual activity, making it harder to find and follow up on the serious cases.

Turning to the constitutional issues, Marten found significant judicial precedents for recognizing sexual privacy rights of minors, which could only be overcome by a strong public interest. The Kansas statute, as it had been interpreted by early attorneys general, seemed to Marten to strike the appropriate balance between the privacy rights of children and the legitimate concerns of the state. "A minor's privacy ends where the state's interest in protecting the minor begins," he wrote. But Kline's opinion lost that balance by intruding into situations where there was no harm to the minor.

In terms of justifying an injunction, Marten found that allowing Kline's opinion to continue in effect would cause more harm than it might prevent. "There is clear risk that mandatory reporting will reduce the number of minors seeking care," he found, "increase workload on SRS, require reporting of activities that SRS will not investigate, and may even lead to increased health risk to minors because they will delay or forego health care. Because many licensed professionals play a dual role as both mandatory reporters and care providers, the confidentiality between licensed professionals and patients should be breached only sparingly."

Marten noted that even the expert witnesses presented by the state, when pressed on cross-examination, conceded that in their own medical practices they would not report consensual sexual activities of minors, even though they had claimed on their direct testimony that all minor sex is injurious. One expert said that reporting all minor sexual activity "would almost certainly involve parents and other systems in ways that kids would be uncomfortable with" and so "many of them would be ambivalent about" seeking health care knowing that their activities would be reported, and that "some might decide not to see the doctor."

Another expert presented by the state, after conceding that she did not report all illegal sexual activity of her minor patients, expressed her concern that the legal system might do mor harm to a patient than whatever injury her patient might have suffered from her sexual activity.

There was also some confusion about what kinds of activity were reportable under Kline's opinion, with some experts testifying that it only extended to sexual intercourse while others thought it also included fondling of genitals and kissing. There was, as usual, divided opinion about oral sex, a lasting legacy of the controversy over President Bill Clinton and Monica Lewinsky.

Marten devoted a portion of his opinion to responding to the 10th Circuit's January ruling overturning the preliminary injunction, contending that the additional evidence developed at the trial was sufficient to meet all the evidentiary points made by the appeals court. Most significantly, Marten rejected the appeals court's argument that minors can have no expectation of privacy while engaging in illegal activity. To the contrary, Marten asserted, the issue is their right of privacy with respect to the doctor-patient relationship, and in any event Marten was unwilling to agree that the state could circumscribe a federal constitutional right by passing a state criminal statute.

Taking it all together, Marten found that it was appropriate to issue an order barring any

enforcement of Kline's opinion. Now the question is whether Kline will file an appeal, which seems virtually certain. A.S.L.

NY Appellate Division Says 9/11 Survivor Claim Can Go Forward

A unanimous three-judge panel of the New York Appellate Division, Second Department, ruled on May 2 in *Cruz v. McAneney*, No. 2004–06939, that the surviving same-sex partner of a woman who died in the 9/11 terrorist attacks should be allowed to pursue the various equitable claims she has asserted against her late partner's brother, who is attempting to keep the entire payment from the Federal Compensation Fund as his sister's intestate heir and "personal representative." The opinion for the court by Justice Anita Florio affirms the refusal by Kings County Supreme Court Justice Yvonne Lewis to dismiss the case.

The Federal September 11th Victim Compensation Fund of 2001 was established to provide compensation to surviving spouses and family members of 9/11 victims in lieu of their bringing wrongful death actions against parties whose negligence could be alleged to have been a proximate cause of the deaths. As such, its formal provisions, if strictly construed, would be limited to people who could, under state law, be entitled to bring wrongful death actions. However, the way the system was set up was that each family was to designate a personal representative to deal with the Special Master, Kenneth Feinberg. The amount to be paid out would be determined by Feinberg and disbursed to the personal representative, who was then to distribute the money to family members in a manner consistent with state law.

The issue of compensation for non-marital partners arose early in the process, and Feinberg expressed willingness to consider information about life partners who might have an equitable claim similar to a spouse's wrongful death claim, although payout would have to go to a qualified personal representative.

In this case, upon Patricia McAneney's death, her brother James, her only surviving legal heir, filed an application for compensation is personal representative. On the assumption that she was a single woman living alone, the fund approved an award of $278,087.42. While McAneney's claim was pending, surviving partner Margaret Cruz filed her own statement with the Special Master, who recalculated the award based on the information that Patricia and Margaret had lived together as partners, authorizing an additional $253,454, to produce a total sum of $531,541.42. However, under the terms of the statute, this money was to be paid to the personal representative for distribution. Margaret Cruz attempted to negotiate an agreement with James McAneney for him to share the award, but McAneney refused. As their negotiations stalled and the Special Master was winding up his operation, the $531,541.42 was paid out to McAneney, and Cruz was told she could sue for her share in state court when McAneney refused to share it.

Cruz filed suit on three theories: that McAneney received the money as a fiduciary for Cruz, that a constructive trust should be imposed on the money with Cruz as the beneficiary, or that Cruz should be compensated under an unjust enrichment theory. Cruz was willing to settle for the amount by which the award was increased as a result of her intervention in the matter before the Special Master, although she argued that as a surviving partner she should be entitled to the entire amount. An important part of her argument was to point to New York law, as the state legislature has recognized the compensation rights of surviving non-marital partners through its victim compensation fund and through an amendment to the Workers Compensation Law to compensative survivors of victims who were at work on 9/11.

McAneney appealed Justice Lewis's refusal to grant his motion to dismiss, but the Appellate Division panel affirmed that decision, stating that all three legal theories asserted by Cruz were viable at this stage of the litigation, subject of course to proof of her factual allegations. McAneney tried to raise certain provisions of state law as a defense, most significantly one that protects the personal representative from suit for how he handles the money if acting in good faith. Florio's response to this argument was pointed: "According to the complaint, the defendant seeks to retain for himself the increased portion of the Fund's award that specifically accounts for the plaintiff's relationship with Patricia. Such action cannot be interpreted as having been taken in a reasonable and good faith manner, especially in view of this State's recognition that domestic partners should be compensated for the loss of their loved ones. Moreover, the Fund allegedly distributed the full award of the sum of $531,541.42 to the defendant, as Patricia's personal representative, with the understanding that the plaintiff could pursue any claim to compensation in State court. Accordingly, as the plaintiff alleges, in essence, the plan of compensation was still in dispute when the award was distributed to the personal representative. Under these circumstances, EPT: 11–4.7(e) does not bar the instant case."

Cruz is represented in the litigation by Jeffrey S. Trachtman, Kerri Ann Law and Eric J. Shimanoff of Kramer Levin Naftalis & Frankel. A.S.L.

Incest Statute Unconstitutional Because It Doesn't Cover Gay Sex!

A Connecticut appeals court ruled on April 11 in *State v. John M.*, 94 Conn. App. 667, 894 A.2d 376 (App. Ct. Conn.), that the criminal incest statute, Gen. Stat. Sec. 53a–72(a)(2), is unconstitutional because it does not extend to gay sex. In a surprising ruling, the court overturned the conviction of a man who had consensual sex with his 17 year old stepdaughter, because the statute would not have applied if the parties were of the same sex.

The defendant John M. lived with J, a woman, and the 17 year old victim, a junior in high school. The victim was home from school due to sickness, the only other person at home that day being John. While they watched a movie together, "the defendant engaged in oral sex and vaginal intercourse with the victim," according to the opinion by Judge William J. Lavery.

The opinion does not specify how this incident came to the attention of the police, but many weeks later John was arrested and charged with sexual assault in the second and third degrees. As all the evidence indicated the sex was consensual, and the victim was over the age of consent, at the end of the trial the judge granted John's motion for acquittal on the second degree charge.

However, based on testimony that John was married to J and that J was the victim's mother, the judge submitted the third degree charge to the jury, which found John guilty. Sexual assault in the third degree covers sexual intercourse between couples who would be prohibited from marrying under the incest provision of the marriage law, Gen. Stat. Sec. 46b–21.. That provision says, among other things, that a man may not marry his stepdaughter. The incest provision only lists opposite-sex relationships. John was sentenced to five years imprisonment, with execution suspended after three years subject to ten years probation and the requirement to register as a sex offender.

John appealed on two grounds. First, he claimed that the proof offered at trial was inadequate to establish beyond a reasonable doubt that his conduct came within the statutory prohibition. Second, he claimed the statute was unconstitutional because his guilt turned on whether the victim was female or male in violation of the Equal Protection Clause.

Although the court found that there was sufficient evidence to support the conclusion that John was married to J, the issue of the victim's status as J's daughter presented a problem. J did not testify. No birth certificate was offered as evidence. Apart from John's admission that he believed the victim was J's daughter, the only testimony on this issue came from the teenage victim, who testified she was born in the Virgin Islands in 1984 and was raised to the age of 16 by two individuals whom she considered to be her aunt and uncle. During that time, she twice visited J, who she believed to be her birth mother, and had moved to Connecticut to live with J and John.

The appeals court found that this was insufficient evidence, referring back to an 1827 Connecticut Supreme Court case, *State v. Roswell*, 6 Conn. 446, that specified the proof required in an incest case and that has never been overruled by the legislature or the courts, at least according to the majority in this case. According to *Roswell*, in the absence of documentation such as a birth certificate, only testimony by somebody with firsthand knowledge of the victim's parentage could definitely establish that she was J's daughter. Lacking such testimony, the conviction had to be thrown out.

However, two members of the three-member appeals panel were concerned that if the state appealed this acquittal, it was possible the Connecticut Supreme Court would agree with the state's argument that *Roswell* had been superseded by modern evidence rulings, so they took up John's challenge to the statute's constitutionality.

"The defendant is challenging... the proscription of sexual intercourse between stepparent and stepchild," wrote Judge Lavery. "He maintains that homosexual relationships are not included among those delineated. As such, he argues that, by proscribing only heterosexual intercourse between kindred persons, [the statute] treats kindred persons who engage in same-sex relationships differently." The state argued that homosexual relationships of the same degree of relation were also covered by implication, but the court rejected that argument, noting that under the recently enacted Civil Union law, a stepparent could form a civil union with a stepchild of the same sex, so it was clear that the incest statute, at least as currently written, does not outlaw sex between and man and his stepson or a woman and her stepdaughter.

The court found that the statute discriminates on the basis of sexual orientation, and that under constitutional equality requirements, there must be a rational basis for the state to discriminate on this ground. Here, the peculiar nature of the Connecticut incest provision undercuts the most logical non-moralistic justification for incest prohibitions, the concern to avoid genetic defects if pregnancy results from inbreeding, sex between close relatives. There is no such concern arising from sex between biologically unrelated persons, who are nonetheless covered by the stepchild provision, and the legislative record shows that no comments were made in 1980 when the law was passed about preventing inbreeding as its purpose.

Turning to other justifications, the court noted that in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), the state could not rely on moral disapproval as a basis for distinguishing between opposite-sex and same-sex intercourse involving stepchildren and their stepparents. Actually, it is difficult to conceive that the legislature would have considered heterosexual intercourse between a man and his stepdaughter to be morally more offensive than the man's intercourse with his stepson.

Further reviewing the legislative history, the court found that the only reason for the law specified by its legislative sponsors was to protect victims of incest by changing the title of the existing law and moving it into the general sexual assault laws, with the hope that when parents are prosecuted it would not necessarily become public that their own children were the victims. One representative said that the bill was intended to "shelter children from adverse publicity" when their parents are prosecuted.

The final ground argued by the state, without reference to the legislative history, was to protect the family unit. Quoting a case from another state, the court described the purpose as "to promote and protect family harmony, to protect children from the abuse of parental authority, and because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict." The court found that this ground, ironically, undercut the state's position, because it provided no explanation for distinguishing between opposite-sex and same-sex activity. If this is the rationale for the statute, wrote Judge Lavery, "there is little justification for proscribing sexual intercourse between stepfather and stepdaughter, but not between stepfather and stepson." Lavery concluded that this unequal treatment "is insurmountable under even the most deferential standard of constitutional scrutiny," further justifying reversing John M.'s conviction.

One member of the court, Judge Barry R. Schaller, agreed with reversing the conviction, but wrote separately that it was unnecessary to address the constitutional issue since the evidentiary flaws provided an adequate basis to rule on the appeal. The Connecticut legislature could solve this problem by expanding the coverage of the incest law, but that would also apparently require some adjustment in the domestic partnership law as well, in light of the anomaly that stepparents and stepchildren of the same sex can presently form domestic partnerships, and perhaps the legislature does not wish to withdraw that right. Thus, a rethinking of the scope of the incest law and the purpose for having it may be needed. A.S.L.

6th Circuit Upholds Discipline for Homophobic Prison Chaplain

Affirming a decision by the U.S. District Court for the Southern District of Ohio, a 6th Circuit panel ruled on April 26 that officials of the Ohio Department of Rehabilitation and Correction (ODRC) did not violate the constitutional rights of prison Chaplain William Akridge when he was disciplined for refusing to allow an openly gay inmate to lead a choral group at religious services. *Akridge v. Wilkinson*, 2006 WL 1112855, 2006 Fed. App. 0280N (not officially published).

