ARIZONA APPEALS COURT REJECTS SAME-SEX MARRIAGE BID

The Arizona Court of Appeals rejected the claims of two men who had sought marriage licenses shortly after the Supreme Court announced its landmark decision in *Lawrence v. Texas*. *Standhardt v. Superior Court*, 77 P.3d 451 (Oct. 8, 2003). Although the court's opinion affirmed the dignity and value of same-sex relationships, the Court of Appeals was unwilling to recognize any right of individuals to marry someone of the same sex.

Days after the Supreme Court issued its *Lawrence* decision, which invalidated sodomy laws as an unconstitutional infringement on all citizens' liberty interest in developing private, consensual sexual relationships without state interference, Harold Donald Standhardt and Tod Alan Keltner applied to the Clerk of the Superior Court of Arizona in Maricopa County for a marriage license. The Clerk denied the application due to explicit provisions in Arizona law prohibiting marriage between persons of the same sex and defining a valid marriage as one between a man and a woman. Standhardt and Keltner petitioned the Court of Appeals directly, seeking an order compelling the Clerk to issue them a marriage license and to declare the Arizona laws prohibiting same-sex marriage unconstitutional under the federal and state constitutions. Although the state argued that the Court of Appeals should decline jurisdiction and force the couple to file their petition with the superior court as an action for declaratory and injunctive relief, the court decided to hear the case after concluding that no additional factual development was necessary and that remand would only delay adjudication of the pure legal questions presented in the case.

In a unanimous opinion written by Presiding Judge Ann A. Scott Timmer, the Court of Appeals rejected the notion that *Lawrence* created a fundamental right to marriage that extended to same-sex couples. Although *Lawrence* clarified that constitutional liberty under the Due Process Clause included the "full right70 to engage in sexual practices common to homosexual relationships, the court noted that Justice Kennedy's opinion pointed out that *Lawrence* did not involve any question about "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." The petitioners attempted to buttress their claims by relying on Justice Scalia's outraged dissent, which claimed that the logic of the majority's decision in *Lawrence* would inexorably lead to the recognition of same-sex marriage. In a footnote, the Court of Appeals noted that it was not convinced that one necessarily flowed from the other, stating that "with all due respect to Justice Scalia, we do not read the Court's comments so broadly."

Second, the Court of Appeals responded to petitioners' argument that the court's recognition in *Lawrence* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* that people are entitled to a sphere of autonomy, within which they can define their own existence and give their life meaning, required the recognition of a constitutional right to select a marital partner of one's choosing. The court commented that while persons may be entitled to the autonomy to many personal decisions, that right did not include "the choice to enter a state-sanctioned same-sex marriage." Rather, in the court's view, *Lawrence* merely held that the state had no interest in preventing individuals from achieving the personal fulfillment that could result from entering into a meaningful homosexual relationship.

In perhaps the most troubling part of the opinion, the court then described *Lawrence* as a rational basis, rather than as a fundamental rights, opinion. It noted that the Supreme Court never explicitly declared that there is a fundamental right to enter into homosexual relationships, and quoted Justice Kennedy's statement that the Texas statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Based on this interpretation of *Lawrence*, in which there is no fundamental right to engage in homosexual sex, the Court of Appeals "reject[ed] any notion that the [Supreme] Court intended to confer such [fundamental right] status on the right to secure state-sanctioned recognition of such union."

When presented with the fundamental rights cases about marriage, the Court of Appeals simply recited the oft-repeated argument that *Loving v. Virginia* and later right-to-marry cases were all based on the premise that "a marriage" by definition is a union between a man and a woman. Therefore, any claim for recognition of same-sex marriage actually seeks to redefine the institution. The court did not dispute the petitioners' argument that the definition of marriage has evolved over time, and, thanks to developments in places like Vermont, California, and numerous foreign countries, there has been greater recognition of same-sex relationships. Nevertheless, the court reiterated the Supreme Court's admonition that fundamental rights status should only be conferred after "exercising the utmost care," and suggested that any such recognition by the court would amount to impermissible judicial policymaking. The court then invoked the mantra of "deeply rooted in our legal and social history" and "implicit in the concept of ordered liberty," as further justification for rejecting the petitioners' fundamental rights argument. Although acknowledging that attitudes about homosexuality and the attributes of family are changing, the Court noted that no states have recognized same-sex marriage. To the contrary, many states have enacted specific laws limiting marriage to different sex couples. Adopting a somewhat apologetic tone, the court admitted that "a homosexual person's choice of life partner is an intimate and important decision." Nevertheless, citing *Glucksburg*, the court insisted that "not all important decisions sounds in personal autonomy are protected fundamental rights."

Turning to the petitioners' state constitutional privacy argument, the court rebuffed the claim that the Arizona constitution, whose explicit privacy provision provides greater protection than under federal law, would compel the recognition of a fundamental right to enter a same-sex marriage. The court rejected the notion that strong state law privacy precedents dealing with the right to die and Fourth Amendment search and seizure were dispositive of the question whether the state must "affirmatively involve itself in a relationship" by recognizing a marriage. Finally, in a somewhat silly observation, the court noted that "it is unlikely the framers [of the Arizona constitution] intended to confer a right to enter a same-sex marriage."

After disposing of the federal and state fundamental rights claims, the xourt then turned to the question of whether the state's ban on same-sex marriage was supported by a rational basis. Although recognizing that the fit was not perfect, the Court accepted the state's argu-

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ment that it had an interest "in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and that limiting marriage to opposite-sex couples is rationally related to that interest." The court noted that, as a biological matter, heterosexual couplings *could* lead to pregnancy even though there was no requirement that they must — whereas under no understanding of modern science could homosexual relationships lead to the creation of a child. This distinction provided the rational basis for the line that the State had drawn: "Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriage would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationship." The vision of marriage promoted by the state and accepted by the court in this opinion is a surprisingly negative one, full of "legal and financial obligations" (as opposed to rights and benefits). Adopting this view, the court determined that the state need not burden same-sex couples with these obligations because their unions do not lead to the production of children. The court acknowledged (somewhat tongue-in-cheek) that allowing same-sex couples to marry would in no way prevent different-sex couples from procreating. Nevertheless, in the court's view, the State was entitled to take a greater interest in relationships that are capable of procreating than those that are not. (Queer theorists should have a field day with this part of the opinion!)

The Court did recognize that many same-sex couples create families and raise children. Those children "deserve and benefit from bilateral parenting within long-term, committed relationships" just as much as children of heterosexual, married parents, and "could benefit from the stability offered by same-sex marriage, particularly if such children do not have ties with both biological parents." But the state is not required to draw its distinctions so as to create a perfect fit, the court noted (with the hint of a sigh) and so children of same-sex couples will just have to suffer for now. This inequity is a matter for the legislature, rather than the judiciary, to resolve (at least so long as rational basis review is the operating standard of review).

Finally, with regard to equal protection, the court explicitly noted that the petitioners did not raise any arguments based on heightened scrutiny for sexual orientation (or intermediate scrutiny for gender, an observation that the reader must imply). Their arguments rested solely on the presence of a fundamental right that was being burdened through the application of an unequal law. Having already rejected the fundamental rights argument, the Court determined that rational basis was the appropriate standard of review. Finding that the law was neither unduly broad nor motivated by animus, as had been the case in *Romer v. Evans*, the court determined that the challenged statutes were not simply to make a class of people unequal to everyone else, and therefore passed constitutional muster.

Notwithstanding pressure from national freedom-to-marry advocates to drop the case, Michael S. Ryan, the petitioners' Phoenix attorney, announced his intention to appeal the matter to the Supreme Court. Michael Adams of Lambda Legal Defense and Education Fund was one of many LGBT advocates expressing frustration about the case, saying, "It's certainly not helpful to have any court ruling that gay couples do not have the constitutional right to marry each other. It's a step in the wrong direction." Lambda Legal is currently pursuing a gay marriage case in New Jersey, and the Gay & Lesbian Advocates & Defenders are awaiting a decision from the Massachusetts Supreme Judicial Court in their same-sex marriage case. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

Federal Court Allows Trangendered Doctor's Discrimination Claim to Proceed Under Title VII

A federal judge in Buffalo, New York, has refused to dismiss a complaint filed by a transgendered psychiatrist against her former employer for alleged violations of Title VII of the Civil Rights Act of 1964. *Tronetti v. TLC Healthnet Lakeshore Hospital*, 03–CV–0375E (W.D.N.Y. Sept. 26, 2003). Senior U.S. District Court Judge John T. Elfvin has joined a growing number of federal judges who have ruled that discrimination against a male-to-female transgendered person for failing to "act like a man" is actionable sex discrimination under federal law.

Dr. Caillean McMahon Tronetti, a clinical psychiatrist and doctor of osteopathy, was born anatomically male. When hired by TLC Healthnet's Lakeshore Hospital in September 2000, she was in the process of transitioning to a female physical identity to match her gender identity, something Tronetti explained during her hiring. Transitioning generally requires a period of living in the preferred gender role for at least one year prior to reassignment surgery.

According to Tronetti's complaint, TLC's Vice President for Mental Health, Dr. Mark Cooper, advised her to avoid wearing overtly feminine clothing, but other members of her department apparently accepted her as a woman, and were aware that she was preparing for surgery. Around December 2001, when Tronetti's appearance and dress became much more feminine, she alleges her work environment became more hostile. She claimed that a nurse manager, Luisa Kelsey, started demeaning rumors about her. Tronetti complained to Cooper about the rumors and requested an investigation, but she claims Cooper merely said that her co-workers needed time to adjust to her sex change.

In January 2002, Tronetti had facial feminization surgery. In March, a disciplinary panel chastised her for "improperly discussing cosmetics" with a nurse who had asked about her post-surgical cosmetic use. Tronetti's department head protested against her being disciplined. Privately, Cooper advised Tronetti that the hospital administration wanted to fire her. Subsequently, Kelsey complained that Tronetti was harassing her after Kelsey found a "penis-shaped toy" on her desk, but it turned out that somebody else had put the object there.