According to the opinion for the court by District Judge Thomas B. Russell, sitting by designation on the 6th Circuit panel, Akridge has been an Ohio state prison chaplain since 1996. In April 2002 he was assigned to Madison Correcitonal Institution (MCI) to serve as the Protestant chaplain there. There had been a choral group of inmates prior to Akridge's arrival at MCI, but it had been disbanded due to "infighting." This was replaced by a "praise band" led by an inmate named Hatfield.

About six months after Akridge arrived at MCI, Hatfield told him that a new group had been formed led by an inmate named Reed and was planning to play at the prayer service. According to Judge Russell, "Akridge told Reed that he did not object to a new band, but that the band members needed to approach him first for permission to play at the service. Akrdige apparently told inmate Reed that his concern was that the group might play 'pagan music.' Akridge did not know at that time that Reed was openly gay. Reed then became confrontational with Akridge, telling Akridge that he believed Akridge was discriminating against him because he was gay. Akridge responded: 'I didn't know you were gay. But since you tell you are gay, then that is reason enough for you not to lead the band.'"

Reed filed a discrimination complaint, and Akridge's superior, Bobby Bogan, after conducting an investigation, ordered Akridge to allow Reed to "have an opportunity to be one of the choir directors," which Akridge refused to do. Akridge was charged with insubordination and ultimately fined two days pay. Akridge then applied to be transferred to another prison and, represented by the Alliance Defense Fund, filed suit against the director of ODRC, the warden of MCI, and Mr. Bogan, his superior, claiming that he was suffering retaliation in violation of his 1st Amendment and Due Process rights.

The District Court found that Akridge had not been punished for protected speech or in violation of due process, and furthermore that the defendants enjoyed qualified immunity in any event. This ruling was affirmed by the court of appeals.

Akridge argued that speech about homosexuality involved public controversy, and so he could not be fined for maintaining his position that an openly gay inmate should not be allowed to lead a choir in a Protestant church service. While conceding that there might be "public interest" to speech about homosexuality, the court of appeals agreed that in this case the fine was for insubordination, not for speech. Furthermore, even if this were subjected to the balancing test under *Pickering*, the leading Supreme Court case on public employee speech, the court found that the balance would tip in fa-

vor of the prison, which was legitimately concerned in enforcing its policy of non-discrimination on the basis of sexual orientation in affording equal treatment to gay inmates. Furthermore, the court noted, outright discrimination based on sexual orientation could raise constitutional issues as well, subjecting the prison authorities to liability under 42 USC sec. 1983.

As had the district court, the court rejected the argument that prison officials were too vague to afford meaningful due process in this case, and that the defendants enjoyed qualified immunity from liability. A.S.L.

Magistrate Limits Discovery on Sexuality of Alleged Same-Sex Harasser

Federal Magistrate Daniel E. Knowles (E.D.La.) has denied two discover requests for admissions made by plaintiff Mark A. Vaughn, the Assistant Principal at Slidell High School, in his same-sex sexual harassment lawsuit against the school and its former principal, Joseph C. Buccaran, in *Vaughn v. St. Tammany Parish School Board*, 2006 WL 950109 (April 7, 2006). The requests for admissions would have required Buccaran to (1) admit or deny that he had ever had the desire to have sex or sexual relations with Vaughn, and (2) admit or deny that he had had sex or sexual relations with any other man during his 40 years of employment at the school.

Buccaran objected to the first request, contending that his "desires" are neither actionable nor relevant, and that the request was totally improper. As to the second request, Buccaran claimed that the question whether he had sex with any other human being was irrelevant to Vaughn's workplace same-sex sexual harassment lawsuit. Magistrate Knowles agreed, stating that "The Court has serious questions regarding the constitutionality of plaintiff's resort to Fed. R. Civ. P. 36 as a means to extract a party's admission regarding his own private thoughts, fantasies and/or desires." He found that the second claim was "*exceedingly* broad," and that only sexual advances towards other employees were relevant.

Magistrate Knowles has allowed Vaughn to revise and resubmit his requests for admissions so that they conform to "the critical issue of whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Buccaran had also asked that if he were compelled to make the contested admissions or any future admissions concerning sexual matters that they be sealed with a protective order, which Magistrate Knowles granted, saying "the admissions sought by Vaughn concern personally identifying information (*i.e.*, sexual orientation) which is highly sensitive and perhaps even more deserving of protection than bank records, social security numbers, medical records, school records and other sensitive personal identifying information." *Bryan Johnson*

Federal Court Finds Employer Non-Discrimination Policy Unenforceable

John Petrucello lost his sexual orientation discrimination claim against Teleflex Automotive Group because the employer had carefully included a disclaimer in its Code of Ethics providing that it was not contractually binding, according to U.S. District Judge Victoria A. Roberts, granting the employer's motion to dismiss in *Petrucello v. Teleflex Automotive Group*, 2006 WL 1007532 (E.D. Mich., April 17, 2006).

Teleflex issued the Code of Ethics to its employees in 2003, stating that the company respected "cultural diversity" and "does not tolerate discrimination based on sexual orientation." John Petrucello, a gay man, had been employed by the company since 1988. In 1994, he had signed an employment agreement that acknowledged that he was employed "at will." He was discharged on June 21, 2005, he claims without just cause, and he alleges that he received a smaller severance payment than similarly situated non-gay employees would receive. He also claims he was discharged for being gay, although he concedes that management had known he was gay throughout the duration of his employment with the company.

Petrucello sued on theirs of breach of implied contract, misrepresentation, negligence, promissory estoppel, equitable estoppel and enjust enrichment, but got nowhere with the court. For one thing, the disclaimer that the Code of Ethics was contractually binding was in bold-face print in the same type-face as surrounding text, so the court rejected Petrucello's argument that the employer had tried to conceal it by burying it in fine print. More importantly, however, the court found that the remainder of Petrucello's claims did not work for him because of a failure to show any sort of reliance on his part. Also, the various misrepresentation claims are difficult to ground in the employer's non-discrimination statement, since it was accompanied by a clear statement that the employer did not intend to make any contractually binding statements, but was merely stating its policies. The court found no basis for an unjust enrichment claim, since Petrucello was compensated for all work he performed for the company. A.S.L.

N.J. Appellate Division Reverses Child Molestation Conviction of Gay Priest

In a *per curiam* opinion, the New Jersey Appellate Division ordered a new trial in the case of a priest found guilty of third-degree aggravated criminal sexual contact with a teenage boy, in part because it found that the judge's failure to exclude from evidence the defendant's statement to the police that he was a "homosexual struggling with his identity" was unduly prejudicial to the defendant. *State of New Jersey v. Michael F.*, 2005 WL 3964673 (April 17, 2006).

The defendant, Michael F., was a Roman Catholic priest who met John and his mother, Joan (not their real names), during assignment to a parish in Bergen County. By 1999, Michael was a frequent visitor to Joan's house; John described Michael as his mother's best friend. According to trial testimony, in March 1999, when John was 13 years old, Michael initiated a wrestling incident with him at the house, in the presence of John's family, during which John felt Michael's hand graze his crotch. A similar incident occurred at Joan and John's house on Thanksgiving of that year. That time, John told Michael to stop. Similar incidents also occurred on John's 14th birthday in March 2000 and again later that summer. A final incident occurred in a hotel room during a trip to Williamsburg, Virginia, by John, Joan and Michael over Labor Day Weekend in 2000, while Joan was in the shower, although this incident was not part of the indictment. A jury found Michael guilty of a single count of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14–3a, but acquitted him of third-degree endangering the welfare of a child, N.J.S.A. 2C:24–a. The appropriate fines, penalties and assessments were imposed, as well as the requisite Megan's Law conditions involving registration as a sex offender, N.J.S.A. 2C:7–1 to –19.

The Appellate Division noted that the trial judge, in his final instructions to the jury, reminded the jury that the "[d]efendant said that he has an interest in males and that his grabbing [John] excited him." In considering defendant's claim that this was prejudicial, the appellate court found that "the balance between probative value and undue prejudice to the accused tipped in favor of defendant as to the portion of the statement about defendant's sexual identity." It further stated that the trial judge's statement raised "the specter of a jury deciding defendant's guilt on the unfounded association between homosexuality and pedophilia." In addition, the appellate court implied that the trial judge himself might have been unduly influenced by defendant's statement that he was homosexual, noting that this statement itself validated "defendant's fear that his homosexuality would be used to draw unwarranted conclusions." The appellate court therefore ordered a new trial.

The appellate court ordered a new trial for one additional reason. The defendant argued that the state failed to provide sufficient evidence to establish "supervisory authority" of the defendant over John pursuant to N.J.S.A. 2C:14–3a. The jury found defendant guilty of

aggravated criminal sexual contact under that statute because it found he had "supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status" pursuant to N.J.S.A. 2C:14–2a(2)(b). The Appellate Division agreed with the defendant, finding that the jury instructions provided inadequate guidance as to whether defendant's status gave him supervisory or disciplinary power over John.

In addition to claiming undue prejudice from the statement that he was gay, the defendant made several other arguments that the appellate court rejected. First, he argued that the trial court's refusal to allow another parishioner and her teenage son to testify about being questioned by the local police was an abuse of discretion. The appellate court disagreed, finding that because the mother and son were called as character witnesses and because the son did not report any inappropriate conduct to the police, any error in not allowing them to so testify was harmless. Second, the defendant argued that the account of the Williamsburg trip was inadmissible because it was not part of the indictment. The Appellate Division disagreed with this argument as well, stating that the trial judge admitted the account as evidence of lack of accident or mistake and as evidence of the defendant's state of mind, and that the judge provided a proper limiting instruction. Finally, the defendant argued that the trial court should have conducted a voir dire of an anonymous juror; the Appellate Division found no need to address this point given its ordering of a new trial. *Jeff Slutsky*

Federal Civil Litigation Notes — Appellate

Supreme Court — The Supreme Court has denied certiorari in *Falwell v. Lamparello*, 420 F.3d 309 (4th Cir. 2005), cert. denied, 2006 WL 283870. Mr. Lamparello earned the wrath of the Rev. Jerry Falwell by starting a website called www.fallwell.com which is critical of Falwell's views about gay people. Falwell sued to have the website shut down, winning before a sympathetic federal district judge but losing before the 4th Circuit, which ruled that Lamparello was not engaged in unfair competition with Falwell but was just exercising his First Amendment rights of free speech, noting that Lamparello's website prominently states that it is ot affiliated with Rev. Falwell or his ministry. Falwell has a history of suing people who have attempted to use his name for their websites.

Supreme Court — The Supreme Court denied certiorari in *Nitke v. Gonzales*, 413 F.Supp.2d 262 (S.D.N.Y., July 25, 2005), cert. denied, 126 S.Ct. 1566 (March 20, 2006), in which photographer Barbara Nitke challenged the constitutionality of a 1996 federal internet obscenity law as applied to sexually explicit photographic depictions of gay and straight sadomasochistic sex and bondage activities which she posts on her website. A three-judge panel of the district court, convened as required by the statute, had rejected her challenge. Nitke argued that the legal requirement to take measures to keep children from accessing the site by requiring credit card, debit account or adult access code imposed an unconstitutional restriction on freedom of speech.

Second Circuit — The federal trial court erred in granting New York City's motion for summary judgment on a Title VII sex discrimination claim brought by Gregory A. Miller, ruled a 2nd Circuit panel on April 26 in *Miller v. City of New York*, 2006 WL 1116094 (not officially published). In a summary order that otherwise upheld District Judge Gleeson's grant of summary judgment on constitutional and retaliation claims, the panel asserted that Miller's factual allegations were sufficient to maintain an action for hostile environment sexual harassment under Title VII. Miller, a slightly built man who was on light duty status because of a disabling condition, alleged that his supervisor, Anthony Porter, "made his life miserable by claiming that Miller was not a 'real man' or a 'manly man,' and by devising work assignments designed to 'toughen [Miller] up.'" These assignment allegedly put such a physical strain on Miller as to exacerbate his disability, forcing him to resign even though he was eventually transferred to a new supervisor who respected his light duty status. The court found that these allegations were consistent with circuit precedent finding a cause of action under Title VII for gender stereotyping claims that result in tangible impact on the job.

Third Circuit — Affirming a decision of the Board of Immigration Appeals, a 3rd Circuit rejected an asylum and Convention Against Torture petition by a gay Lithuanian in *Satkauskas v. Attorney General*, 2006 WL 1004880 (April 18, 2006) (not officially published). Mr. Satkauskas, who claims to have been beaten in Lithuania, had come to the U.S. in June 1998 on a J–1 exchange visitor visa, but failed to maintain the necessary status and was to be deported. He sought asylum, claiming he would be persecuted for being gay if he was returned to his home country, but he delayed filing until more than a year after his admission, so his claim was technically time-barred. He also asserted a claim that he would be subject to serious physical harm, invoking protection of the CAT. But the Immigration Judge ruled against him, finding he had failed to prove that he would be persecuted or tortured upon return to Lithuania. The court of appeals panel indicated that it would have to defer to factual findings by the Immigration Judge unless there was no record support for them. Satkauskas argued that the IJ refused to believe he was gay based on her personal views, but that was evidently besides the point in the view of the reviewing court, which pointed out that it was not to upset the IJ's factual findings unless the petitioner presented evidence that compelled a contrary conclusion, which was lacking here.