Kelsey instructed her staff to use male pronouns in reference to Tronetti, contrary to what Tronetti had requested. Tronetti complained that Kelsey's hostility toward her created a "hostile work environment." Subsequently, Tronetti asked Cooper whether the administration's hostility toward her had diminished, and Cooper said that the hospital administration was "uncomfortable" with Tronetti's "life choices," and advised her to "keep a low profile."

In October 2002, Tronetti had advised the hospital of her sex-reassignment surgery scheduled for February 2003, and asked for a leave of absence. She was told that she could have six to eight weeks off at 60 percent of her regular pay. Tronetti alleged that a member of TLC's board of directors was spreading outrageous rumors about her and questioning her sanity. Tronetti then left voice mail messages with an administrative staff person, indicating she intended to file a complaint with Cooper. Shortly thereafter, Tronetti was summoned to a meeting at which she was told that she would be discharged and her professional credentials would be endangered if she did not resign, so she did so under protest.

She filed a complaint with the federal Equal Employment Opportunity Commission and the N.Y. State Division of Human Rights. The EEOC ultimately closed its file, advising in its Dismissal and Notice of Rights Letter that "Title VII does not cover pre-operative transsexualism." Tronetti filed a federal lawsuit, charging discrimination in violation of the sex discrimination provisions of Title VII of the federal Civil Rights Act, the New York Human Rights Act (for sex discrimination and disability discrimination based on Tronetti's gender

dysphoria) and the federal Family Medical Leave Act.

The U.S. Courts of Appeals for the Seventh, Eighth and Ninth Circuits, and several district court decisions nationwide, have ruled over the years that Tile VII does not protect against discrimination on the basis of transgender status. However, as Judge Elfvin noted, "Tronetti is not claiming protection as a transsexual. Rather, Tronetti is claiming to have been discriminated against for failing to 'act like a man.'" In several other parts of the country, most recently Massachusetts (*Centiola v. Potter*, 183 F.Supp.2d 403), courts confronted with discrimination claims by transsexuals have determined that federal law prohibits employers from treating employees adversely because of the employees' failure to conform to gender stereotypes. These decisions trace their history to the 1989 comments of Justice William J. Brennan in *Price Waterhouse v. Hopkins*, 490 U.S. 228, that one of the purposes of Title VII was to overcome stereotypes that held back women from advancing in the business world. Citing *Price Waterhouse* and reaffirming that sex stereotyping is evidence of sex discrimination, Judge Elfvin pronounced that "transsexuals are not genderless, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."

Judge Elfvin found that Tronetti's factual allegations also support a claim of unlawful retaliation, since she claims she was discharged in response to her voice mail message complaining about the harmful rumors about her forthcoming sex-change surgery.

In support of its motion to dismiss, TLC argued that Tronetti's claims were time barred to the extent they related to conduct that occurred more than 300 days before she filed her complaint. Judge Elfvin accused TLC's counsel of making a legal argument "that was not legally warranted" in light of the U.S. Supreme Court's 2002 decision in *Nat'l R. R. Passenger Corp. v. Morgan*, 536 U.S. 101, that the entire period of the alleged hostile environment may be considered for purposes of determining liability under federal law, as long as at least one act contributing to the claim occurred during the 300–day filing period. Judge Elfvin directed TLC's counsel to file a letter with the court explaining why she made the erroneous legal argument. "Absent adequate explanation," Judge Elfvin ruled, TLC's attorney "may be personally sanctioned."

Although Judge Elfin ruled that Tronetti's state law claims were governed by the same standards as Title VII and stated a claim for sex discrimination, the court dismissed without prejudice Tronetti's state law disability claims, since Tronetti had elected an administrative remedy by filing a complaint with the N.Y. State Division of Human Rights as to that claim. The court also dismissed without prejudice Tronetti's FMLA claim, since Tronetti did not allege that TLC employed a sufficient number of employees within the meaning of the statute, and because Tronetti did not specifically identify the FMLA provision under which she sought relief. Judge Elfvin declined to rule whether sex reassignment surgery qualifies as a serious health condition under the FMLA, but noted that the U.S. Supreme Court only recently denied certiorari to an Eighth Circuit decision ruling that it was not.

Overall, the decision is a victory for Tronetti and other transgendered plaintiffs exploring ways to seek redress in federal court for employment discrimination. Nonetheless, one cannot help but note that the decision highlights that an employer's exposure under Title VII may be based on arbitrary, fine-line distinctions. Can a judge or jury truly distinguish between a claim that one was fired for being transgendered (which is not actionable), and a claim that one was fired because, as a transgendered person, one is not sufficiently masculine or feminine (which is actionable)? In places like New York City, questions like this one are moot, since the city's human rights ordinance was amended to include gender identity last year.

The Law Offices of Lindy Korn represent Tronetti. TLC is represented by Melinda G. Disare of Damon & Morey, LLP. *Ian Chesir-Teran & A.S.L.*

Florida Appeals Court Applies Domestic Violence Law to Gay Couple

Deciding a new point of Florida law, the Florida District Court of Appeal, 2nd District, unanimously ruled in *Peterman v. Meeker*, 2003 WL 22259814 (October 3), that the state's domestic violence law, Fla. Stat. Sec. 741.30, provides a basis for issuing an injunction in the context of a gay relationship where one member is threatening the other with violence.

John Russell Peterman and Nute Carl Meeker, Jr., were domestic partners for thirteen years and lived together in a house they jointly owned. Toward the end of their relationship there were "violent episodes between these men," according to the opinion for the court of appeal by Judge Carolyn K. Fulmer. Meeker went to the Pinellas County Circuit Court, seeking a domestic violence injunction against Peterman. Peterman's attorney filed a motion to dismiss the action, arguing that since the men were not legally related to each other, the Domestic Violence statute did not apply to them and the court had no authority to issue the injunction.

The statute says that such an injunction may be sought by someone who is either the victim of domestic violence or who has reasonable cause to believe that he is in imminent danger of becoming such a victim. In order to invoke the authority of the court, the plaintiff and defendant must be family members or members of the same "household." The statute extends to "spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married." Interpreting this language, Circuit Judge John C. Lenderman had ruled that the legislature intended to protect "intimate partners" and issued the injunction against Peterman, who appealed the court's order.

Noting that "there is no reported case in Florida on this issue," Court of Appeals Judge Fulmer reported that "several courts around the country" have ruled that "persons in a same-sex relationship qualified for domestic violence protection." She cited in particular cases from Illinois, Kentucky, and Ohio. She also noted another provision of the Florida statute, which stated that "no person shall be precluded from seeking injunctive relief pursuant to this chapter solely on the basis that such a person is not a spouse." This, together with the persuasive rulings from other jurisdictions, led to the conclusion that "the statute does not exclude those persons who otherwise meet the requirements for a domestic violence injunction but seek protection from a person of the same sex." A.S.L.

California Appeals Court Approves $75,000 Damages in Case of Lesbian Harasser

In a ruling that illustrates important differences between federal and California law governing workplace sexual harassment, California's 1st District Court of Appeal has approved a $75,000 damages award against the San Francisco Housing Authority based on sexual harassment of a female employee by a female supervisor. *Drummer v. San Francisco Housing Authority*, 2003 WL 22391173 (Cal. Ct. App., 1st Dist., Oct. 21, 2003). The unanimous decision by a three-judge panel rejected an argument by the employer that the trial judge should not have heard testimony about incidents in which the supervisor had also harassed male employees.

Deborah Drummer, a clerical employee at Alice Griffith, a public housing project in San Francisco, filed the harassment claim after the employer failed to take effective steps to end continuing harassment by Karen Huggins, a supervisory employee. According to trial testimony, the harassment included frequent sexually-charged remarks, unwanted gifts and touching, and an attempt by Huggins to get Drummer to kiss her. Drummer, who is straight and married, protested to Huggins's supervisor, and was told that Huggins would be transferred, but Huggins continued to show up at the old workplace and Drummer experienced signifi-

cant emotional distress, manifesting itself in sleeplessness and other physical symptoms.

According to the evidence, Huggins was an "equal opportunity harasser" who had engaged in similar conduct towards two male employees. If this suit had been brought under Title VII, that would have spelled disaster for Drummer's claim. Sexual harassment claims in federal court are brought under a statute that prohibits "sex discrimination." According to the U.S. Supreme Court, a sexual harassment claim under Title VII is valid only if the plaintiff can show that she was harassed "because of her sex." By contrast, California's statute specifically bans sexual harassment. Thus, the courts need not be concerned with *why* the particular victim was selected for harassment, so long as it is proved that the plaintiff was subjected to harassment of a sexual nature, without getting into such issues as the sexual orientation of the harassing superior or the reason the harassment is being inflicted on the particular victim.

Writing for the appeals court, Judge Barbara J. R. Jones noted the Housing Authority's argument that the trial court erred because it "refused to consider, let alone render a finding on, Huggins' sexual orientation." Jones found that this contention had been rejected ten years ago by the court of appeal in another case, when it said: "The focus of a cause of action brought pursuant to Government Code section 12940 is whether the victim has been subjected to sexual harassment, not what motivated the harasser." Jones pointed out that the Housing Authority was relying on federal precedents, not directly applicable to California law. She also noted that in the famous federal same-sex harassment case of *Oncale v. Sundowner Offshore Services*, the U.S. Supreme Court had observed that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex," so even in a federal court the failure to inquire into the sexual orientation of the harasser was not necessarily an error.

But, more to the point, in a federal court, evidence that a supervisory employee harasses both men and women will usually be seen as ending the case, since in such cases the court would conclude that the victim was not harassed because of their sex. Not so in California, however.