Eighth Circuit — In a rare case of alleged lesbian same-sex harassment, a panel of the 8th Circuit Court of Appeals affirmed the district court's grant of summary judgment to the defendants in *Powell v. Yellow Book USA*, 2006 WL 1071855 (April 25, 2006). Tammy Powell alleged that a female co-worker had solicited her for sex and created a hostile environment through frequent ribald remarks. She also accused the co-worker of inappropriately proselytizing for her religion, spiking Powell's diet soda, and interfering in her contractual relationship with her employer. Writing for the court of appeals panel, Judge Arnold was diplomatically polite in suggesting a lack of evidence for some of these allegations, and concluded that Powell's factual allegations were insufficient to show actionable sexual harassment under Title VII. "While good manners should have tempered the ribald nature of Yellow Book's office," wrote Arnold, "the conduct that Ms. Powell complains of is simply not sufficient to make out a sexual harassment case." The court also found that the employer had responded promptly and appropriately to complaints about religious protelyzation.

Ninth Circuit — In a closely-watched en banc ruling, the 9th Circuit Court of Appeals incidentally reaffirmed its developing gender stereotyping sexual harassment case law in *Jespersen v. Harrah's Operating Co., Inc.*, 2006 WL 962533 (April 14, 2006). Darlene Jespersen quit her job at Harrah's casinon in Reno, Nevada, rather than comply with a change in the dress code requiring that all female bartenders wear makeup, and sued under Title VII, claiming that imposing a makeup requirement on women was sex discrimination. The majority of the en banc panel, in an opinion by Chief Judge Mary M. Schroeder, rejected her claim, finding that Jespersen had failed to show that a makeup requirement imposed a greater burden on women than the company's dress code imposed on male bartenders, who also had to comply with precise grooming standards. The court refused to take judicial notice of the fact that it would be more costly, time-consuming and burden some to require a woman to wear makeup than to require a man to be neatly groomed and shaved. Dissenting Judge Alex Kozinski evidently thought the court's refusal to extend judicial notice to such a fact was erroneous. As to whether it takes more time to comply with the female than the male grooming standards, he observed: "Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and point to our wrists." Judge Pregerson also dissented, and two other judges joined in the dissents. In the

course of her opinion for the court, Judge Schroeder described and distinguished the two other 9th Circuit cases generally relied upon as precedents, including the crucial case brought by gay plaintiff Norman Rene against MGM Grand Hotel. (These Reno hotels are amazingly stuck on gender conformity...). At the end of his dissent, Kozinski pointed out how difficult it is to find good, loyal employees, noted Jespersen's two decades of sterling service, and voiced hope that Harrah's, having won it's legal point, would come to its senses and offer to take her back without the makeup requirement. A.S.L.

Federal Civil Litigation Notes — Trial Courts

Arizona — U.S. District Judge Campbell some of a gay employee's Family and Medical Leave Act (FMLA) action to continue, ruling in *Foraker v. Apollo Group, Inc., dba University of Phoenix*, 2006 WL 964489 (D. Ariz., April 12, 2006), that the University's reorganization of a department that eliminated Wayne Foraker's job title and responsibilities while he was on medical leave may constitute an FMLA violation. Foraker also complained of retaliation against him in violation of Title VII of the Civil Rights Act, on grounds of sexual orientation and religion, but those claims are now out of the case as a result of Judge Campbell's ruling on the balance of the University's summary judgment motion. (Among other reasons, there is no indication the University was aware of Foraker's Title VII complaint when it took the personnel actions that are the basis of the retaliation claim.) Campbell also held that certain aspects of Foraker's allegations are too remote in time from his medical leave to meet the threshold for alleging causation i.e., that the adverse employment action was in response to the employee taking protected medical leave. However, the loss of his job title and responsibilities, as well as a promised pay raise, took place relatively soon after he went on leave, so the court was willing, at least for purposes of ruling on the summary judgment motion, to allow temporal proximity to stand in for causation at the pleading stage.

California — U.S. District Judge George Schiavelli ruled that Log Cabin Republicans, a gay political club, lacked standing as a plaintiff to challenge the Defense Department's "Don't Ask, Don't Tell" military policy, because the complaint filed in his court lacked the names of any individual plaintiffs. In an unpublished opinion in *Log Cabin Republicans v. Department of Defense* (March 29), Schiavelli maintained that associational standing relies upon showing that some members of the association have standing to sue as individuals. Schiavelli gave the plaintiffs until April 28 to come up with some names to put on their complaint, or the case would be dismissed with prejudice. We were unable to obtain a copy of the opinion. A PlanetOut online story quoted Schiavelli as referring to past challenges to the military policy with named plaintiffs and, rejecting Log Cabin's argument that those of its members in the military could not take the risk of coming out in order to sue, said: "These cases demonstrate that here, as in other situations in our country's history, individuals who believe their constitutional rights have been violated will step forward to legally challenge the perceived injustice despite the potential consequences of being identified in a lawsuit." Schiavelli also noted that confidentiality concerns would not seem relevant for plaintiffs who are former rather than current service members, and who would clearly have standing to challenge the rules under which they were discharged.

District of Columbia — Gay City News (April 27) reported that U.S. District Judge Rosemary Collyer has ordered the federal government to release documents to Servicemembers Legal Defense Network that relate to covert surveillance of domestic LGBT groups. SLDN sued the government for information under the Freedom of Information Act, concerned by reports that the government was engaging in surveillance of law student groups protesting military recruitment on campus. Evidently failing to understood the humorous way that student groups sometimes name themselves, the Pentagon appears to have believed that OUTLaw, the gay student group at NYU Law School, was potentially a terrorist organization, its name reflecting a willingness to commit violence and serve as vigilantes, according to documents released by the Defense Department. In their nightmares!

Idaho — In *Drews v. Joint School District No. 393*, 2006 WL 851118 (D. Idaho, March 29, 2006) (not officially published), the female plaintiff claimed that as a student in the Wallace School District's high school she had been subjected to harassment by students and recent graduates based on perceived sexual orientation, in violation of her rights under 42 USC sec. 1983 (Equal Protection) and Title IX of the Education Amendments of 1972, which forbid sex discrimination in schools that receive federal funding. District Judge Lodge noted, after reviewing cases from many circuits, that there was general agreement that a student who stated a claim under Title IX need not resort to a constitutional sex discrimination claim. Accepting that an allegation of discrimination based on perceived sexual orientation (the student asserted she is not a lesbian but was called names and harassed as if she were one) could be actionable on both the Equal Protection Clause and Title IX, Lodge found nothing distinctive about the case to support a constitutional claim and granted the defendants' summary judgment on the constitutional claim. However, on the Title IX claim, Lodge found that there were substantial issues of material fact that could not be decided on motion, particularly concerning the extent of school officials' knowledge about the harassment and whether they acted with deliberate indifference to particular claims of harassment by Ms. Drews, although Lodge cut down the case for trial significantly by making findings of adequate administrative response to many of the harassment claims alleged by Drews. However, the court found the plaintiffs' negligence claim not actionable as a matter of Idaho law, and also granted judgment for defendants on Drews' claim of denial of educational opportunity. The court also dismissed Ms. Drews' parents as co-plaintiffs in the case, noting that by the time the complaint had been filed she had reached the age of 18 and there were no independent allegations of injury to the parents. The bulk of Judge Lodge's decision consists of a detailed statement of factual allegations, leading the court to state: "This case is a sad case of kids being mean to other kids. The question for this Court now becomes, did the Defendants, in trying to respond to the complaints of harassment by Plaintiffs, violate Casey's civil rights or other duties owed to the Plaintiffs?" The answer was, on the whole, no, but perhaps in some particular instances, so a portion of the case remains alive for trial.

Illinois — Granting summary judgment to the employer in a same-sex harassment case under Title VII, *Collins v. Louis Jones Enterprises, Inc.*, 2006 WL 408091 (Feb. 16, 2006), Chief District Judge Kocoras found that plaintiff Herbert Collins had failed to show that the harassing conduct on the part of two employees of other contractors on a construction worksite was because of his sex. These workers seemed focused on Collins' butt, praising its sexiness and suggesting things they would like to do with it. Collins presented no evidence that the two men were gay, or that they were generally biased against other men in the workplace, so Kocoras found that a basic element for a same-sex harassment case had not been presented. In addition, although finding this a closer question, Judge Kocoras did not think Collins' allegations were sufficient to meet the severe and pervasive threshold beyond which workplace harassment becomes actionable under Title VII.

Illinois — Refusing to dismiss constitutional and tort claims against two male prison supervisory employees charged with sexually harassing another male employee, U.S. District Judge Michael M. Mihm found that the law in the 7th Circuit on hostile environment sexual harassment as a violation under 42 U.S.C. sec. 1983 was sufficiently established during 2004 as to prelude a qualified immunity defense. *Massaro v. Illinois Department of Corrections*, 2006 WL 1063797 (C.D.Ill., April 20, 2006) (not reported in F.Supp.2d). Anthony Massaro claimed that he became the target for various

kinds of hostile environment harassment at the hands of supervisors Guy Johnson, Jeff McChurch, Jeff Papish, and Albert Osborne, after he rebuffed sexual advances from Johnson, who complimented him on his "nice butt" and regaled him with sexually-charged statements involving Massaro and male inmates. McChurch and Papish moved to dismiss charges against them, but Judge Mihm found that Massaro had adequately alleged harassing conduct by both men sufficient to meet pleading requirements for an equal protection claim, noting that the standards for such a cause of action were the same as for Title VII in the area of hostile environment sexual harassment. McChurch and Papish argued that a concurring opinion by 7th Circuit Judge Richard Posner in *Cooke v. Stefani Mgt. Services*, 250 F.3d 564 (7th Cir. 2001), suggested that the law was sufficiently unsettled so that they should have qualified immunity. Judge Mihm disagreed; although Posner had criticized the way in which the law was developing under Title VII, his concurrence did not suggest that a plaintiff being harassed because of perceived gender nonconformity was not protected under the current case law. McChurch and Papish had also moved to dismiss a supplementary state law claim of intentional infliction of emotional distress, but Mihm found that Massaro's factual allegations were of conduct sufficiently outrageous to withstand a pretrial dismissal motion.

Illinois — On May 1, U.S. District Court Judge Blanche Manning (N.D. Ill.) entered a consent decree in *EEOC . Bice of Chicago, Inc.*, No. 04 C 2708, a pending Title VII case alleging that the restaurant failed to take action to protect the rights of male employees who were subjected to sexual harassment by a male supervisor. The complaint alleged that management ignored the groping and lewd taunts by the supervisor despite complaints from male employees. Under the terms of the settlement, eight current and former employees will each receive $22,500 in monetary relief, and three other individuals will each receive $10,000. Bice agreed to provide training and to adopt anti-harassment policies, and to undertake period reports to EEOC on compliance with the consent decree. BNA Daily Labor Report No. 84, 5/2/06.

Kentucky — Chief District Judge John G. Heyburn rejected various constitutional claims asserted by Victoria Roach, a transsexual, in connection with her arrest and two-day detention at Louisville Metro Department of Corrections, in *Roach v. Louisville Metro Government*, 2006 WL 1071809 (W.D. Ky., April 20, 2006). It seems that Roach purchased a used Chevy Blazer from Pedigreed Auto; unbeknownst to Roach, the car had been repossessed from a prior purchaser for non-payment, and the prior purchaser had reported it as stolen. A police officer checking license plate number for reported stolen autos spotted the Blazer, pulled Roach over and arrested her. Roach, described by the court as "a biological female who was undergoing testosterone therapy at all times relevant to this dispute in an effort to develop the secondary sex characteristic of a man," appeared in a transitional condition, having facial hair and broad shoulders as a result of hormone treatment. She displayed a receipt for the auto, but did not have proof of title or registration and the police officer brought her in on a charge of possessing stolen property. She represented herself at trial and won dismissal of the charges, but only after having spent two days in jail. When she was booked, she was asked whether she should be housed with men or women. She replied neither, and asked to be placed in isolation. When she complained that the isolation cell in the booking area was too cold, she was placed in the only other available isolation cell in the male section of the jail. She was surrounded on three sides with solid walls, but the front of the cell was partially open to the view of passersby. She claimed that she refrained from using the toilet for two days from fear of being seen, and that male prisoners being escorted back and forth made inappropriate comments to and about her. Upon release, she sued the government, claiming violations of her constitutional rights, but Judge Heyburn, while writing an opinion that is courteously composed and takes her claims seriously, found no basis for faulting prison authorities in their handling of the situation. There was probable cause for arrest, he found, the housing arrangements were essentially at Roach's request, the while she suffered some discomfort and upset, he found nothing amount to a due process violation in the form of improper "punishment" of one not yet adjudicated a criminal. (As a pre-trial detainee, her claims would arise under the 14th Amendment rather than the 8th Amendment.)