An important issue in the case was whether the Housing Authority should be held responsible for Huggins's actions, and this turned to some extent on the Authority's awareness of Huggins's past harassing conduct. This was the reason that Drummer introduced evidence that in the past Huggins had harassed two male employees, both of whom had complained to management about the harassment. The Authority argued that this past knowledge was not relevant, because knowing that Huggins had harassed men did not put it on notice that she might harass a woman. Judge Jones was not persuaded by this argument, finding that it was "based on a faulty premise. While appellants [the Housing Authority] state that people in our society are 'presumed to have one sexual orientation,' they have not cited any authority that supports that proposition. Indeed, in a cosmopolitan city such as San Francisco that embraces sexuality in its many and varied forms, it is demonstrably not true." We always knew there was something 'different' about Baghdad on the Bay…

The Housing Authority also said that the trial judge had ignored its response to Drummer's complaints in deciding its legal liability to her. Just as well, seemed to be the opinion of Judge Jones, who commented that "the evidence showed the Housing Authority's investigation of Drummer's allegations was ineffectual at best. Although the Housing Authority concluded Huggins had acted inappropriately, it then promoted her to a higher position. Even the minor corrective action the Housing Authority did take was ineffectual. Huggins did not consider it to be discipline and she did not change her conduct toward her subordinates. We conclude these facts were sufficient to establish that the Housing Authority failed to take all reasonable steps necessary to prevent harassment."

The decision underlines the deficiency in federal civil rights law, with its limited coverage of workplace sexual harassment — a deficiency echoed in the law of many states. When lesbian or gay employees experience sexual harassment, they frequently have no federal redress unless they can show that they were victimized because of their sex rather than their sexual orientation. Although a law that forbids sexual orientation discrimination will take care of this problem, the lack of such a law at the federal level leaves the arsenal of statutory civil rights protection severely deficient for both gay and non-gay employees. A.S.L.

Alleged Consensual Sodomy on Sleeping Partner Earns Criminal Conviction

In *People of Colorado v. Hoskay*, 2003 WL 22309230 (Oct. 9, 2003), the Colorado Court of Appeals affirmed the conviction of Stanton Hoskay for public indecency and for sexual assault upon a physically helpless male victim, rejecting arguments about fault in the jury selection process and alleged erroneous rulings by the trial judge. Judge Marquez wsrote for the unanimous appellate panel.

Hoskay had been checked into a detoxification facility by a counselor, and directed into a male dormitory. Later that night, while doing a bed check, the counselor found Hoskay in bed with another man. The counselor testified that Hoskay had his pants down and that the other man appeared to be asleep. In the words of the court, "[a]lthough the counselor could not see defendant's genitals, it appeared to him that defendant was having anal intercourse with the victim. When the counselor entered the room, defendant was startled. However, the victim remained motionless." The counselor removed Hoskay from the room, went back, woke up the victim, who testified that he had been asleep, and that he had been "dreaming about anilingus being performed upon him." The victim testified to soreness in his anus for "a couple of days" after the incident. The victim said he was asleep while it was happening. Hoskay said the act was consensual. Hoskay was convicted, and raised seven grounds on appeal.

A juror was challenged because she initially stated that "she had a religious objection to homosexuality and admitted that if she were in defendant's position, she would be concerned about having a person such as herself on the jury" and that "she hoped she would not be selected because of the nature of the case." She stated that she "did not know how her feelings about homosexuality would affect her judgment," and promised that she would judge the case on the evidence presented. The Court of Appeals found no abuse of discretion in denying the challenge to her admission to the jury for cause.

Hoskay challenged a counselor's testimony as to whether the sexual encounter appeared nonconsensual. The court found that "'[a] lay witness may state an opinion about another person's motivation or intent if the witness had sufficient opportunity to observe the person and to draw a rational conclusion about the person's state of mind." The court of appeals thus found that the trial court's acceptance of the counselor's conclusion into evidence was thus not an abuse of discretion.

Hoskay argued that he had no way of knowing that the dormitory would be deemed a "public place" within the meaning of the statute in question. The court ruled that a "reasonable person in the defendant's position" should have known that a dormitory would be deemed a public place.

The Court of Appeals rejected an argument that the trial court should have offered a jury instruction that the jurors should not be influenced by gender bias or prejudice. Hoskay argued that he was prejudiced by the absence of a gender bias instruction because the case involved a homosexual act, and his defense was consent. The court did not find this argument persuasive "because it erroneously equates gender bias with bias against homosexuals, and the record provides no reason to believe the jury would have confused these two concepts." Further, the appellate court found that the trial court's instruction that the jurors not allow prejudice to influence their decision to be sufficient.

Finally, the Court of Appeals rejected a challenge to the sufficiency of the evidence for findings of guilt of sexual assault upon a physically helpless victim and for public indecency. The court ruled that when reviewing challenges as to sufficiency of the evidence, the evidence presented must be reviewed in a manner giving the prosecution the benefit of every inference which might reasonably be drawn from the evidence. As to the sexual assault charge, the victim's testimony of a sore anus, the counselor's testimony that both victim and accused were in bed together naked from the waist down, and Hoskay's claim that the act was consensual were sufficient to show that the act happened. The statements by the counselor that the victim appeared asleep and the victim that he was asleep supported the charge that the victim was physically helpless. As to the sufficiency of the charge that the act took place in a public place, sufficient to sustain a charge of public indecency, the court found that the room where the event occurred was open to others in the facility, including those in treatment and staff. This would make the room sufficiently "public" to sustain the charge. *Steven Kolodny*

Third Circuit Says Anti-Gay Hecklers May Be Excluded from Pro-Gay Public Gatherings

A small group of anti-gay hecklers repeatedly showed up at gatherings in Harrisburg, Pa., to noisily harangue people about the Bible's unfavorable view of homosexuality. Several of the gatherings were specifically gay; others were merely forums at which pro-gay politicians participated. The hecklers were, at various times, barred, removed or asked to leave the gatherings, even though they were in public parks. The hecklers responded by suing Harrisburg city officials, requesting an injunction that would allow them to exercise their First Amendment right to express themselves in public forums, and a declaration that certain laws and regulations were unconstitutional. The U.S. District Court for the Middle District of Pennsylvania, in *Diener v. Reed*, 232 F. Supp. 2d 362 (M.D. Pa. 2002), ruled that two park regulations were unconstitutional because they allowed too much discretion to park officials, who might use that discretion to bar speech on the basis of content. Generally, however, the district court supported local officials in their actions restricting the protesters and upheld the regulations and statutes. The Third Circuit Court of Appeals affirmed the district court's decision in full, in *Diener v. Reed*, 2003 WL 22326515 (3d Cir., decided Sept. 13, filed Oct. 10, 2003).

The action for an injunction was based on seven specific incidents dating from June 2000 to July 2002. Upon the request of Mark Diener and his cohorts (the protesters), the courts struck down two park regulations. One of the regulations required a permit before one could speak to groups of one or more persons in a public park, and the other prohibited the distribution of literature in a particular location in one of the parks, near a Civil War museum. The permit requirement, held the court, was too broad and would bar spontaneous speech and speech that is no threat to the city's interest. The area where literature could not be distributed was found to be a limited public forum where it was not reasonable to bar leafleting. Both regulations were found unconstitutional.

Other parks regulations, however, gave officials ample criteria to require permits, and to bar those without permits from disrupting the activities of permit holders. The criteria in the regulations were content-neutral and constitutionally valid.

Regulations aimed at facilitating the orderly and efficient use of parks are acceptable as time, place and manner restrictions, even if the provisions inadvertently affect some First Amendment activity. Park ordinances allow the park director to allocate the use of facilities; if facilities are in use by one group, another group may not use them at the same time. The government has a substantial interested in coordinating multiple uses of public facilities, the court stated, quoting *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Any regulation must contain adequate standards to guide officials in their decisions, which should be subject to effective judicial review.

The right of gay people to gather without being disturbed by those opposed to them gained ironic support from the Supreme Court's decision in *Hurly v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In that decision, the organizers of a St. Patrick's Day parade were permitted to forbid a gay group from joining the parade as a self-identified group, because the organizers of the parade did not want to appear to endorse the gay group's views. Even though the parade took place on public property, its organizers were granted the First Amendment right to choose the content of its message. The same held true for the gay groups in Harrisburg. The anti-gay protesters would suffer no impediment in obtaining their own permit and staging their own demonstration. They in turn must allow the gay group to express its message. The grant of exclusivity provided to permit-holders through the parks ordinances is an appropriate measure to foster First Amendment activity.

The protesters also challenged the Pennsylvania disorderly conduct statute, which has been held to outlaw approaching someone and screaming threats. The protesters alleged that their intent was not to threaten. However, the court held that the level of intent required is the intent to cause inconvenience or annoyance. Moving toward town officials in a threatening manner was sufficient to find that the protesters engaged in disorderly conduct.

The protesters challenged their arrest under the disorderly conduct statute for acts creating a hazardous or physically offensive condition, based on their behavior in entering a public area after being barred by an officer. Forcibly entering or remaining in an area where one is unwelcome after the police requested that one leave might create a public inconvenience, annoyance or alarm, said the court. Physical resistance of the police serves no legitimate purpose. Although the protesters may believe that an officer is wrong in detaining them, such belief does not offer a justification to physically resist the officer's order. The shouting, amplified sound, and drum-banging of the protesters rose to a level of disturbing the peace. Although loud conduct in conducting an activity protected by the First Amendment may be tolerated, harassing the police is not such an activity. Therefore, the arrest of the protesters was justified, as they had engaged in disorderly conduct. *Alan J. Jacobs*

District Judge in Rhode Island Finds Same-Sex Harassment Insufficiently Severe and Pervasive

Regular readers of hostile work environment sex discrimination decisions will have noticed a pattern. A plaintiff has been subjected to inappropriate or even outrageous behavior in the workplace. The court, however, implicitly or explicitly motivated by the concern that Title VII not become a "mere" code of workplace civility, denies the plaintiff relief. The Oct. 10 decision granting summary judgment to the defendant in *Mann v. Lima*, 2003 WL 22382934 (D.R.I.) differs, in that it describes the summary judgment process as a "game," and describes the pleadings, elements, and rulings in baseball terminology.

Mary Jo Lima supervised Roberta Mann's customer service work for Sovereign Bank in 2000. Mann testified that Lima told her, on two occasions, that Mann's necklace was pretty, and that Mann should buy one for Lima. Lima once whispered in Mann's ear "what do I need to do, slide in beside you and take it off?" Lima also suggested that Mann wrap her necklace and give it to Lima for her birthday. After Mann changed her hairstyle, Lima rubbed Mann's head "in a massaging motion" while commenting on how pretty it looked. At a closed meeting between the two at Lima's request, Lima insisted that Mann needed a hug. On Mann's refusal of the hug, Lima knelt before her, held her ankle, and again asked for the necklace. Lima concluded the meeting with "let's just forget this ever happened." The meeting prompted Mann's first complaint to Sovereign's human resource department, which investigated and orally reprimanded Lima. Later, Lima sat on Mann's desk and told Mann how pretty Mann's

top looked on her. The next week Mann told Sovereign's human resources staff that she would not be returning to work, due to Lima's conduct.

Credit District Judge William E. Smith's footnote, citing the statement in *Shepherd*, 168 F.3d 998, that the list of examples of possible same-sex discrimination in the *Oncale* decision, 118 S.Ct. 998, was meant to be instructive, not exhaustive. However, Mann pleaded only that Lima is a homosexual person, and that Lima's conduct was based on her sexual desire for Mann. Lima is presently married to a man, and once recounted to Mann that, at a family gathering, she stated that she was a lesbian woman "so her mother would stop trying to fix her up with people." The judge held that this could support an inference that Lima's conduct was "based on sex," sufficient to withstand summary judgment. Nevertheless, citing fact patterns from previous decisions, the court decided that Mann experienced sporadic abuse ("minor league"), rather than the "severe and pervasive" abuse present in a hostile work environment. *Mark Major*

[To give the judge the benefit of the doubt on the baseball metaphors pervading this opinion, all of New England was caught up in the grip of the post-season struggle between the Boston Red Sex and the New York Yankees for the American League Championship, and the judge may have merely been reflecting the general preoccupation with this topic rather than any attempt to signal disfavor to the plaintiff in this case. — Editor]

Civil Litigation Notes

Federal — Connecticut — The Associated Press reported on Oct. 20 that a group of faculty members at Yale Law School had filed suit against Defense Secretary Donald Rumsfeld seeking an injunction against enforcement of the Solomon Amendment, a provision of federal law that authorizes suspension of federal financial assistance to any institution of higher education that bars military recruiters from campus access to students. The suit argues that the Solomon Amendment violates the First Amendment rights of Yale and its faculty to make policy decisions about access to campus. Professor Robert Burt, one of 44 faculty members represented in the suit, which was filed on Oct. 16, stated: "What the military is trying to do by demanding that we actively assist them in their recruiting efforts here is draft us in their war against gays and lesbians." Yale, like many other schools, suspended its nondiscrimination policy with respect to the military last year, in response to a threat of losing $300 million in federal research grants which underwrite a major portion of the cost of Yale's faculty in the sciences and medicine. ••• When military recruiters showed up at Yale Law this year on October 9, black cloth was draped in the halls by students protesting their presence. One of the recruiters told the press: "Putting up some black paper and handing out pins to some recruiters probably is not going to implement the changes they want to see. The laws are made in Washington, D.C. If they wish to change the laws, they should go there." *Hartford Courant*, Oct. 10.

Federal — Florida — A little-noted change in Florida's adoption laws may have a major impact on a pending lawsuit challenging the state's statutory ban on "homosexuals" adopting children. As part of an overhaul of the rules governing adoption in Florida, recognizing the impossibility of finding married couples to care for the 4700 children still awaiting an adoption placement, the state has repealed its preference for married couples and will now allow single adults to adopt children. The proposed rules were published for public comment in April, but attracted little attention until after they went into effect on August 19. In addition to removing the preference, they also removed language from prior rules stating that having both a mother and a father was "considered important" for a child's growth and development. The attorney representing the state in defending the anti-gay adoption ban, Casey Walker, advised the 11th Circuit Court of Appeals of the new rules, but insisted that they did not undermine the state's argument that it has a rational basis for excluding gays from adopting. The ACLU Lesbian and Gay Rights Project, representing several adoptive gay fathers, begged to differ. As we went to press, the court was still to be heard from. *Bradenton Herald*, Oct. 9 & 12.

Federal — Kentucky — Showing resolute determination to keep a gay student group from meeting at the local high school, the Boyd County school district is now arguing to the federal district court that the district has succeeded in eliminating all non-curricular student group meetings at the school, and thus should be able to stop the gay-straight alliance from meeting as well. In *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F. Supp. 2d 667 (E.D.Ky., Apr. 18, 2003), District Judge David Bunning had issued a preliminary injunction requiring the school to let the group meet at the high school under the Equal Access Act, on the ground that other student groups were continuing to meet despite a "policy" adopted by the school board for the specific purpose of stopping the gay group from meeting. In a motion filed with the court on October 14, the district argued that its new restrictions "cure the prior problems, and the educational mission of the school district would be unjustly prevented if it is not permitted to implement the revised policies." The ACLU, which represents the student group, has responded that nothing has changed that would justify lifting the injunction, and contended that the district is trying to get the injunction lifted so it can impose different rules on the gay-straight alliance. *Lexington Herald Leader*, Oct. 26.

Federal — New York — Some new developments are reported in the case of *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y., July 15, 2003), in which District Judge Lawrence E. Kahn had ruled that New York state prison officials may have violated the constitutional rights of a transsexual prisoner seeking treatment for gender dysphoria by categorically applying a policy that somebody who was not receiving such treatment prior to their incarceration cannot initiate treatment in prison. The case involves a murder convict serving a life sentence. According to a brief news report in the *New York Law Journal* on Oct. 30, Judge Kahn issued a new order on Oct. 29, allowing two of the named defendants to submit summary judgment motions after the deadline, but sticking to his original judgement that 8th Amendment issues are raised by Brooks' case. Kahn also commented that the state is now taking the position that Brooks is entitled to treatment.

Arizona — Lambda Legal reported on Oct. 30 that the Arizona Supreme Court has refused to entertain an action brought directly by six state legislators seeking a declaration that Governor Janet Napolitano's Executive Order banning sexual orientation discrimination in state employment is invalid. The legislators argued that the governor had improperly legislated in excess of her authority, but the court was evidently not willing to entertain such a direct challenge. The legislators could file an action for a declaratory judgment in a state trial court, however, so the case, styled *Biggs v. Napolitano*, may not be over. There is no written opinion explaining the court's decision. *Lambda Press Release*, Oct. 30.

California — The *San Jose Mercury News* reported on Oct. 16 that San Mateo County officials have agreed to settle a privacy lawsuit brought by Ramona Gatto, a world champion kickboxer, who alleged that the County wrongfully told her ex-husband that she was a lesbian, leading to a year-long custody battle over her daughter. Gatto had filed suit in San Mateo Superior Court against District Attorney Jim Fox and Assistant D.A. Morley Pitt in 2000. Gatto claimed that Fox, a longtime friend of her ex-husband, violated the confidentiality of a police report that was filed after a domestic dispute that occurred at her San Carlos home. The county agreed to pay Gatto $94,500, without any apology or admission of guilty, with ten percent of the money earmarked for her daughter's education fund.

Florida — A confidential settlement has been reached in litigation over the estate of Gregory Hemingway, the transsexual child of author Ernest Hemingway, who died leaving a $7.5 million estate. The dispute was between

Gregory's twelve children and his widow, Ida, and revolved around whether Gregory died a man or a woman and whether his marriage to Ida was valid, since it took place after he had undergone sex-change surgery and emerged as Gloria Hemingway. Hemingway died in a Miami women's prison after being arrested for indecent exposure. The Associated Press reported the settlement on Oct. 3.

Georgia — In an opinion issued on Oct. 16, the U.S. Court of Appeals for the 11th Circuit ruled that inasmuch as compulsory process to compel testimony of witnesses is not required for an administrative proceeding, the City of Atlanta should be upheld in having revoked the liquor licenses of several private clubs over their objections that the license revocation proceeding violated their rights. *Foxy Lady, Inc. V. City of Atlanta*, No. 01–03419–CV-CC–1. The clubs in question were alleged to have violated liquor control laws by providing nude dancing entertainment for customers while serving alcoholic beverages, a no-no in Georgia and many other states.

Minnesota — The Associated Press reported that a Christian student group has sued the University of Minnesota, claiming a violation of its First Amendment rights due to the University's insistence that student groups abide by the campus's non-discrimination code, which includes sexual orientation, religion and marital status as forbidden grounds for discrimination by student organizations. At University of Minnesota, according the lawsuit, organizations are required to sign the Equal Opportunity Statement in order to qualify to meet on campus and receive other benefits of recognized student organizations. The Alliance Defense Fund represents the Maranatha Christian Fellowship in challenging this requirement. Maranatha requires that its members live according to "Biblical tenets," including eschewing all extramarital and homosexual sexual activity. The main goal of the lawsuit is equitable relief exempting religious organizations from having to comply with the requirements as a condition of meeting on campus. *St. Paul Pioneer Press*, Oct. 25.