Minnesota — In a rather straightforward application of the Equal Access Act, U.S. District Judge Joan N. Ericksen ruled on April 4 that Straights and Gays for Equality (SAGE), a student group at Maple Grove Senior High School in the Osseo Area Schools — District No. 279, was entitled to preliminary injunctive relief on its claim for violation of federal statutory rights by the school's failure to extend equal access to rights and benefits afforded other student groups at the school. *Straights and Gays for Equality (SAGE) v. Osseo Area Schools*, 2006 WL 983904 (D. Minn.). The school classified student groups as "curricular" or "noncurricular" and accorded greater rights of access to the former than the latter. Interestingly, the school had classified a group called Gays, Lesbians, Bisexuals, Transgender, Questioning and Allies (GLTBQ-A) as a curricular group with full access rights, but classified SAGE as non-curricular. Even more implausibly, the synchronized swimming club and the cheerleading squad were also labeled curricular. The dispute between the parties boiled down to whether the school had total discretion to decide what was curricular, or whether these labels have to be meaningful in relation to what is actually taught at the school. Judge Erickson found the later to be true and that, at least as a preliminary matter pending trial, SAGE was entitled to the same access as the synchronized swimming and cheerleading groups, which Erickson concluded had no apparent relation to the curriculum of the school. The school argued that it should be allowed to reclassify as noncurricular any group so deemed by the court, so as to be able to continue limiting SAGE's contact rights, but Erickson was unwilling to accept this as a plausible reason for denying preliminary injunctive relief, especially as several of the individual plaintiffs are high school seniors who will graduate at the end of this semester and thus would have had no relief for the violation of their rights if a preliminary injunction did not promptly issue.

New York — In *Lewis v. Berg*, 2006 WL 1064174 (N.D.N.Y., April 20, 2006), U.S. District Judge Gary L. Sharpe was dealing with a 42 U.S.C. sec. 1983 action brought by Jessica M. Lewis, also known as Mark L. Brooks, a self-identified transsexual prisoner claiming 8th and 14th Amendment violations based on a refusal to provide medical treatment for gender identity disorder. The case was referred to Magistrate Gustave DiBianco for a report and recommendations on the government's dismissal motion, and Judge Sharpe decided to adopt the report and order dismissal of the case. Despite Judge Sharpe's order to the clerk to append the magistrate's opinion, it does not appear in the Westlaw report. Unfortunately, Judge Sharpe's opinion presumes familiarity with the magistrate's opinion and does not independently elucidate the facts. From what we can tell, it seems that inmate Lewis considers herself to be transgender but has not been formally diagnosed as such, was not receiving treatment for gender dysphoria prior to incarceration, and is complaining that she is not receiving treatment in prison. Almost the entire opinion by Sharpe is devoted to procedural issues, but a brief portion towards the end suggests that since Lewis has not been diagnosed with gender dysphoria by medical personnel, she cannot seek an order for treatment for the condition. A.S.L.

State Civil Litigation Notes

California — The Supreme Court refused on April 12 to review the recent ruling by the 3rd District Court of Appeal that had rejected a challenge to the validity of the state's Domestic Partnership statute. *Campaign for California Families v. Schwarzenegger*, 2006 WL 205118 (Jan. 27, 2006), review denied, April 12, 2006.

New Jersey — The *Asbury Park Press* (April 12) reported that N.J. Monmouth County Superior Court Judge Ronald L. Reisner rejected a request by a lesbian couple, Catherine O'Conor (the birth mother) and Stephanie DiVita, to have both of their names listed as parents on the birth certificate of their son, who was conceived using donor insemination. Reisner wrote, "The plaintiffs have an efficient method for the rapid recognition of Ms. DiVita as the parent of [the boy] through adoption." DiVita had filed an adoption petition the day after the child was born, but was contending with her partner that being required to go through an adoption process should be unnecessary under the circumstances. *Application of DiVita and O'Conor.*

New York — The New York Court of Appeals rebuffed John Langan's attempt to obtain interlocutory review of the Appellate Division's ruling that he may not assert a wrongful death claim against St. Vincent's Hospital as part of a malpractice case stemming from the death of his partner, with whom he had been civilly united under Vermont law. In its May 2 order denying the right of appeal *sua sponte*, the court said that the order appealed from did not finally determine the action or the rights of any of the parties, a point that was hotly disputed by Langan's counsel in their brief supporting his petition to appeal the ruling in *Langan v. St. Vincent's Hospital of New Yor*, 802 N.Y.S.2d 476 (N.Y.A.D. 2 Dept., Oct 11, 2005). As the court has not pronounced on the merits directly, Langan could theoretically raise the issue again after trial of the remaining claims in the case. ••• The court of appeals has scheduled oral argument in the same-sex marriage cases for Wednesday, May 31. In light of the strong public interest in the case, the court will present a live webcast of the oral argument beginning at 2 pm, and an archived version of the argument will be available on the website for several months thereafter. The address is: http://www.courts.state.ny.us/ctapps/ A.S.L.

Criminal Litigation Notes

Federal — 6th Circuit — Finding that police had elicited a confession in violation of constitutional right to counsel, the 6th Circuit Court of Appeals issued a writ of habeas corpus in *Van Hook v. Anderson*, 2006 Fed. App. 0140P, 2006 WL 997203 (April 18, 2006), requiring that a man convicted of the brutal murder of a gay man after a bar pick-up be released or retried within six months of the court's order. According to the opinion by Circuit Judge Merritt, the confession that is to be suppressed relates that Van Hook connected with David Self in a Cincinnati bar in February 1985, went back to Self's apartment, strangled Self into unconsciousness, then slashed Self's body open with a kitchen knife, exposing internal organs, and placed several items in Self's body. Van Hook then stole several items from Self's apartment and headed south to Ft. Lauderdale, where he was apprehended two months later. After Florida police read him his *Miranda* rights, he requested counsel, so questioning was suspended. Then two detectives from the Cincinnati police showed up and fouled everything up by initiating questioning with him through the device of mentioning having spoken with his mother. During this conversation Van Hook confessed. He was convicted and sentenced to death, the conviction and sentence being upheld by the Ohio Supreme Court. The district court rejected his petition for habeas corpus but to the 6th Circuit panel this seemed a clear violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), under which police may not initiate questioning of a suspect in custody after the suspect has clearly requested counsel but not yet been provided with same.

Federal — Military Appeals — In what has become a routine application of Art. 125 of the Uniform Code of Military Justice, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the court martial conviction for consensual sodomy of Marine Captain Scott A. McCoy on April 20. *U.S. v. McCoy*, 2006 WL 1029163 (N.M. Ct. Crim. App.) (unpublished disposition). Captain McCoy, a married man, met a female lance corporal at a social club at Marine Corps Air Station, Futenma, Okinawa, and began an affair with her that included several encounters incorporating oral sex. Appealing his conviction of violating several provisions of the UCMJ, he specifically attacked his consensual sodomy conviction in reliance on *Lawrence v. Texas* to no avail. Applying the approach of *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), the court found that there are considerations peculiar to the military environment to withhold constitutional protection for consensual sex on a military base between persons of different ranks. "We note that the appellant's conduct was the basis for his conviction of violating a lawful general regulation prohibiting personal relationships between service members that are unduly familir and that fail to respect differences in grade or rank, when such relationships are prejudicial to good order or of a nature to bring discredit upon the Naval Service." When the corporal thought she was pregnant, she lied about her relationship with McCoy to her superiors, as a result of which another innocent officer was subject to investigation. "We find that the appellant's misconduct with Lcpl H directly undermined good order and discipline, placing his adultery and sodomy with her outside the protected liberty interest recognized in *Lawrence*," wrote Senior Judge Scovel for the court.

State — Arkansas — The Cleburne County Circuit Court erred in admitting various gay-related books into evidence during the rape trial of Charles V. Simmons, but other evidence confirming the guilty verdict was so overwhelming that the Arkansas Court of Appeals refused to overturn the verdict. *Simmons v. State of Arkansas*, 2006 WL 1009039 (April 19, 2006). According to the court of appeals opinion, whose authorship is not attributed in the slip-copy originally made available on Westlaw, Simmons was convicted on five counts of rape and one count of producing, promoting or directing a sexual performance. He was sentenced to 210 years in prison. His victims were teenage boys. It appears that Simmons had legal custody of a teenage boy, and was shown to have staged rather wild parties for the boy and his friends and Simmons' adult pedophile friends, during which there was allegedly plenty of drinking, sex, and making and exhibiting pornographic films. At trial, the prosecutor offered in evidence five books found in Simmons' home as well as numerous sexually-related videos. Simmons objected that his case had been prejudiced by admission of this evidence. "On the merits," wrote the court, "we agree that the books are only marginally relevant to the case. None of the victims testified that Simmons showed them any pornographic books or used the books to lure them in any way. In fact, it appears the only reason for introducing the books was to inform the jury that Simmons was homosexual. Regardless, we find any error to be harmless in light of the wealth of other evidence (including the testimony, videos, and photos) of Simmons's homosexual lifestyles." The court rejected a similar objection to the films, on the ground that some of the boys were depicted in the films and there was testimony that the films were exhibited to the boys. The court also rejected an 8th Amendment challenge to the sentence.

State — California — In *People v. Romero*, 2006 WL 1102653 (2nd Dist. Ct. App., April 27, 2006) (not officially published), the court made the point that enhancing a prison sentence under the bias crime provisions on sexual orientation does require proof that the victim was selected due to his sexual orientation. In this case, the court found, although the victim happened to be gay, the prosecution did not prove that his sexual orientation had anything to do with why he was killed, and set aside the enhancement part of the sentence while affirming the conviction.

State — Kansas — Denying the appeal of a second degree murder, intentional theft, forgery and criminal firearms possession verdict of Melvin D. Harris, the Court of Appeals of Kansas rejected, inter alia, the defendant's claim that he was entitled to a jury charge on voluntary manslaughter because he claimed that he shot the victim as a result of an unwanted sexual advance. *State of Kansas v. Harris*, 2006 WL 851228 (March 31, 2006) (not designated for publication). "Harris argues there was evidence of a provocation sufficient to justify the

killing because he state to police that he shot the victim after the victim grabbed his leg and made an unwanted sexual advance. Harris said he became angry after the advance, got out of the vehicle, leaned back into the car, and shot the victim. Harris, however, admitted to two previous homosexual encounters with the victim, wherein the victim performed oral sex on Harris. We conclude," wrote the court per curiam, "that an unwanted homosexual advance is insufficient provocation to justify an instruction on the lesser included offense of voluntary manslaughter… The act of grabbing someone's leg and indicating a desire to engage in a homosexual encounter consists of words or gestures and although perhaps a battery, clearly not a battery sufficient to cause a reasonable belief that one is in danger of great bodily harm or death," which are normally prerequisites to such a provocation charge. Also, an eyewitness claimed that "neither Harris nor the victim appeared upset directly before the shooting began, and Harris calmly exited the car on the passenger side, paused for a few moments, and talked with the victim while leaning into the passenger door before opening fire. This evidence defies Harris' argument that he was acting out of passion."

State — New Mexico — District Judge Michael Vigil imposed sentences upon six youths who pled guilty to hate crime charges in the severe beating of James Meastas, a gay man who was beaten into a coma and is still relearning to walk, talk and dress himself, according to a report in the *Albuquerque Journal* on April 6. The three youths who did not actively participate in the beating were sentenced to probation and deferred sentences that will put permanent felony convictions on their records. The three who participated actively all drew prison time, although the exact amount is yet to be determined after they undergo psychological evaluations, since there is no trial record on these issues due to their guilty pleas.

State — Pennsylvania — A trial court did not err in allowing voir dire of jurors on their attitudes towards homosexuality, in a case where one of the witnesses against the female defendant was a female witness who had been engaged in sexual activity with the defendant in the past. *Commonwealth of Pennsylvania v. Miller*, 2006 WL 1062574 (Pa. Superior Ct., April 24, 2006). Defense counsel objected to the voir dire, as it would plant in the jurors' minds the idea that the defendant engaged in homosexual activities, which was not strictly relevant to the charges against her but could undermine her credibility, but the trial court thought it relevant because the defendant had confided in the witness, and evidence about their sexual relationship would bear on the credibility of the claim that the defendant confided in her. The Superior Court panel concluded that the trial judge had handled the matter correctly, having explained, "If some person has some views or some feelings about allegations of a bisexual nature, wouldn't it be appropriate to ask that so if that is the case, we find that out before that person is selected as a potential juror, rather than have any inference of that come out during the trial and someone does harbor some views or thoughts about it and at that point they would have already been seated." The defense argued at that point about admission of such evidence at trial, but then did not object during the trial. On this basis, the Superior Court did not think much of this asserted grounds for setting aside the defendant's conviction. A.S.L.

Legislative & Administrative Notes

Federal — A coalition of 50 prominent conservative religious leaders, putting their weight behind a renewed effort by Republican legislators to get Congress to give initial approval to a Federal Marriage Amendment, signed a petition calling on Congress to act. The proposed Amendment in its previous iteration would have banned same-sex marriage in the U.S., and also contained language that could be construed to ban other forms of legal recognition for unmarried couples. It is not certain what language will be used if Senate Majority Leader Bill Frist goes forward with his announced intention of bringing the measure to a vote in June. There were reports that staff members of several U.S. Senators were involved in organizing the religious coalition. The petition also kicked off a lobbying campaign by church leaders, who are supplying postcards address to U.S. Senators to their congregants, and a new strategic political alliance of Catholic and Protestant leaders, united in their determination to enshrine anti-gay bigotry in the U.S. constitution. *New York Times*, April 24.

Federal — U.S. Rep. Jerrold Nadler (Dem. — NY) introduced H.R. 5152, which would amend the Social Security Act to provide equality of treatment for same-sex couples, providing the same benefits, obligations and responsibilities as others who pay into the Social Security system. The measure would recognize a category called "permanent partner" wherever the statute now uses the terms "husband" or "wife." The main impact of the measure would be to entitle partners to survivorship benefits and children of permanent partners to have the same death benefits entitlements as children of married couples. The measure was introduced with 17 co-sponsors. *The Advocate*, April 11.