New Jersey — The Associated Press reports that George DeCarlo and Ryan Reyes, a gay couple from Berkeley Heights, N.J., have initiated litigation to compel the state tax authorities to allow them to file their tax returns jointly, based on their having contracted a civil union in Vermont in August 2000. The AP story noted that under the Vermont Civil Union Law, civilly-united couples in that state may file joint state tax returns on the same basis as married couples. New Jersey normally requires couples to file using the same status that they use on their federal returns. Federal law forbids the Internal Revenue Service from allowing same-sex partners to file as married, pursuant to the Defense of Marriage Act, and N.J. tax authorities have asserted that they do not have the power administratively to alter that aspect of state law. DeCarlo and Reyes initially filed suit in state court without paying a fee, stating that it was not clear which amount applied to their dispute, but a tax court judge told them on Oct. 24 that they would have to pay a fee and refile their complaint in order to initiate the lawsuit. *The Record*, Oct. 27.

North Carolina — Ruling on motions to dismiss by various defendants in *Bradley v. N. Carolina Dept. Of Transportation*, 2003 WL 22299741 (Oct. 7, 2003), U.S. District Judge Thornburg (W.D. N. Car.), fuled that John Peter Bradley may pursue his constitutional claims against certain named government officials sued in their individual capacities, despite 11th Amendment immunity, since he was seeking prospective injunctive relief. However, his claims for compensation would be barred by immunity. Bradley, who described himself as a whistle-blower who was reporting official corruption, claimed that one government officials had writtena letter identifying Bradley as a bisexual, and that ultimately the letter was used to harm him when he had obtained employment outside of Atlanta as a small-town police chief. The factual allegations make the defendants sound like shady behind-the-scenes conspirators trying to get rid of a bisexual man from the police force, although there is a paucity of direct evidence in the case at this pretrial stage.

Washington State — The ACLU has announced a settlement in *Miguel v. Guess*, 51 P.3d 89 (Wash.App. 2002), in which the Washington Court of Appeals upheld an equal protection claim on behalf of a lesbian employee of a public hospital. According to an Oct. 8 press release, the plaintiff will receive $75,000 damages. The case was described by the ACLU as being the first in which a state appellate court had found that anti-gay employment discrimination by a government agency was actionable under the equal protection clause, creating a significant published appellate precedent. A.S.L.

Criminal Litigation Notes

U.S. Military — On October 7, the U.S. Court of Appeals for the Armed Forces heard oral argument in *U.S. v. Marcum*, an appeal by Tech. Sgt. Eric P. Marcum of his conviction on consensual sodomy charges under Article 125 of the Uniform Code of Military Justice. With amicus assistance from gay rights litigation groups, Sgt. Marcum is arguing that his conviction under Art. 125 is unconstitutional as a result of the Supreme Court's decision in *Lawrence v. Texas*. The argument was the subject of a front-page news story by Marcia Coyle in the Oct. 13, 2003 issue of *The National Law Journal*, under the title "Gay rights ruling gets test in military: A sodomy case is heard on appeal."

U.S. Michigan — Rejecting a habeas corpus petition in *Marcicky v. Renico*, 2003 WL 22272142 (E.D.Mich., Sept. 30, 2003), U.S. District Judge David M. Lawson found that defense counsel's failure to voir dire perspective jurors about their sexual orientation did not constitute ineffective assistance of counsel in a case where the victims were gay and appeared to have been targeted as such by the defendants. Judge Lawson also rejected the argument that the case had been tainted when the prosecutor stated in opening and closing arguments that the victims were targeted because they were gay. At trial it was shown that the defendant in this habeas proceeding, Kirk Marcicky, and his confederate, Christopher Schema, went to a gay bar and go themselves invited home at closing time by one of the bar patrons and a friend, and that in the patron's home, Marcicky and Schema staged a robbery during the course of which their host was strangled to death and his friend was rendered unconscious. Stolen goods from the house and a victim's stolen car were later traced and their disposition linked with the defendants. Responding to the voir dire argument, Judge Lawson wrote, "The petitioner has not alleged any specific facts from which one might reasonably infer that the composition of his jury would have been more favorable if his trial attorney inquired about sexual preference." On the issue of the prosecutor's closing remarks, Lawson wrote: "In the present case, the prosecutor's arguments that the victims were chosen because they were homosexual logically flowed from the evidence," and so it was not a misrepresentation for the prosecutor to have argued to the jury that the petitioner and his co-defendant "specifically targeted homosexuals as their victims." Lawson also rejected the somewhat strange argument that the jury had been tainted because the prosecutor made frequent references to "gays" and also used some derogatory slang terms of gay people in the course of his argument, expressing uncertainty as to how "the prosecutor's use of disparaging remarks about the victims would have prejudiced the petitioner." Lawson noted that under the prosecution's theory of the case, the references to "homosexuals was arguably relevant to the motives of the petition and the co-defendant in this case."

California — On Oct. 8, police arrested Dennis William Gosnell, a 4th-grade teacher in the Anaheim public schools, and charged him with prostitution, specifically offering to perform sex for money with a male undercover officer. Immediately upon being notified of the arrest, the school district suspended Mr. Gosnell on paid administrative leave, pending an investigation by the district's legal counsel. Police reportedly started investigating Gosnell after receiving a tip that he was advertising sexual services on an several internet gay escort web-

sites. School district officials expressed particular concern about whether Gosnell was using school computers for this purpose, and indicated that a conviction would end his teaching career. A spokesperson for the California Commission on Teacher Credentialing told the *Los Angeles Times* that prostitution was among the crimes for which teaching credentials could be revoked. *L.A. Times*, Oct. 10.

California — Christopher Hillis, a former investigator for the Kern County District Attorney's office, pled guilty on Oct. 7 to voluntary manslaughter in the laying of Kern County Assistant District Attorney Stephen Tauzer, a gay man who had previously had a sexual relationship with Hillis's deceased son. According to a report in the *Los Angeles Times* on Oct. 8, Hillis's son, Lance, then 22 years old, was addicted to drugs, and Hillis had wanted his son to go to prison to overcome his addiction in a substance abuse program for inmates. But Tauzer, a long-time friend of the Hillis family, intervened by writing letters and appearing in court to get Lance Hillis an additional chance to reform himself. Tauzer let the young Hillis stay at his home and gave him money and a car. Lance was killed in a car crash "as he fled a drug treatment center in a stolen car just six weeks before Tauzer was attacked," according to the *Times* article. Tauzer's slayer was identified as the senior Hillis based on a DNA recovered from a blood knife found at the scene. Hillis was charged with first-degree murder, but negotiated a guilty plea by recounting his final confrontation with Tauzer in which Tauzer admitted to him for the first time that he had a sexual relationship with Lance. Ironically, Kern County D.A. Ed Jagels told the newspaper, "Steve Tauzer was responsible for establishing the DNA program in Kern County, without which the identity of his killer could not have been established." Hillis was sentenced to twelve years in prison, the statutory maximum plus one year for using a knife to commit the murder.

Massachusetts — The Appeals Court of Massachusetts affirmed the conviction of Michael G. Richotte, a gay man, on charges of assault and battery against Michael Taylor, described as his "male companion." *Commonwealth of Massachusetts v. Richotte*, 2003 WL 22295353 (Oct. 8, 2003). Taylor suffered a stab wound from a steak knife during an altercation with Richotte. Taylor's ex-companion, Alberto Lorenzi, was also present at the time, and on appeal Richotte argued that the prosecutor was improperly allowed to discredit his defense argument that the wound was due to Lorenzi intervening in their fight and pushing Richotte when he was holding the knife. When Richotte talked to police after receiving his Miranda warnings, he admitted to stabbing Taylor. Then, at trial, his defense was that Lorenzi pushed his arm. During final arguments, the prosecutor sought to discredit this defense by noting that Richotte had not mentioned anything of the kind when he talked to the police. Richotte argued that this violated his right against self-incrimination, but the court found that it is perfectly permissible for a prosecutor to point out discrepancies between what a defendant told the police and the defense he presented at trial.

Massachusetts — The Associated Press reported on Oct. 21 that Suffolk Superior Court Judge Catherine White has issued an injunction requested by the Attorney General barring James Alevizos from intimidating, coercing or communicating with two men he allegedly attacked last spring as they were leaving a "gay night" event at the Avalon nightclub in the Fenway neighborhood of Boston. Alevizos is being prosecuted on counts of assault and battery with a dangerous weapon and civil rights violations, to which he has pled not guilty. His attorney claims that the prosecutors have not adequately investigated Alevizos's claim that he is not the attacker of the two men, who required hospitalization and sustained serious injuries in the attack.

North Carolina — Convicted murderer Eddie Hartman was executed on October 3 after both the U.S. Supreme Court and Governor Mike Easley refused to intervene, with Easley denying a clemency petition late the night before the execution just hours after the Supreme Court refused to review Hartman's case. The state supreme court had also declined further review the previous day. Hartman's lawyers were seeking a commutation of his sentence to life imprisonment, arguing that the prosecution had used Hartman's gay sexual orientation as part of its argument to the jury for the death penalty. That governor's statement denying clemency didn't even address the issue. Hartman's lead attorney, Heather Wells of Wilmington, told the press: "Cases that result in the ultimate punishment death must be free of all forms of discrimination." Hartman was 39. *News & Observer*, *Charlotte Observer*, Oct. 3.

Texas — In with a bang, out with a whimper… When the U.S. Supreme Court ruled in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), that the Texas sodomy law was unconstitutional, it was not just stating a general proposition but also ruling in an actual case in which two gay men, John Geddes Lawrence and Tyron Garner, were convicted of consensual homosexual sodomy and suffered the imposition of fines ($200 each) by the trial court. What the Supreme Court ruled was that the case should be remanded to the Texas courts for action consistent with its decision. On October 30, grudgingly noting that "This court is required to follow the decisions and reasoning of the United States Supreme Court on federal constitutional issues," a panel of the Texas 14th District Court of Appeals reversed the judgmenets of the trial court, ordered that the complaints against Lawrence and Garner be dismissed, and rendered judgments of acquittal in each case. *Lawrence and Garner v. State of Texas*, 2003 WL 22453791. And two heroes of the struggle for lesbian and gay rights finally won their vindication.