Arizona — A measure passed by the House that would give married couples prefernece over single people in adopting children was narrowly defeated in the Senate. Gay rights supporters in Arizona had lobbied against the bill on the ground that it would make it more difficult for gay people to adopt children in the state, even though the bill contained no direct ban on such adoptions. *365Gay.com*, April 18.

Colorado — Once more into the breach... On April 20 the Colorado Senate approved S.B. 81, which would extend protection against employment discrimination on the basis of seual orientation, while providing an exemption from compliance with non-discrimination laws for religious organizations. A similar bill was approved by the legislature last year, but vetoed by Governor Bill Owens, a Republican, who claimed that the law was unnecessary because the state's off-duty conduct law already arguably protects gay workers from being discharged for their off-duty activities. Owens also claimed the law would lead to costly and lengthy litigation, and might be construed as requiring employers to provide domestic partnership benefits. He's wrong on both counts, of course; states that have approved such laws have not seen an explosion of costly and lengthy litigation (and, of course, if another statute already provides a cause of action for discriminatees, this is a totally spurious argument), and due to ERISA preemption the state law cannot be construed to require private sector employers to provide domestic partnership benefits. When an executive cites spurious reasons for vetoing legislation, that means, of course, that the real reason is not being articulated. The real reason is that the Republican Party of Colorado is in the grip of right-wing religious fundamentalists for whom the legislation is anathema on religious and moralistic grounds… A spokesperson for the governor indicated that if the bill passes the House it will probably meet the same fate as last year. *BNA Daily Labor Report* No. 77, April 21, 2006.

Kentucky — Governor Ernie Fletcher, a Republican, exulting in the spirit of inclusiveness and toleration on the state's designated Diversity Day, issued an executive order on affirmative action in the state government on April 11 that removed sexual orientation and gender identity, categories that had been added to the state policy by his Democratic predecessor. The governor's office described the new order as an effort "to enhance the government's affirmative action plan." Fletcher takes the position that the policy should only cover characteristics included in federal and state anti-discrimination statutes, and that enforcing affirmative action on these bases would require state agencies to inquire into the sexual orientation and gender identity of applicants and employees, which would be you guessed it discriminatory. Fletcher is also fighting off an effort to end state financing for religiously-affiliated schools that maintain anti-gay enrollment policies, one such school having stimulated litigation by expelling a student for revealing he was gay on his internet homepage.

New Jersey — On April 25 Haddon Township's commissioners unanimously approved a

resolution authorizing extension of health benefits to employees' domestic partners, having previously extended pension benefits last year. *Cherry Hill Courier Post*, April 26. The City Council in Plainfield passed a similar measure on March 20 by unanimous vote. *Bridgewater Courier News*, March 21.

New York — Suffolk County legislators voted on April 4 to establish a domestic partners registry for same-sex and opposite-sex unmarried couples. Registered partners would have limited rights from the county, but could use the certificates to attempt to gain spousal benefits from employers. The vote was 13–5, and the measure had bipartisan support. County Executive Steve Levy, a Democrat, had supported the measure, and had previously extended some benefits to partners of county employees. *Newsday*, April 5. By contrast, Nassau County legislators surprised political observers by narrowly defeating a proposal to establish a domestic partnership registry for the county. The measure, which County Executive Tom Suozzi, a self-declared candidate for governor, had said he would have signed had it passed, had been proposed by the Democratic leadership, which holds a narrow majority, but the nine Republicans were solidly against and were, at the last minute, joined by one Democrat, prompting an abstention of another Democrat and a 10–8–1 vote against the measure on April 24. Presiding Officer Judy Jacobs pronounced the vote "a very embarrassing moment." Suozzi quickly called for a new vote, announcing stronger support for the measure, which would be similar to one that previously passed in neighboring Suffolk County and nowhere near as wide-ranging as the New York City Domestic Partnership Ordinance.

Ohio — Canton — Canton became the thirteenth municipality in Ohio to prohibit discrimination against sexual minorities when an amendment to a city ordinance, approved on March 20, went into effect on April 21. The measure added "disability" and "sexual orientation" to the city's ordinance, as well as changing the word "sex" to "gender." Although it is not entirely clear, many believe that the changed wording will be interpreted to protect transgender individuals from discrimination as well. *Gay People's Chronicle*, April 21.

Ohio — Cincinnati — Opponents of the recent city council vote to add sexual orientation and gender identity to Cincinnati's human rights ordinance submitted sufficient signatures to put the measure on the ballot, so it will be delayed from going into effect, according to an April 17 report in the *Cincinnati Post*. Even though city voters repealed a charter amendment that had invalidated a prior gay rights law, Citizens for Community Values, which promotes the community value of anti-gay bigotry that is so important in defining the soul of Cincinnati, at least in their view, just would not give up in its fight to preserve the right to discriminate. A spokesperson for the group said, "This is a very divisive issue, and we voters ought to have a say." Democracy in action! Let's decide every "controversial" public policy issue by referendum, the way they do in California...

Virginia — Virginia voters will consider a proposed anti-marriage ballot amendment on Nov. 7, but the measure approved by the legislature will appear without the approval of Governor Timothy M. Kaine. Although the governor cannot veto a proposed constitutional amendment, Kaine has stated his opposition to the broadly-worded measure and refused to sign it. It seems that in the past governors have routinely signed proposed amendments passed by the legislature as a way of showing their endorsement, although the signature has no legal effect. Kaine stated that although he did not support same-sex marriage, he was opposed to a measure that banned any form of legal recognition whatsoever for unmarried couples as this one purports to do. *Times-Dispatch*, April 11. A.S.L.

Law & Society Notes

Notable Death of a Movement Leader: Another story about how important "coming out" can be to affect public policy: On April 15, the *New York Times* printed an obituary notice for Julia Pell, a former board member of the National Gay & Lesbian Task Force and president of the Rhode Island Alliance for Lesbian and Gay Rights. More importantly for this item, Ms. Pell was the daughter of Senator Claiborne Pell of Rhode Island.. Said the *Times*: "Her father, former Senator Pell, spoke out on the Senate floor about his daughter Julie, a lesbian. He said he now had a more profound understanding of the discrimination she faced." Sen. Pell was notable as a co-sponsor of gay rights legislation and opponent of gay-bashing legislation.

Catholic Adoption Agencies — Catholic Charities of Boston will be ending its adoption services rather than comply with requirements of Massachusetts law banning sexual orientation discrimination. Governor Mitt Romney, a conservative Republican, had floated the idea of a legislative exemption from the non-discrimination requirement, but met solid opposition from the Democrats who control the state legislature. News reports about the Massachusetts situation have made this an issue in several other archdioceses, most notably San Francisco and Denver. *Associated Press*, April 29.

Conservative Judaism — The newly appointed Chancellor of the Jewish Theological Seminary, described as "the heart of Conservative Judaism in America, is Arnold M. Eisen, a Stanford University professor and, surprisingly, not an ordained rabbi. In an interview attending the announcement of his appointment, Eisen voiced support for allowing openly gay and lesbian people to enroll in the rabbinical education program at JTS and be ordained as rabbis, a distinct change from the view of his predecessor, Rabbi Ismar Schorsch. Eisen refused to state a view on whether Conservative Rabbis should conduct same-sex commitment ceremonies, stating this did not fall under his purview as Chancellor of the Seminary. "I'm going to leave same-sex ceremonies to the rabbis," he said, while noting that some Conservative Rabbis already perform them without official movement authorization. *Houston Chronicle*, April 15. At its recent meeting, the Rabbinical Assembly of the Conservative movement rejected an attempt from last year by opponents of same-sex marriage to make it more difficult for the movement's Committee on Jewish Law and Standards to make a change in this area. In a motion that passed 106–37 with 24 abstentions, the body voted that a bare majority of the committee could approve revisions to rabbinic law, overturning a decision last year by the Assembly's Executive Council requiring a 20–vote threshold within the 25 member committee to make such changes. However, a motion to leave previous rules in effect, under which a resolution approved by six members of the Committee could be cited as a statement of rabbinic law, was tabled. *Jewish Weekly Forward*, March 31.

Tax Status — Lambda Legal announced early in April that its inquiry about whether a same-sex couple who were married in Canada could file a joint state tax return in New York had brought a negative response from the state tax agency. It is possible that this may turn into a lawsuit over whether New York government agencies must accord comity to lawful same-sex marriages performed in other countries.

Military Service — An editorial in the *Omaha World-Herald* (April 17), picking up on a March 19 report by the *Boston Globe*, noted that the U.S. Armed Forces, dealing with extraordinary staffing demands, are being more selective about who gets discharged under the *Don't Ask, Don't Tell" anti-gay policy. The number of personnel discharged under the policy was 1,273 in 2001, 9906 in 2002, and 787 in 2003, the last year for which complete data were available. This at a time when, of course, the number of personnel under arms increased to meet the overseas emergency. In addition, the number allowed to remain in service after having violated the policy also increased. Quoting from the Globe*: "The number of soldiers allowed to stay despite being identified as gay 36 of 120 contested cases was substantially higher than in 2004, when 22 of 125 soldiers prevailed, and three times as many as in 2003, when only 12 of 107 were able to persuade their commanders or a military review board to keep them in uniform, the data show." The Omaha newspaper editorial argued from these data that

law studentsprotesting military recruiting should "concede the fact" that the military policy is not so bad as cracked up to be. But another way of looking at the data is to reinforce the argument that the military policy is not based on sound principles but rather on the unproven assumption that openly gay people cannot serve without undermining the effectiveness of our military forces. If that is so, why is the Defense Department loosening up on enforcing the policy, other than because it knows that the assumption is a lie? This is about politics and fear, not about the "expertise" of military commanders.

Shareholder Initiatives — Gay rights advocates have not been particularly successful in getting corporate shareholders to compel their corporations to adopt non-discrimination policies, but for once shareholders have voted for gay rights: PlanetOut (April 28) reports that shareholders of the Kraft Corporation overwhelmingly rejected a shareholder proposal that would have instructed the company to terminate its sponsorship for Gay Games VII. The proposal was filed in response to reports that Kraft had made a $25,000 donation to be a sponsor of the games. Dr. Marcella Meyer of Chicago, proponent of the measure, argued that Kraft might incur liability if a young person attending the games decided to "experiment with homosexual encounters and later develops a serious, even fatal, illness." That's pretty bizarre. She's never read *Palsgraf*. But then she's a doctor, not a first semester law student. In the same news report, PlanetOut reports that American Express shareholders soundly rejected a resolution against domestic partnership benefits, which garnered the support of only 2% of the outstanding shareholders. Attempts by gay rights advocates over recent years to get non-discrimination policies adopted through shareholder resolutions have now inspired this counterwave, as conservative shareholders of several large corporations have recently presented proposal to rescind or prevent sexual orientation anti-discrimination policies or domestic partnership policies. • • • The Securities and Exchange Commission rejected an attempt by Ford Motor Company to keep shareholders from voting on a proposal to remove "sexual orientation" from the company's equal employment policy. A shareholder has submitted a proposal to exclude any reference to "sexual interests, activities or orientation" from company policies. Ford asked the SEC to exclude the proposal from its proxy statement, articulating concern that if passed it would have an adverse effect on corporate recruiting, as some universities require companies to certify that their non-discrimination policies include sexual orientation before they can recruit on campus. The SEC said that the rule that allows companies to exclude shareholder proposals that deal with "ordinary business operations" did not apply to non-discrimination policies. Interestingly, this case is the reverse of the usual controversy, where a corporation attempts to exclude shareholder proposals that call for enactment of a sexual orientation non-discrimination policy; consistently, the SEC has ruled in the past that corporations could not exclude such measures from their proxy statements. *Associated Press*, April 5.

Gay Activism Conference — Students of Harvard Lambda held what they hope will be the first in an annual series of conferences on Gay and Lesbian Legal Advocacy. At the end of the day-long conference, held at Harvard Law School on April 8, Lambda honored Boston College Law Professor Kent Greenfield for his work in challenging the Solomon Amendment.

Transgender Rights in Higher Education — Joining a growing trend among colleges and universities, Harvard University announced April 11 that it amended its nondiscrimination policy to prohibit gender identity discrimination. The administration approved the change after a year-long study of its potential remifications. The University's Transgender Task Force, including students, faculty, staff and alumni, said the policy would extend to "all people who are included under the umbrella of the transgender community," even though the University had not adopted the broader phrase "gender identity or expression" that has been used elsewhere. (The University's rationale was that it already protects free expression under existing policies, which sort of misses the point....) The Transgender Law and Policy Institute, hailing the University's move, pointed out that 52 other colleges and universities have taken the step of expanding their policies to protect transgender people, as have two law schools. *BNA Daily Labor Report*, No. 72, April 14, 2006.