Texas — The Court of Appeals of Texas in El Paso upheld a jury verdict of second degree murder against Cesar Lara in the 1995 death of Bobby Alba, who worked as a door man at the Old Plantation (known locally as O.P.), a downtown El Paso gay bar. *Lara v. State of Texas*, 2003 WL 22413650 (Oct. 23, 2003) (not officially published). There was plenty of conflicting evidence in the case, but the jury apparently found that Lara, who worked at Cliff Bar, a gay bar around the corner from O.P., had gone home with Lara the night of November 1, 1995, and murdered him there. Most of the evidence for Lara being the murderer (which he denied) was circumstantial, and the opinion for the appeals court, by Justice Ann Crawford McClure, while setting out in great detail all the circumstantial evidence against Lara, did not reveal anything about the possible motive for this murder. There was a significant age discrepancy between the individuals, Alba being in his 60s and Lara a relatively young man. Nonetheless, the appeals court determined that the mountain of circumstantial evidence was sufficient to support the jury verdict. Lara was sentenced to twenty years in prison and a $5,000 fine.

Virginia — A panel of the Court of Appeals of Virginia unanimously affirmed the forcible sodomy conviction of John Ian Mitchell in an opinion by Judge Nelson T. Overton. *Mitchell v. Commonwealth of Virginia*, 2003 WL 22433546 (Oct. 28, 2003). According to the opinion, Michael Wright picked up Ross Klinefelter, described as a "twenty-two year old mentally retarded male," and drove him to Mitchell's home, where Mitchell played a gay porn tape and asked Klinefelter if he was "getting turned on." Mitchell performed oral sex on Klinefelter, who "became upset, left the house, and reported the incident to his mother who contacted the police." Mitchell contended that the sex was consensual and that the evidence did not support his conviction, but the court notes: "Mitchell also remarked that he knew Klinefelter was mentally ill and that he thought Klinefelter 'did not know what was going on.'" The appeals court, finding that the evidence indicated that Klinefelter did "not understand the nature and consequences of the sexual act involved," found that the evidence, which "was competent, and not inherently incredible," was sufficient to prove beyond reasonable doubt that Mitchell had committed forcible sodomy, which remains a crime after *Lawrence v. Texas*. (The court did not mention the *Lawrence* case.) Obviously, after *Lawrence*, sodomy prosecutions will focus more closely on issues of consent, and it is likely that there will be considerable litigation over the capacity of persons with

mental illness or disabilities to consent to gay sex. This case follows the approach of asking whether the mentally ill person could understand "the nature and consequences of the sexual act." A.S.L.

Legislative Notes

Federal — Two bills were introduced in the U.S. Senate on Oct. 2 dealing with employment rights of lesbians and gay men. S. 1705, the newest version of the Employment Non-Discrimination Act, would ban employment discrimination by employers subject to federal Civil Rights Laws on the basis of sexual orientation. There are 44 co-sponsors for this bill, for whom the lead sponsors are Senators Edward Kennedy (D-Mass.), Lincoln Chafee (R-R.I.), James Jeffords (I-Vt.), and Joseph Leiberman (D-Conn.). S. 1702, a new bill, would end the taxation of domestic partner health benefits. At present, spousal health benefits are non-taxable to the employee, but domestic partner benefits are imputed as income to the employee subject to taxation. There are five co-sponsors, and the lead sponsors are Senators Bob Graham (D-Fla.) And Gordon Smith (R-Ore.). As in the past, S.1705 covers "sexual orientation" but does not specifically reference "gender identity," despite significant efforts by some gay rights and transgender rights groups to obtain more expansive protection. *BNA Daily Labor Report* No. 193 (10/6/03), P. A–16.

California — Shortly after the voters approved his removal of office, but before such removal would officially take place, Gray Davis signed into law A.B. 17, a measure that requires California state agencies that enter into contracts with vendors of goods or services valued at $100,000 or more to ensure that the vendors do not discriminate "between employees with spouses and employees with domestic partners." In essence, the bill adopts the policy that the state generally will not contract with private companies that do not provide equal rights to employment benefits for those employees who are involved in registered domestic partnerships. (The state had previously enacted a law establishing a domestic partnership registration process for same-sex partners and elderly couples.) The law includes exceptions for situations involving unique vendors, emergency situations, situations where there are strings attached (usually federal strings) to the money that will be used to acquire the goods or services, and so forth. The measure does not go into effect until January 1, 2007, giving employer plenty of time to adopt domestic partnership benefits plans if they want to remain eligible to contract with the state of California. The measure will be codified as Section 10295.3 of the California Public Contract Code.

Colorado — Denver — In a spirit of going on record in support of an embattled community, the city council in Denver unanimously passed a resolution on Oct. 20 to commemorate the thirtieth anniversary of the gay rights movement's lobbying efforts for equal rights in Denver. The resolution marked the thirtieth anniversary of gay leaders coming to the council and obtaining a public hearing for their request for non-discrimination legislation in 1973, which was eventually enacted. In addition to banning discrimination based on sexual orientation and gender identity, Denver now offers domestic partner benefits for municipal employees and has a partners registry. Local activists are pushing for passage of an equal benefits measure for city contractors. *Denver Post*, Oct. 21.

Florida — Largo — The city of Largo, Florida, has adopted a policy against discrimination or harassment by city employees based on race, religion, gender, age, sexual orientation, gender identity or expression. City commissioners unanimously approved the policy on Oct. 7, and it went into effect immediately. The city manager indicated that there would be training for all city employees on the policy during the last two months of the year. *St. Petersburg Times*, Oct. 8.

Maryland — Greenbelt — Suburban Greenbelt will extend employee benefits eligibility to domestic partners of the city's employees, pursuant to a unanimous vote of the City Council on October 13. Greenbelt will be the first jurisdiction in Prince George's County to take this step, which has already been taken by Baltimore, Rockville, Takoma Park, Montgomery and Talbot Counties in Maryland. Similar proposals are under consideration in College Park and Annapolis. *Washington Post*, Oct. 16.

Oregon — Lake Oswego — Lake Oswego, a suburb of Portland, enacted an antidiscrimination ordinance on Oct. 21 that forbids discrimination on the basis of sexual orientation and gender identity or expression. Reacting to favorable public comment about the measure, city managers of Gresham and Beaverton indicated they would suggest similar measures to their city councils. According to an Oct. 24 article in the *Oregonian*, the measure will be enforced by the state's Bureau of Labor and Industries. Complaints will first be submitted to alternative dispute resolution processes, but the Bureau can also hold administrative hearings and is authorized to impose civil penalties of up to $1,000 per violation.

Wisconsin — The State Assembly voted 68–29 to pass a bill that would define a marriage in Wisconsin as the union of one man and one woman, and the measure went to the state Senate for consideration. According to news reports, Governor Jim Doyle is expected to veto the measure. The Assembly vote suggests a veto could be overridden in that chamber, but observers expected that some of the eleven Democrats who voted for the bill might not vote to override a veto by the Democratic governor. Some Democratic members of the Assembly tried to forestall passage by attaching various amendments to the bill, including one that would render invalid a marriage involving somebody who had been divorced three or more times. Republicans claimed the measure was needed because the existing gender-neutral marriage law could be construed by a court to allow same-sex marriages. *Milwaukee Journal Sentinel*, Oct. 24. A.S.L.

Law & Society Notes

The grand persecutor of gays has devised a new psychological torture, to be enacted in Casper, Wyoming, the hometown and burial place of Matthew Shepard, the victim of a vicious gay-bashing in October 1998. The so-called Reverend Fred Phelps, who led a protest at Shepard's funeral screaming his favorite slogan, "God hates fags!," now proposes to erect a monument in Casper's City Park, with the following words chiseled on the stone: "Matthew Shepard Entered Hell October 12, 1998, at Age 21 In Defiance of God's Warning: 'Thou shalt not lite with mankind as with womankind, it is abomination.' Leviticaus 18:22." Local officials feared that they could not stop Phelps from erecting his monument, because they allowed the local Eagles Club to erect a Ten Commandments monument in the park in 1965, thus making it a public forum, at least according to a recent decision by the U.S. Court of Appeals for the 10th Circuit in an unrelated case. There was already a demand pending with the city to remove the 10 Commandments monument, from a group called "Freedom from Religion." The local Eagles Club chapter volunteered to take their monument back and find a different, private location for it, and some local churches offered to take it, so as to return the City Park to pristine non-sectarian purity and provide a basis for denying Phelps the right to locate his monument in the park. Instead, he would have to find a homophobic private landowner in Casper who was eager for the notoriety of hosting the monument. *Los Angeles Times*, October 12. On Oct. 28, the City Council voted 5–4 after extended debate to move the Ten Commandments monument out of the park, both to avoid a lawsuit by "Freedom from Religion" and to forestall the Phelps monument. It is possible that Phelps will sue to get his monument placed in the park. *Deseret Morning News*, Oct. 30.

In an article published in many newspapers around the U.S. on Oct. 29, the Associated Press reported that a new survey of adoption agencies in the United States found that about sixty percent of them will accept applications from gay men and lesbians to be adoptive parents. Religiously-affiliated agencies predominate among those who refuse such applications. The Evan B. Donaldson Adoption Institute, which conducted the study, predicted that the

number of "holdouts" would continue to decline, noting that at one time no agency would accept such applications. Said Adam Pertman, the executive director of the institute, "We started out near zero, and just within the last decade we're up to 60 percent. The reality on the ground is way outpacing the policy debate." According to the survey, the agencies most likely to place children with gay parents were "either public, private and secular, or Jewish- and Lutheran-affiliated." The survey also showed that agencies specializing in "special needs" and international adoptions were "relatively more open toward gays."

The world Anglican communion is in an uproar over the scheduled consecration of Gene Robinson, an openly gay man, as its bishop in New Hampshire. The Archbishop of Canterbury, Dr. Rowan Williams, titular head of the communion as the highest church official in England by appointment of the crown, summoned church leaders to an extraordinary meeting, at which it was apparently agreed that there will be further extended discussion before any official action is taken. Williams had a reputation as being gay-supportive prior to his recent appointment. Most of the fiercest protest within the church is coming from its leaders in South America, Africa and Asia, and some very conservative American dioceses, especially in the south. On October 29, Archbishop Williams announced the appointment of a Commission charged with recommending a course of action for the 70 million member church. The Commission will be chaired by Dr. Robin Eames, the Archbishop of Armagh and Primate of All Ireland, and is charged with "maintaining the highest degree of communion that may be possible in the circumstances." Its membership is a mix of church liberals and conservatives, with all major viewpoints on the issue of homosexuality and the church represented. Officially, Dr. Williams has no authority to order an American diocese not to consecrate a bishop that it has selected and that has been ratified by the leaders of the American church. *Financial Times*, Oct. 30; *The Independent*, Oct. 30.

What was described as "the highest court in the United Methodist Church" has ruled that charges should have been brought against Rev. Karen Dammann, a minister who informed her bishop in writing that she is a lesbian. An investigative committee had resolved not to bring charges, but that determination was appealed and overruled, so Rev. Dammann will likely face a church trial and possible removal from the pulpit at First United Methodist Church in Ellesburg, Washington. While the church's Judicial Council did not order that such charges be brought, it found that the investigative bodies had ignored the church's Book of Discipline in reaching their decision, and ordered them to reconsider. *Washington Post*, Oct. 28. A.S.L.

International Notes

Austria — A European Gallup poll found that 48 percent of Austrians favor legal recognition for same-sex marriages, while only 41 percent oppose such a move. This is slightly below the level of support in Europe as a whole, where the poll found 57 percent support. *Austria Today*, Oct. 15.

Canada — The Supreme Court of Canada rejected an attempt by private parties to interject themselves into the same-sex marriage litigation. In a unanimous disposition announced on October 9, the court granted a motion to quash applications for leave to appeal the marriage decision by the Ontario Court of Appeals, which had been filed by right-wing and religious groups, and also dismissed motions by these groups to be added as parties to the case for purpose of obtaining standing to appeal. *The Association for Marriage and the Family in Ontario v. Halpern; The Interfaith Coalition on Marriage and Family v. Halpern*, No. 29879. At an oral argument on the motions held a few days prior to the decision, Chief Justice Beverley McLachlin had commented that it would be "quite unprecedented" for the court to countermand the government's decision not to appeal this ruling and to "reach out and take jurisdiction" at the instance of private parties, on a matter that has sharply divided the Parliament and the public. The court did not publicly announce its reasons for refusing to take the case, as is customary. *Toronto Star*, Oct. 10. A new poll by the Centre for Research and Information on Canada found that 48 percent of Canadians support legal recognition for same-sex marriage, while 47 percent are opposed. There is a generation gap on the issue, however. Among those age 18–34, the poll found 63 percent support for same-sex marriage. *Canadian Press*, Oct. 28. The Liberal Canadian government is evidently quite serious about obtaining a positive ruling from the Canadian Supreme Court on its reference of questions concerning proposed legislation opening up the common-law definition of marriage to same-sex partners. It has retained one of the most prominent constitutional law scholars in the country to argue before the court: Peter Hogg, former dean of Osgood Hall Law School and author of *Constitutional Law of Canada*, the leading treatise which is frequently cited by courts as authoritative. Hogg led the fashioning of a brief to the court, made public on Oct. 30, which urges the court to adopt a "progressive interpretation" of the constitution, given the "marked change in public attitudes and public policy since Confederation.... The Constitution must be continuously adapted to new conditions and new ideas." *Toronto Star*, Oct. 31.

Hong Kong — A gay male couple from Hong Kong who went to Toronto to get married plan to sue the Inland Revenue Department, which is refusing to recognize their marriage for tax purposes. According to a report on *365Gay.com*, Roddy Shaw and Nelson Ng would receive substantial tax benefits by filing jointly as a married couple, but the IRD insists that it will recognize only opposite-sex marriages, even though a local law states that legally-contracted foreign marriages will be recognized in Hong Kong for tax purposes.

Russia — Gay cooties are a real problem for the Russian Orthodox Church. After a priest in Nizhny Novgorod claimed to have been tricked into performing a marriage ceremony for two men in the Chapel of the Vladimir Icon of the Mother Of God, church authorities ordered that the chapel be demolished because it had been "defiled" by this event. A church spokesman indicated that the chapel had to be destroyed because it had been "desecrated." *UPI*, Oct. 9.

Taiwan — Radio Australia reported on Oct. 27 that a bill being jointly drafted by the presidential office and the cabinet of Taiwan will authorize same-sex marriages and will allow same-sex couples to adopt children. If such a measure is actually introduced and enacted, it would make Taiwan the first nation in Asia to take these steps.

United Kingdom — Following on the reforms in sex crimes laws, including a recent equalization of the age of consent for gay and non-gay sex at 16, the British Home Office is moving to reform the registered sex offender registry to remove the names of those whose offenses are no longer criminal, particularly consensual sexual activity where both partners were at least 16 years of age. There is a problem, however. Public records are so ambiguous about the nature of offenses that it is not possible for the list to be purged based on existing files, which indiscriminately mix consensual and non-consensual activity and don't always specify ages of participants. Thus, the reform is to be accomplished by inviting members of the public who are on the list to apply to be removed and to supply the details of their cases, with a right of appeal open for those who are denied. This all awaits final passage of a bill that was originally hailed by gay rights campaigners as finally repealing the law against "cottaging" (public restroom sex) in consensual cases where no unwilling participants are present; the government has modified the proposal however, to the dismay of gay rights advocates, by proposing to create a distinct new offense of "sexual activity in a public toilet," that would go beyond existing bans on sexual intercourse to include any sexual touching of the body. Activist Peter Tatchell decried the proposal as a reintroduction of "legislative homophobia by the back door. It criminalises sex in public toilets but not sex in other public places," he pointed out. "Why is the government targeting gay behavior?" The point is that the police are generally indifferent to sexual touching short of

intercourse by mixed-sex couples in parks and other public venues. *The Guardian*, Oct. 7, 2003. The government is also proposing to add sexual orientation and disability to the categories covered by the nation's hate crime law, which at present covers only race and religion. Under the law, judges can pass stiffer sentences if a crime was aggravated by one of the enumerated characteristics. The proposal followed months of lobbying by gay rights groups, according to a spokesperson for Stonewall, the country's leading gay political group. *The Guardian*, Oct. 31. A.S.L.

Professional Notes

The 2003 winners of the Dan Bradley Award, presented by the National Lesbian and Gay Law Association at its annual Lavender Law Conference, are Matt Coles and Leslie Cooper of the ACLU's Lesbian and Gay Rights and AIDS and Civil Liberties Projects. Coles is director of the projects and Cooper is a staff attorney. The award was specifically related to their work on the case of *Lofton v. Kearney*, 157 F.Supp.2d 1372 (U.S.Dist.Ct., S.D.Fla., Aug. 30, 2001), now on appeal to the U.S. Court of Appeals for the 11th Circuit, challenging the state of Florida's statutory ban on gay adults adopting children. The case was brought on behalf of two gay male couples who were disqualified from being adoptive parents solely because they are gay, although, ironically, Florida places foster children in gay homes. The awards were presented at the annual Dan Bradley Awards Luncheon on October 18, at Fordham University School of Law in New York City. Attendance at this year's Lavender Law Conference exceeded 600, a new record.

The Massachusetts Lesbian and Gay Bar Association reports in its October newsletter that new revisions to the Massachusetts Code of Judicial Conduct went into effect on October 1, prohibiting anti-gay bias by judges and requiring them to refrain from membership in organizations that practice "invidious discrimination on the basis of race, sex, religion, national origin, ethnicity or sexual orientation." However, there is an exemption from this prohibition for members in U.S. military organizations, religious organizations, and any "intimate, purely private organization." A.S.L.

AIDS & RELATED LEGAL NOTES

PWA Wins Reconsideration of Disability Benefits Claims Under ERISA

On October 20, San Francisco PWA Antonio Di Giovanni won a motion for summary judgment on his claim that Chevron's employee disability plan had violated his rights under ERISA by cutting off his long-term disability benefits without following the procedures set out in its own plan documents. *Di Giovanni v. Chevron Corporation Long-Term Disability Plan Organization*, 2003 WL 22416416 (U.S.Dist.Ct., N.D. Cal.). Senior U.S. District Judge Samuel Conti ordered the benefits plan officials to reconsider their decision and calculate the back benefits owed to Di Giovanni.

Chevron hired Di Giovanni as an administrative assistant in February 1988. Two years later, he left work, "complaining of stress and depression," and was diagnosed HIV+ during 1990. His application for long-term disability benefits under Chevron's benefits plan was approved in writing by the Claims Administrator on May 6, 1991, based on a diagnosis of "major depression." When the initial 18 months of benefits was set to expire, the plan investigated whether Di Giovanni was entitled to continued benefits, obtaining a letter and medical documentation from Di Giovanni's doctor, and he was approved for the benefits.

However, in the letter informing him that his claim had been approved, the plan stated it was Di Giovanni's responsibility to submit regular Attending Physician's Statements of Disability from his doctor, even though the documentation provided to the plan indicated that his symptoms were "truly incapacitating" (severe progressive peripheral neuropathy), and that his "prognosis for return to any occupation is zero." At that time the treatments for AIDS-related conditions were limited in effectiveness.