Where there's smoke....? Pennsylvania State University, defending a lawsuit by former student Jennifer Harris charging that the women's basketball coach, Rene Portland, had subjected her to hostile environment harassment, launched its own investigation of Coach Portland. The University concluded that Portland had violated its non-discrimination policy in her treatment of Harris, whom she perceived to be a lesbian. On April 18 the University released the results of its investigation and imposed a $10,000 fine on Portland, but refused to dismiss her. Portland announced disagreement with the conclusions of the report. News reports of the case have brought out allegations from other women who have played on teams coached by Portland that she was biased against lesbians or those she perceived to be such. *Associated Press*, April 19.

Wendy's Non-Discrimination Policy — Responding to an initiative by New York City Comptroller William C. Thompson, Jr., on behalf of the NYC Pension Funds, Wendy's International, Inc., agreed to amend its equal opportunity employment policy and revise its anti-harassment policy to specifically provide that discrimination and harassment on the basis of sexual orientation and gender identity is prohibited by the company. The announcement came after a group of NYC public employee pension funds joined in a shareholder resolution supporting this proposed policy change. The combined funds own almost 300,000 shares of Wendy's stock, valued at more than $17.2 million. Over the past two years, Thompson's initiative has led to similar policy changes at Toys 'R' Us, Cerner Corporation, GenCorp, DTE Energy, and Oneok. *US State News*, April 12.

College Policy — The *Kansas City Star* (April 13) reports that the trustees of Johnson County Community College voted to add "sexual orientation" to the school's non-discrimination policy, after the school's Faculty Association brought the issue to the board in January in the wake of incidents of anti-gay graffiti in college restrooms last fall. A.S.L.

International Notes

Australia — A proposal by the government in the Australian Capital Territory (ACT), the equivalent of the U.S. District of Columbia, to enact legislation providing civil unions for same-sex partners carrying virtually all the legal rights of marriage met with threats from the federal government to override any such step. As a result, the government has revised its proposal to provide some but not the full menu of rights. In addition, Bill Stefaniak, the ACT's "shadow attorney-general" for the minority party has introduced a much more limited partnership registration bill, which he describes as consistent with federal law and unlikely to arouse the hackles of the national government.

Austria — Now pending before the Supreme Court is the appeal of a decision by the Regional Court of Eisenstadt, 20 R 177/05m (Feb. 21, 2006), denying a second-parent adoption petition presented by a lesbian couple. The Regional Court stated that a child would need to have parents of both sexes, thus justifying not allowing this to be treated the same as a routine step-parent adoption. The court's decision makes little sense in light of the fact that the child will be raised by the lesbian couple in any event, since one of the women is the child's legal parent. The real question before the court is whether the child should be disadvantaged by not having any legal right to support from her second mother, or any protection for that relationship should something happen to her legal mother or should the women separate.

Belgium — On April 21 the Belgian Senate voted 34–33, with two abstentions, to approve a measure making Belgium this fifth nation in Europe to extend equal adoption rights to

same-sex couples, joining the UK, Spain, the Netherlands and Sweden. Prior to this legislation, only opposite-sex couples and singles could adopt children in Belgium. *PinkNews.co.uk*, April 21.

Cameroon — The *NY Times* (April 25) reported that nine men charged under Cameroon's sodomy law were acquitted and released from prison, after having been arrested at a nightclub in Yaounde and held on suspicion of violating the law.

Canada — Scott Brison, Canada's first openly-gay Cabinet Minister, will seek the leadership of the Liberal Party, which is up for grabs after the party lost the last parliamentary election. Brison is a member of Parliament from Kings-Hant in rural Nova Scotia, originally elected as a Conservative. He crossed the aisle to the Liberal side in 2003 as a result of the Conservative Party's opposition to same-sex marriage, and was made a cabinet minister as reward for his actions. Although not openly gay when he was first elected to Parliament, he has been re-elected twice since coming out. He was formerly an investment banker. If successful, Brison would be the second openly-gay Canadian to head a political party, the first being Andre Boisclair, the gay leader of the Parti Quebecois who is presently leading in polls to become the premier of Quebec. *365Gay.com*, April 18.

Canada — Adultery as grounds for divorce does not have a statutory definition in Canada, so a New Brunswick court carved out new interpretive ground when it granted a divorce to Pascal Thebeau of St. John on the ground of his wife's affair with another woman. Thebeau's wife filed an affidavit stating that she was in "a committed lesbian relationship" since separating from Pascal last May. Justice Ann Wooder of Court of Queen's Bench that she would infer that there is sexual activity based on that affirmation, and cited a British Columbia Supreme Court decision from last August, *P v. P*, in which the court granted a divorce based on evidence that Mr. P was engaged in an affair with a man. These are believed to be the only two cases in Canada so far to have ruled on the question. *Hamilton Spectator*, *Canadian Press*, April 29.

Canada — Ruling in *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 (April 13, 2006), the Court of Appeals held that Hugh Owens had not violated the Saskatchewan Human Rights Code when he published a newspaper advertisement publicizing his religiously-based disapproval of homosexuality. The Commission had ruled that Owens' ad violated the hate speech provision in the code, and had been upheld by the Court of Queen's Bench. The Court of Appeals, the province's highest appellate court, said that the code had to be construed in light of the free speech and free religious belief guarantees in the Canadian Charter of Rights and Freedoms. Finding that the advertisement did not involve extreme emotions or strong feelings of detestation, the Court of Appeals found it to be protected expression, while warning that religious texts could not be used as license for unlawful actions against gays and lesbians.

Hong Kong — Hong Kong's Home Affairs Bureau informed the British consulate on April 18 that the mission could not host civil union ceremonies for British nationals who happened to be resident in Hong Kong. Many countries that do not allow same-sex marriage or other legal unions for same-sex couples have nonetheless given the go-ahead to British consulates to perform the ceremonies, including, of course, many British Commonwealth members as well as some U.S. states. British law allows British nationals to enter civil unions with non-British nationals of the same sex at British diplomatic offices, wherever located, provided local authorities do not object. *Associated Press*, April 20.

Ireland — Republic of Ireland Prime Minister Bertie Ahern has pledged that his government will pass some sort of legislation legalizing the relationships of same-sex couples. Ahern made the pledge at opening ceremonies of new offices for the nation's main gay rights group early in April. "Sexual orientation cannot, and must not, be the basis of a second-class citizenship," Ahern stated. "Our laws have changed, and will continue to change, to reflect this principle." Due to constitutional restrictions, same-sex marriage cannot be made available by simple legislation, but Ahern's government is pledged to enact some sort of civil union along the lines recently adopted in the U.K. *Chicago Sun Times*, April 4, 2006.

Israel — The Supreme Court will hear oral argument on May 28 in the case of five Israeli same-sex couples who were married in Canada and have demanded that Israel recognize the marriages, the same way it recognizes other marriages contracted outside of Israel that could not be performed within Israel due to the lock on marriage maintained by the orthodox rabbinate. The court announced that seven judges will sit in this case, rather than the usual panel of three judges. Onn Stock, one of the lawyers for the couples, told 365Gay.com (April 5), "Israeli straight couples who marry overseas have their marriages recognized by the Ministry of the Interior regardless of whether they are able or not to marry each other in Israel," and his clients are arguing to the court that any distinction between straight and gay couples in this regard violates equality principles established under Israeli law.

Korea — *The Chosun Ilbo* reported that Defense Minister Yoon Kwang-ung announced April 4 that the government will revise or repeal military laws that require punishment and discharge of gay soldiers. Responding to a recommendation of the National Human Rights Commission, Yoon told a meeting of the National Assembly Defense Committee that the government planned to follow the Commission's recommendations, despite the opposition of senior military officers who claim any change will lead to disciplinary problems in the ranks, similar to the mass outbreaks of dissension in the armies of Canada, the U.K., Israel, Australia, and South Africa that erupted to world wide consternation when openly gay people were allowed to serve not.

Nigeria — The government is proposing legislation to make it a serious felony for anybody to engage in a same-sex marriage, speaking affirmatively about same-sex marriage, or assist anybody in undertaking a same-sex marriage. The same bill would also prohibit any gay club, society or organization from being registered or recognized by any level of the government, and would prohibit the print and electronic media from depicting gay relationships. After reading this bill, we were convinced that it would probably pass overwhelmingly in the Alabama legislature, but luckily it is pending only in Nigeria.

Russia — As final preparations were being made at a Moscow night club for a big GLBT celebration, about 100 protesters identified as a mix of skinheads, nationalists, and elderly religious arrived to try to break things up. Police arrived to provide security too slowly, said some of those in the club and the party had to be cancelled. Gay organizers in the city hope to hold a gay pride parade this spring, but they have already been told unofficially that the municipal government is opposed. *BBC News*, May 2.

Spain — *Catholic World News* reported that a federal panel of judges in Spain rejected a petition by a justice of the peace in Valencia to be excused from presiding at civil marriages of same-sex partners. If the JP cannot perform his duties due to conscientious objection, he should resign, following the example of a JP from the city of Pinto in December.

United Kingdom — Finding that a child conceived through donor insemination and raised by a lesbian couple was the psychological and thus natural child of both parents, the Court of Appeal (Civil Division) ruled on April 6 that when biological mom violated a visitation order by moving away, residential custody should be given to non-biological mom. The court held that the parental status of both women was equal, thus allowing other factors to determine which parent should have primary custody of the child. *CG and CW*, [2006] EWCA Civ. 372 (April 6, 2006). Lord Justice Thorpe wrote for the court that in the eyes of a child, "the natural parent may be a non-biological parent who, by virtue of long-settled care, has become the child's psychological parent." Although the three-judge panel was unanimous in upholding a lower court opinion to this effect, one member

expressed some concern at the prospect of removing children from a biological parent.

United Kingdom — In *Krasniqi v. Secretary of State for the Home Department*, [2006] EWCA Civ 391 (April 10, 2006), the Court of Appeal ruled in favor of Emine Krasniqi, a lesbian Albanian from Serbia seeking to be allowed to continue living in the U.K. while the asylum petition of her partner, Albana Lamaj, from Kosovo, is being determined. Both women were raped by Serbian troups and fled to the U.K., where they first met each other and formed a domestic partnership. They live together in Birmingham where they are jointly raising Ms. Lamaj's child. Krasniqi won an initial asylum ruling from an adjudicator last year but the government appealed. Krasniqi and Lamaj claimed that the women should be able to continue living together in England by virtue of the guarantee of respect for family life under Art. 8 of the European Convention on Human Rights, while their asylum petitions were ultimately being decided. The Court of Appeal panel concluded that since the women would not be able to live together safely as a couple in either Serbia or Kosovo, they should be allowed to remain in the U.K. pending decision of their cases. A.S.L.

AIDS & RELATED LEGAL NOTES

Gay Exec Wins Right to Trial of HIV Disability Claims; Court Questions "Fairness" and "Sufficiency" of Insurer's Review Process

A gay former corporate executive living with HIV won the right to a trial to restore his disability benefits on March 31, when Senior U.S. District Judge Charles S. Haight, Jr., rejected a motion for pre-trial summary judgment by the disability insurance company. *Troy v. Unum Life Insurance Company of America*, 2006 WL 846355 (S.D.N.Y.). Pre-trial discovery in the case exposed flaws in the way that the insurer conducted its process for determining whether people on disability were entitled to continue receiving benefits, leading Judge Haight to question the "fairness" and "sufficiency" of the insurer's review process. The following description is based on Judge Haight's lengthy and detailed written opinion.

Steven Troy was a top executive of Ketchum Communications, Inc., serving as Chairman and Chief Executive Officer of Ketchum Directory Advertising and as President of Ketchum Interactive Group. The two divisions of the corporation headed by Troy included 160 employees in seven offices, generating annual earned revenue of $125 million. Troy also served on the board of directors of the corporate parent, an advertising and public relations conglomerate with close to $2 billion in annual revenues.

One of the benefits of Troy's high executive positions was a disability insurance policy from Unum Life Insurance Company of America. This was not the typical run-of-the-mill disability policy, but rather a special executive policy for officers of the corporation who served on the board of directors, intended to pay out benefits if the covered employees were unable due to injury or sickness to "perform each of the material duties" of their "regular occupation." Alternatively, disability coverage could also continue under certain circumstances where the employee could perform some duties but was earning less than a specified portion of their pre-disability pay.

Troy, who began working at Ketchum in 1976, developed symptoms of advanced HIV infection in 1993, causing him to cancel business trips, falter in presentations due to memory loss, and ultimately become unable to function effectively as an executive. On April 5, 1994, his doctor started him on AZT, then the treatment of choice for symptomatic HIV infection, at a time when he had lost 26 pounds over the prior eight months. A few days later, on April 8, he stopped working and applied for the long term disability benefits provided by the Unum insurance plan. Troy's application for benefits was approved.

Five years later, Unum contacted Troy requesting "updated certification of your continued disability," a routine practice when somebody has been receiving disability benefits for several years. Troy's doctor filled out the requested forms, describing Troy's continuing symptoms and stating that he "should not work in any mentally or physically demanding job-related activity." Despite these statements, Unum launched an "investigation" of Troy's status, "due to the stability of plaintiff's condition and greater level of activity," according to statements submitted in the lawsuit by Unum's lawyers.

Unum's internal review process included review of Troy's medical records by a registered nurse, and further review by an infectious disease specialist, Dr. William Hall. Hall focused on whether Troy was physically and mentally able to return to doing light work, and interviewed Troy's doctor on the phone, subsequently sending a letter to the doctor summarizing the conversation and asking him to countersign it. This led Troy's doctor to send a new letter, relating recent symptoms, attributing them both to the HIV disease and to the antiretroviral therapy, which has its own side-effects, as well as Troy's psychological reaction to his medical situation. Troy's doctor reiterated his earlier conclusions that it would be "very difficult for Mr. Troy to maintain the level of function required for him to carry out the duties of his previous employment."

Troy's benefits continued, but in the summer of 2001, Unum claims to have received an anonymous email message and a phone call stating that Troy was defrauding the insurance company by submitting false diagnoses of his condition. However, Unum's Special Investigations Unit concluded that there was not enough information to pursue a fraud claim. Nonetheless, Unum intensified its investigation and sent a surveillance team to document Troy's condition on film. The team surreptitiously videotaped a man at Troy's residence on November 28, 2001, "standing, walking, climbing steps, leaning, bending over at the waist, carrying trash bags and snapping right arm in an up and down motion while shaking a piece of cloth."

One problem: as it later developed, the man on the surveillance videotape was Troy's domestic partner. However, based on that videotape and Unum's review of Troy's records, Unum sent a letter to Troy at the end of January 2002 stating that he was no longer eligible for disability benefits, stating "we concluded based on all the objective medical documentation in your claim file, that there is no indication of severe, progressive or intractable disease or symptoms which would preclude you from performing your occupation as Chairman, Director of Advertising." The letter mentioned the surveillance video, in which he appeared to have "a muscular build," and described the activities pictured. The letter said that Troy's benefits were terminated effective that date.

Another problem: the letter referred to a definition of disability taken from the policy, but it was the wrong definition. There was one definition for officers who are members of the board of directors, and there was a different definition for "all other employees." The "all other employees" definition provided benefits for up to two years if somebody was unable to perform their regular job, and after that time only if the person was so disabled that they could not "perform each of the material duties of any gainful occupation for which you are reasonably fitted by training, education or experience," a much more demanding standard to qualify for benefits.

As it later developed in the discovery process, this was the definition that Dr. Hall had been using in reviewing Troy's claim to continued disability entitlements, and apparently would continue to use throughout the review process. Troy's attorney responded on his behalf, explaining that the wrong definition had been used and seeking to reverse the decision. Unum decided to continue paying benefits while continuing its review process. Again the file went to a registered nurse, and again it was

referred to Dr. Hall for review, and again, based on his stated conclusions, it appeared that he was using the wrong definition. Unum's communications to Troy indicated that Unum was focusing on his physical ability, even though the main impediments to his performing work on the executive level were mental and psychological.

On August 23, 2002, Unum informed Troy again that he had been found ineligible for benefits, and Troy's attorney requested a formal appeal. More people were drawn into the review process, including a vocational rehabilitation consultant, to determine whether Troy was capable of working to the extent that he would no longer be considered disabled, and a psychologist. Troy's attorney had submitted evaluations performed by a psychologist and a report by vocational consultants in support of Troy's claim to continued disability.

On April 7, 2003, Unum informed Troy that it had concluded that its previous decision was correct, in a letter that again referred to the anonymous charges and "a reported activity level that appears inconsistent with an individual so impaired that he is unable to work." This referred to Troy's travel between California and New Jersey, his participation in the Gay Men's Chorus, a vacation in Mexico, and various recreational activities that had been observed.

When Troy's attorney responded to this notice with a threat to bring suit, Unum agreed to take another look and arrange for an independent neuropsychiatric evaluation, but the psychologist Unum retained backed out before the examination could take place, and then Troy decided not to submit to another exam arranged by Unum. In a letter explaining Troy's refusal of the exam, his lawyer told Unum that the previous psychologist had told him that he had withdrawn from the exam "because he had become convinced that the process would not be fair to Mr. Troy and that UNUMProvident had put him in the untenable position of using his professional skills in the service of a preordained conclusion." Unum submitted the information available to the same doctors who had made the previous decision, and they of course concluded that they had been correct, so Unum denied the claim once and for all and the lawsuit began.

After discovery, both sides moved for pretrial summary judgment, Troy contending that based on the entire file he continued to be eligible for benefits, Unum arguing that it had provided all the necessary appeals process and that its decision was correct.

Judge Haight found "a significant number of facts call into question the sufficiency and fairness of defendant's claims review process," including that at each level of review the same medical doctor would review his prior determinations and confirm them, that the vocational analysis was lacking in explanation for its conclusions, and appeared to be relying on outmoded sources of information, by stark comparison to the detailed explanations and up-to-date sources offered by the vocational consultant retained by Troy. Perhaps most significantly, Judge Haight found that Dr. Hall had consistently used the wrong disability definition from the Unum policy in explaining why he found that Troy was not disabled within the meaning of the policy. Finally, Judge Haight pointed out that Unum had made its final determination on an issue that turned heavily on the "mental aspects of plaintiff's condition on the basis of opinions of independent consultants who never personally examined plaintiff, while discounting the opinions of plaintiff's treating physicians and independent examiners who did conduct personal examinations."

Even though courts generally afford considerable deference to medical decisions made by insurers, they are unwilling to do so where the process is so severely flawed, and Judge Haight refused to grant summary judgment to the insurer. However, he decided that the question whether Troy was disabled within the meaning of the policy still needed to be determined and was hotly contested between the parties, so it would not be appropriate in his view to grant summary judgment to Troy either.

"The material duties of plaintiff's regular occupation and the restriction and limitations required by plaintiff's illness are the two elements central to the definition of disability under the Plan," wrote Haight. "Both elements are questions of fact that cannot be resolved without the Court's making a credibility determination as to the expert opinions present in the record. Such a credibility determination cannot be made on a motion for summary judgment, absent any indication that some of the expert evidence is unreliable as a matter of law. The differing opinions of the several doctors, as well as of the vocational consultants, present a genuine issue as to the material facts of Troy's medical condition and his regular occupation." The judge ordered that the trial begin on October 16, 2006. Troy is represented by Mark Scherzer and Chris Wieber, leading HIV insurance law advocates. A.S.L.

District Court Rejects Summary Judgment Motions in HIV Employment Discrimination Case

District Judge John Shabaz rejected cross-motions for summary judgment in *Birch v. Jennico 2*, 2006 WL 1049477 (W.D.Wis., April 19, 2006), in which Randy Birch, a gay man living with HIV, alleges that Jennico 2 violated the Americans With Disabilities Act by requiring a medical examination before offering him a permanent job.

Birch had been working at Jennico's plant as the employee of a contractor since September 2002. In November 2003, Jennico, which makes laundry aids and surface cleaning products, as well as plastic containers for those products, decided to train Birch and try him out to fill a vacancy as a Batch Maker. Birch's understanding, according to his complaint, is that the training period would be used to evaluate him for the position. The position requires employees to work with various toxic substances. An officer of Jennico heard that Birch was receiving chemotherapy, and claiming concern about whether he could safely work in the job advised an officer of the contracting company, Jobs Plus, that she wanted a written medical statement from Birch's doctor approving his working with the chemicals involved. Birch claims he was told at a Nov. 21, 2003, meeting with a human resources representative from Jennico that he required a medical evaluation. Birch confirmed with Jobs Plus that Jennico had asked for this medical evaluation. Within the week, Birch's assignment as a Batch Maker trainee was terminated.

Jennico takes the position that it was not unlawfully requiring a pre-hiring physical exam on two grounds: first, that it considered Birch already to be a Jennico employee when he was in the trainee position, and second because the medical exam was, in its view, job-related. Birch takes the position that he was at all relevant times on Jobs Plus's payroll, and thus this was a request for a pre-hiring physical before he had been offered a job, in violation of the ADA. Jennico also argued that Birch was not covered as a person with a disability under the ADA. Birch's position was that he was substantially limited in the major life activity of reproduction, asserting that had he not been HIV+, he might have attempted to have a child through donor insemination with a surrogate. Both parties moved for summary judgment.

In denying both motions, Judge Shabaz concluded that there were material factual disputes that had to be resolved before a ruling could be rendered on the merits of Birch's legal claims. Indeed, virtually every relevant point of the ADA analysis requires resolving factual disputes in this case, including whether Birch qualifies as a person with a disability, whether he was an employee of Jennico 2 at the time the medical exam was requested, and whether such an exam could be considered job-related in this context. Shabaz noted that the Supreme Court has ruled in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that "a woman's HIV infection is a physical impairment which substantially limits a major life activity, her ability to reproduce and bear children," but he was not willing to decide on summary judgment the question whether Birch was similarly disabled on that basis. This is the major sticking point for ADA coverage for HIV+ gay men, a legal question that has yet to be definitely resolved. A.S.L.

HIV+ Prisoner Loses 8th Amendment Case Against Prison, Along With His Vision

On March 30, 2006, a federal district court in Georgia granted summary judgment against an HIV+ state prisoner named Tommy Dukes in his 8th Amendment medical treatment case. *Dukes v. State of Georgia*, 2006 WL 839403 (N.D.Ga.). Judge Owen Forrester found that the prison doctor, Dr. Miriam J. Burnett, was grossly negligent in failing to make herself aware of lab results indicating Dukes was suffering from cryptococcal meningitis. While the lab never expressly notified the doctor of Dukes' lung biopsy results, "[t]his information was available to Defendant Burnett at a computer terminal at [the hospital]". Proving fatal to Dukes' case however, Forrester excluded his medical expert's testimony. Without the medical experts, Dukes was unable to prove that medical malpractice caused the injuries of which he complained, or that the conduct of defendants met the standard of "deliberate indifference." The case sadly reaffirms the truism that courts have found virtually no federal constitutional protection against medical malpractice for incarcerated felons.

Dukes was arrested on February 21, 2001. At this time, he had been HIV+ for six years, but failed to inform prison personnel of this. A day later, plaintiff requested medical services because he had "the flu real bad." The jail physician along with a bevy of nurses treated Dukes with various antibiotics and other medications, but Dukes' condition did not change significantly. Over two months later, after noting that Dukes had "small patches of macular rash" and pneumonia, one jail nurse asked Dukes if he was HIV+ positive, to which Dukes then admitted.

Dr. Burnett learned about this the same day and immediately contacted an organization that evaluates and treats HIV+ patients. An evaluation on May 30 shoed that Dukes suffered from a multitude of ailments ranging from a fungal infection of the mouth and gastrointestinal tract to blindness. Dukes' condition continued to deteriorate, and he was sent to the emergency room. There, a lung biopsy was performed, and due to the identification of a mixture of bacteria and fungus, further tests were performed. The results of this lab work indicated that Dukes was suffering from a pulmonary yeast infection. Dr. Burnett was not notified of these results, but had access to them on a shared computer.

During the first week of June 2001, Dukes behaved erratically; he complained of blindness and dizziness, refused medicines, urinated on himself, suffered from high blood pressure and a decrease in blood oxygenation. Jail personnel noted that these actions seemed to occur when Dukes knew he was being watched and Dukes did not complain of any pain during this time. "Dr. Burnett concluded that [Dukes] was faking in hopes of being placed back in the hospital."

On June 8, more than three weeks after the lung biopsy was performed, Dr. Burnett inquired into the results. Subsequent tests revealed that Dukes was suffering from cryptococcal meningitis. The record indicates this condition caused Dukes to lose his vision.

It seems clear that Dukes did not receive good medical treatment. However, that Dukes hid his HIV infection from jail personnel likely lowered the relative standard of care burden Dr. Burnett had to meet. Judge Forrester wrote that for Dukes to succeed on a claim of "deliberate indifference," the liability standard under the 8th Amendment, he needed to show that "Dr. Burnett knew of a substantial risk and chose to ignore it". According to Forrester, there was no evidence that Dr. Burnett knew Dukes had a fungal infection. Forrester opined that the evidence supported a negligence or failure to diagnose argument, but according to precedent in the Eleventh Circuit, did not meet the standard of deliberate indifference.

However, upon reading Forrester's restatement of the deliberate indifference standard, one wonders what actions could constitute deliberate indifference so as to satisfy a summary judgment motion. Specifically, under *Farrow v. West*, 320 F.3d 1235 at 1246, "[a] delay in the provision of medical treatment can also constitute deliberate indifference when, for example, a defendant delays provision of treatment for non-medical reasons." Forrester notes this, but doesn't seem to apply it here. Looking at these cases though, it seems clear that it is very difficult for a state prisoner to win on a claim of deliberate indifference.

Also, not surprisingly, Forrester finds that the county was not liable because Dukes failed to "demonstrate a sufficient causal link between the County policies under attack and [his] injuries." Specifically, Forrester writes that there was nothing in the record to indicate that any of the following alleged policies caused Dukes' injuries: (1) the sheriff's inadequate screening policies; (2) the jail's inadequate record-keeping process; (3) the jail policy of not transporting an inmate out of the county; (4) the County's policy of inadequate staffing of medical personnel at the jail; (5) or the medical staff's failure to train or supervise. Dukes failed to establish a pattern of this treatment with other inmates, but it seems silly that Forrester did not agree that two months of inadequate treatment for an HIV+ prisoner could have aggravated Dukes' injuries.

The medical lab was not liable for medical malpractice because Forrester excluded the plaintiff's medical expert testimony. Dukes' medical experts were two doctors. Forrester excluded one doctor because he was only an expert on matters of correctional health, and not internal medicine, infectious diseases, or proper laboratory procedure. Therefore any testimony he could provide was not relevant. The second doctor was excluded because during his deposition, he admitted he did not have any personal knowledge about the growth rates of Cryptococci, never worked with the fungus, and did not know of any studies conducted to determine the growth rate of Cryptococcus. Forrester ruled that this doctor was not qualified to give expert testimony on Cryptococcus.

Dukes also lost on his ADA and Rehabilitation Act claims, to which the court paid scant attention. The evidence on record simply did not support a favorable finding for Dukes, according to Judge Forrester. In summary, according to the court, none of the defendants was responsible for Dukes' injuries. *Eric Wursthorn*

Court Denies Summary Judgment in HIV Confidentiality Claim Against Union

U.S. District Judge Gerald Crotty denied Teamsters Local 804's motion for summary judgment in a case where the EEOC claimed the union violated the Americans with Disabilities Act (ADA) by disclosing previously confidential information that a John Doe complainant had HIV. *EEOC v. Teamsters Local 804*, 2006 WL 988138 (S.D.N.Y), April 12, 2006.

Mr. Doe, a UPS employee and member of Local 804 since 1990, was diagnosed with HIV in 1994. Doe informed his supervisor and the Human Resources Department that he had been diagnosed with cancer and would need to take disability leave to seek treatment. When Doe returned to work in January 1995, he requested a transfer to accommodate the needs of his medical disability. UPS in turn required Doe to provide documentation to verify his disability. Subsequently, Mr. Doe submitted a doctor's note stating he had AIDS and lymphoma. UPS granted the accommodation, but it could not be finalized until Local 804 concurred because of union seniority rights. The information contained in the doctor's notes was protected from disclosure and Mr. Doe claims he told no one he was HIV+. Yet, Doe claims that Local 804 learned of his HIV status and disclosed that confidential information through a statement by a union official to another employee.

The court denied the motion for summary judgment based largely on the many factual issues in dispute, namely, what information did the UPS share with Local 804 if any, and were they aware it was protected information? The court faced a question of first impression; whether the ADA imposes a duty of confidentiality on third-party entities (Local 804) to whom the employer discloses information. However, Judge Crotty declined to rule on the issue because the record in the case was not yet detailed enough. The court went on to stress that the parties should attempt to settle this

claim because Mr. Doe is back working and the disclosure could have been unintentional. *Tara Scavo*

Actual Exposure to HIV Not Required for Conviction Under "Criminal Exposure" Statute

The Court of Criminal Appeals of Tennessee ruled in *State of Tennessee v. Bonds*, 2006 WL 2333572 (Feb. 21, 2006), permission to appeal denied by Supreme Court, that the state need not prove actual exposure to HIV in order to convict a person of criminally exposing another to the virus under Tenn. Code Ann. Sec. 39–13–109.

Hezzie Bonds was convicted of aggravated rape of a thirteen year old boy and criminal exposure of the boy to HIV. The only direct witness against Bonds was the boy, who was about seventeen by the time the case came to trial in 2004. The boy claimed he had gone to Bonds' house to get some cigarettes, knowing Bonds from a previous fishing trip, that when he arrived, Bonds was seated with a very large, black man who pushed the boy down, held him down while Bonds pulled down the boy's pants and penetrated him anally, then threatened him if he told anybody what had happened. The boy did not mention the assault to anybody for two weeks, then told a friend who urged him to contact the police. The boy never positively identified the alleged black accomplice. Bonds was convicted on both charges and sentenced to 25 years on the rape charge and 6 years on the criminal exposure charge. The boy has consistently tested negative for HIV since the incident. It was established that Bonds was diagnosed HIV+ in 1994 and had received counseling about HIV transmission.

Writing for the Criminal Appeals Court, Judge David H. Welles rejected Bonds' argument that the criminal exposure conviction should be reversed because the boy was not infected and the state provided no evidence that the boy had been exposed to Bonds' bodily fluids. A jury could believe the boy's tale of what happened, which included being anally penetrated by Bonds. According to Welles, it was well within the bounds of statutory interpretation to read the criminal exposure statute as extending to any defendant who put a victim at risk of HIV transmission, noting that some courts in construing similar statutes in other jurisdictions had rejected a condom use defense in such cases.

"We conclude that the use of the word 'exposure' requires something less than actual contact with bodily fluids," wrote Welles. "Consequently the statute at issue requires that for a defendant to be found guilty of criminal exposure of another to HIV via intimate contact, the prosecution need only show that the defendant subjected the victim to the risk of contact with the Defendant's bodily fluids."

The court found that the drafters of the statute could have been more explicit if they intended to require proof of actual exposure to bodily fluids as an element of the offense. "In this case, we conclude that when the Defendant, with knowledge that he was HIV positive, raped the victim by anal penetration, and he 'exposed' the victim to bodily fluids, i.e., made his bodily fluids accessible to the victim, in a manner that presented a significant risk of HIV transmission," he had violated the statute. The court also commented that prior cases referring to "unprotected sex… supports the conclusion that 'exposure' means simply to submit to a risk of contact with bodily fluids, such a risk being substantially more prevalent in unprotected sex than when some form of prophylactic is utilized," and should not be taken to have adopted an actual exposure standard. A.S.L.

AIDS Litigation Notes

Federal — D.C. — Granting the defendant's motion for summary judgment under applicable Virginia law, District Judge Rosemary Collyer rejected a claim of emotional distress by Mary Susan LeFande and her daughter, who alleged that at a Kentucky Fried Chicken outlet run by defendants they had been served sandwiches marred by human blood from a wound on the arm of the employee who prepared the sandwiches, and thus developed AIDS phobia. *LeFande v. Yum! Brands, Inc.*, 2006 WL 949894 (D.D.C., April 11, 2006). Collyer found that Virginia law requires a finding of physical injury before an emotional distress claim can be asserted. "The LeFandes argue that to demonstrate a physical injury, a plaintiff only needs to show an incident of possible exposure that could lead to a reasonable fear of contracting Acquired Immunodeficiency Syndrome (AIDS)," she wrote. "The claim is in error," being based on cases from other jurisdictions that do not rest on Virginia tort law. "Because the LeFandes have failed to present any evidence of 'symptoms' or 'manifestations' of physical injury, not merely of an underlying emotional disturbance, the motion for summary judgment will be granted."

Federal — Georgia — District Judge Edenfield adopted a magistrate's recommendation to dismiss an equal protection suit by James Peterson, an HIV+ Georgia state prison inmate who is being kept in isolation. *Peterson v. Donald*, 2006 WL 1134133 (S.D. Ga., April 26, 2006). Peterson had been asked to be placed in general population, but was told that because of his HIV status he had to be kept away from other prisoners. Judge Edenfield said that Peterson had not "satisfied the requirements for asserting an equal protection claim against Defendants. The segregation of HIV positive prisoners is not unconstitutional. Segregating HIV positive inmates is within the wide deference afforded prison administrators. Prisoners with HIV may be segregated from the rest of the prison population to protect the proliferation of the disease in other inmates." [Yes, the judge really wrote the last sentence; perhaps Edenfield is a member of the George W. Bush school of the English language.] Edenfield concluded that Peterson is only similarly situated with other HIV+ prisoners, and thus can't claim he is being subjected to unequal treatment by being segregated like others in his circumstance.

Federal — Iowa — An inmate scheme to make some money, just a bit too clever, came to grief in *Keene v. Busy Bee Cafe*, 2006 WL 1004975 (N.D. Iowa, April 17, 2006) (not officially published). Justin Keene is serving a 25–year sentence after pleading guilty to criminal transmission of HIV and disseminating obscene material to a minor. He sent an application to the Busy Bee Caf, for a job as a cashier, telling them that he is HIV+ and well qualified to work for them. They turned him down. So he filed this suit, alleging a violation of the Americans With Disabilities Act, alleging that he was a qualified applicant who had been denied employment due to his HIV status, and demanding damages of $5,000. He also applied to proceed in forma pauperis and to have counsel appointed to represent him. District Judge McManus granted the motion to proceed in forma pauperis, but dismissed the complaint and denied the motion for appointment of counsel as moot. "Title I of the ADA does not apply because the plaintiff is an inmate of the Iowa State Penitentiary, not an employee or job applicant," wrote Judge McManus. "The fact that plaintiff is an inmate prevents him from being an employee or a job applicant of a private employer. Stated differently, there is no way the plaintiff could be an employee or job applicant of the Busy Bee Caf, because he is confined at the Iowa State Penitentiary, which is approximately 170 miles away."

Federal — New Jersey — The procedural and evidentiary requirements of state medical malpractice law tripped up an HIV+ inmate complaining of inadequate care in *Mays v. Correctional Medical Services, Inc.*, 2006 WL 1084082 (D. N.J., April 24, 2006). CMS, the contractor that provides health care to state inmates in New Jersey, moved for partial summary judgment on all medical malpractice claims that may be contained in the complaint, on the ground that plaintiff Marvin Mays failed to serve an affidavit of merit as required by the New Jersey statutes for such claims when allegations of malpractice are levied against licensed professionals. The affidavit of merit must be made by an "appropriate licensed person" in support of the claim that there was a reasonable probability that the licensed professionals named in the complaint had actually failed to exercise the standard of care required by New Jersey law. Since Mays had not served

such an affidavit, Chief Judge Brown granted the motion to dismiss that part of the case.

Federal — New York — In a rare reversal of a Social Security disability benefits ruling, U.S. District Judge Shira Scheindlin remanded a case back to the Commissioner of Social Security, finding that the ALJ's decision on a disability benefits claim from an HIV+ man was incomplete because the ALJ had not followed up on information in the file indicating the possibility of non-exertional limitations on ability to work. Various medications listed in the applicant's medical records should have alerted the ALJ to consider such limitations, but the record shows no such consideration. *Rodriguez v. Barnhart*, 2006 WL 988201 (S.D.N.Y., April 13, 2006).

Federal — Utah — A retail sales clerk under treatment for HIV-infection lost his appeal of denial of disability benefits by the insurance company providing such benefits under the clerk's employer's benefits plan, in a ruling March 31 by U.S. District Judge Tena Campbell adopting a report and recommendations by U.S. Magistrate Judge Samuel Alba. *Robbins v. Lowe's Companies, Inc.*, 2006 WL 861381 (D. Utah). For Magistrate Alba's description of the procedural history of the case, it sounds like the plaintiff unwisely sought to pursue disability benefits without professional advice, and it is possible that a meritorious claim has failed due to incompetence on the plaintiff's part. In any event, Judge Alba concluded that forged medical records were submitted to support the disability claim, because the doctor who purportedly provided them later disclaimed any knowledge of them. Using the arbitrary and capricious standard to judge the insurance company's handling of the claim, Magistrate Alba concluded that, based on the record before it, the insurer's decision was rational. From the evidence available, it appeared that the plaintiff, while suffering from HIV-infection, was receiving medication that was controlling his infection, had not lost significant weight so as to qualify for a diagnosis of "wasting syndrome" as claimed on the forged records, and seemed able to perform his job duties in light of an occupational analysis submitted to the court. A.S.L.

Study Questions Conventional Wisdom About HIV Transmission in Prison

A study published April 20 by the U.S. Centers for Disease Control and Prevention discredits the widespread belief that HIV is being transmitted widely through prison sex. The study, based on epidemiological research in the Georgia prison system, found that 90 percent of inmates with HIV infection had acquired the infection prior to incarceration, and that of approximately 45,000 prisoners in the state during the period of the study, only 88 individuals appear to have become infected, chiefly through sexual intercourse, while incarcerated. Also, about half of those who became infected while in prison claimed that it was from sexual intercourse with prison staff, not with fellow prisoners! Prisoners who reported having same-sex intercourse while in prison indicated that such activity was consensual about 2/3 of the time, and that attempts were made to use rubber gloves or plastic wrap in place of contraband condoms about a third of the time. *Washington Post*, April 21. A.S.L.

ACLU Letter Stimulates Change in California Prison Policy

Responding to a letter from the ACLU of Southern California, the California Department of Corrections decided that its categorical exclusion of prisoners with HIV from its family visitation program was unlawful and should be changed. The Department was persuaded that the Americans With Disabilities does apply to the program in question, and that HIV+ prisoners would have a right to equal treatment in the provision of this service to prisoners. ACLU's letter was prompted by contact from a woman who had been denied an overnight family visit with her incarcerated husband due to his HIV status. A.S.L.

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LESBIAN & GAY & RELATED LEGAL ISSUES:

Balog, Kari, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met*, 53 Clev. St. L. Rev. 545 (2005–2006).

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Tuskey, John, *What's a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 Touro L. Rev. 597 (2005).

Specially Noted:

Symposium: State Marriage Amendments, 7 Fla. Coastal L. Rev. (Fall 2005) (individual articles noted above). • • • Publication forthcoming: Kees Waaldijk & Matteo Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (T.M.C. Asser Press — 2006) • • • The annual Law Day supplement to the New York Law Journal published May 1 included a brief article about LeGal by Tara Rice, LeGal's president, and Lewis A. Silverman of Touro Law School, a LeGal member and volunteer attorney in LeGal's Long Island legal clinic program. The title of the article is "Promoting Civil Rights and Social Justice."

AIDS & RELATED LEGAL ISSUES:

Beh, Hazel Glenn, and Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 Colum. J. Gender & L. 12 (2006).

EDITOR'S NOTE:

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