Di Giovanni provided some updated physician's statements, but his various doctors had an irritating lack of consistency in how they filled out the forms, although several did indicate that he would "never return to work" due to his deteriorating physical condition. In November 1995, the Dominion Life Foundation (a treatment organization) stated to the benefits plan, in response to a request for an update on Di Giovanni's disability status: "Considering the degenerative nature of his disease, we find it unproductive to continue filling these forms out at a cost to the patient. Therefore, unless you can provide this office with some compelling reason that necessitates the need for our client to continue to present the forms to his doctor for completion at a cost to him given the nature of his illness and that every other insurance company waives this process in consideration of an HIV (AIDS) diagnosis, we will be unable to accommodate your request at this time."

This led to a dispute between the benefits plan bureaucrats, who insisted they had to receive the periodic forms to keep Di Giovanni's benefits active, and the provider, which insisted that repeated diagnoses of permanent disability rendered the forms superfluous and burdensome, with Di Giovanni caught in the middle. Several months later, Dominion did forward a doctor's statement to the plan, once again indicating total disability, although the doctor left blank the part of the form asking for his assessment of Di Giovanni's ability to return to work.

Over the next year (1997), this doctor was curiously inconsistent in filling out forms, sometimes checking off internally contradictory statements on the forms. Throughout 1998 and 1999, there was frequent correspondence back and forth between Di Giovanni and the benefits plan. When Di Giovanni missed some doctor appointments and new forms didn't get filed, his long-term disability benefits were cancelled, and the plan resisted all attempts by him to get the decision reversed, even declining his suggestion that they appoint an independent medical examiner to evaluate his condition, something the plan documents guaranteed as a right of participants.

Finally, Di Giovanni sued in desperation. Although Judge Conti used diplomatic language in characterizing the plan's conduct, he found that it was "an abuse of discretion to terminate Plaintiff's LTD benefits. We emphasize that we are not deciding Plaintiff's disability status or his entitlement to benefits under the Plan. Rather, we are saying that based on the evidence before us, we cannot find substantial evidence to support the Defendants' decision. Furthermore, … we find certain aspects of Defendants' conduct problematic under the circumstances of this case."

Conti found that in making its decision to terminate Di Giovanni's benefits, the Plan had "departed greatly from the process" spelled out in its own internal procedures, failing to advise Di Giovanni directly that his benefits were in danger, failing to obtain a vocational evaluation of his potential to return to work, failing to resolve all discrepancies in its records about his case, and most importantly, failing to comply with the requirement that "when a difference of opinion exists between Medical Department staff and claimant's attending physician, an Independent Medical Examination must be obtained." Conti found the Plan's failure to obtain such an examination to be the "most confusing" part of its behavior. "Under the circumstances of this case, particularly, where a claimant has on multiple occasions and by different doctors been certified as 'totally disabled' and given a 'zero' chance of returning to work, where the existing medical information is ambiguous at best, and, ... there is no substantial evidence indicating that Plaintiff was no longer disabled, Defendants' decision to terminate benefits was an abuse of discretion," Conti concluded.

Score one for a determined PWA in his ongoing battle with the bureaucracy! But Di Giovanni's quest for benefits doesn't end here, since Conti could not, consistent with ERISA, just order their payment. Instead, under the statute, the matter has to be sent back to the Plan, to

whose tender mercies Di Giovanni is now remitted for a determination of what he is entitled to receive. Of course, a failure by the Plan to respond in good faith could land it back before Judge Conti for more severe action. A.S.L.

NYC HIV+ EMT Gets Second Crack at Disability Pension

Brooklyn Supreme Court Justice Martin Schneier reversed a New York City Employees Retirement System (NYCERS) decision to deny an HIV+ emergency medical technician (EMT) an accidental disability retirement benefit. *Collins v. New York City Employees Retirement System and the City of New York*, 2003 WL 22383100 (October 14, 2003). Seymour Collins argued that he contracted HIV in the line of duty.

Collins sought and received an ordinary disability pension due to having AIDS. He also applied for an accidental disability pension on the grounds that he contracted HIV in the line of duty. NYCERS Medical Board denied the accidental disability pension because "documentary evidence [for] such a claim was not forthcoming." Collins brought an article 78 proceeding, seeking judicial review of this administrative determination, claiming that NYCERS "misinterpreted the statutory presumption" in section 207–o of the General Municipal Law, which provides that an EMT who "contracts HIV (where the employee may have been exposed to a bodily fluid of a person under his or her care or treatment, or while the employee examined, transported or otherwise had contact with such person, in the performance of his or her duties) tuberculosis or hepatitis, will be presumed to have contracted such disease as a natural and proximate result of an accidental injury received in the performance or discharge of his or her duties and not resulting from his or her willful negligence, unless the contrary be proved by competent evidence."

The court found that the NYCERS action was improper. "Once petitioner submitted evidence that the presumption was applicable, it was incumbent on NYCERS to apply the presumption or engage in fact-finding and disprove its basis," wrote Justice Schneier. He concluded that the Medical Board "abdicated its fact-finding function and instead crafted an extra-statutory condition precedent."

NYCERS argued that the court should "limit the applicability of the HIV statute to those EMT's suffering from HIV, who can prove that they suffered an exposure to bodily fluids carrying the virus of a person under their care while performing their duties." Justice Schneier found that ordinarily an agency action should be upheld unless the rule is "not irrational or unreasonable." In this case however, he wrote that there is a question "of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." The court found that NYCERS read "the word 'may' out of the statute." Additionally, NYCERS' claim "that the statute requires an exposure to bodily fluids containing the HIV virus" is contrary to the statute. The court remanded the case to NYCERS, finding their actions "arbitrary and capricious." *Daniel R Schaffer*

New York Court Rules for Hispanic AIDS Forum on Motion to Dismiss Discrimination Claim

The Hispanic AIDS Forum (HAF) will get to litigate its discrimination claim against a landlord that refused to renew its office space due to alleged bias against transgendered clients of the agency, according to an October 8 decision by New York Supreme Court Justice Marilyn Shafer. *Hispanic AIDS Forum v. Estate of Joseph Bruno*, No. 112428/01 (N.Y.County Supreme Ct., Part 36). Justice Shafer rejected the landlord's motion to dismiss the case, finding that HAF had alleged facts sufficient to present a case of discrimination on the basis of sex and gender.

HAF, which has offices in Manhattan, the Bronx, and Queens, rented an office suite in the Bruson Building on 37th Avenue in Jackson Heights, beginning in 1991. There were several uneventful renewals of the lease, and in 1995 HAF expanded the amount of space it was renting in the building. The relationship between HAF and the landlord seemed to be harmonious until another tenant, a travel agency, began raising complaints about transgendered clients of HAF using the "wrong" bathroom.

According to HAF's complaint, late in 1999 one of its transgendered clients informed an HAF staff member that an employee from the travel agency had approached her to ask why she was using the women's bathroom, and soon after that incident, a travel agency employee told an HAF staff member that they did not like "those men that look like women using the bathroom." Attempts to explain about transgendered people were apparently unavailing, because the travel agency voiced concerns to the landlord.

This problem was exacerbated when HAF initiated special outreach to people in the transgendered community in Queens who needed AIDS-related services, resulting in a larger number of transgendered clients coming to the office and using the restroom facilities. Although HAF had successfully negotiated renewal leases for both of its office suites, the landlord balked at signing them and then filed a lawsuit to evict HAF. According to HAF's allegations, during conversations between its attorney and the property manager there were more comments about the bathroom situation, and the statement by the building manager that he "just needed to get rid of 'all these Queens.'"

In its complaint, HAF claimed discrimination on the basis of sex in violation of the state human rights law, discrimination on the basis of gender under the city human rights law, and discrimination on the basis of actual or perceived disability under both the state and local laws. Significantly, the city's new law banning gender identity discrimination had not yet been enacted when these events took place, so was not available to be the basis for a complaint.

However, even before the new law was passed, several courts had taken the position that the existing city law, forbidding gender discrimination, could be interpreted to include discrimination based on gender identity. The oldest of these cases involved the famous transgender pro tennis player, Renee Richards, who successfully sued back in the 1970s under the state law to be able to compete as a woman at the U.S. Open in Forest Hills, the judge in that case finding that requiring Richards to prove that she was genetically female amounted to sex discrimination in violation of the state law. More recently, two courts have found that the city law lent itself to an interpretation banning gender identity discrimination.

"In the instant action," wrote Justice Shafer, "HAF alleges that they were told by the defendants that the lease would not be renewed unless HAF prevented its transgendered clients from using common areas in the building, including the main entrance and the bathrooms. HAF was told by the defendant's manager that they were not going to sign the renewal lease because the defendants received complaints from other tenants and had issues with 'men who think they're women using the women's bathrooms' and 'women who think they're men using the men's bathrooms.'" Justice Shafer also noted HAF"s allegations about offensive statements by the property manager to HAF's attorney concerning transgendered clients of the agency.

Shafer concluded that if these allegations could be proved at trial, HAF would be entitled to legal relief under the state and city human rights laws. "Defendants' counsel's difficulty in grasping the concept of transgendered persons as addressed in his affirmations is irrelevant to the fact that plaintiff has met its pleading burden to sustain" the sex and gender discrimination claims. However, Justice Shafer dismissed the disability claims on technical grounds. HAF had focused its argument in the case on the sex discrimination issues, and Justice Shafer found that it had failed to make several specific factual allegations necessary for a disability discrimination case, so she dismissed this part of the complaint without prejudice, which will give HAF an opportunity to make new allegations if it wants to revive its disability claims as the litigation proceeds.

The ACLU Lesbian and Gay Rights & AIDS Projects represent HAF in its legal dispute with the landlord. A.S.L.

AIDS Litigation Notes

Federal — 3rd Circuit — The U.S. Court of Appeals for the 3rd Circuit ruled in *Veneziano v. Long Island Pipe Fabricators & Supply*, 2003 WL 22416714 (Oct. 23, 2003) (not officially published), that a former employee whose insurance coverage lapsed when he lost his job due to AIDS was entitled only to nominal damages for his employer's failure to notify him in a timely way of his right to apply for continued benefits coverage, since the district court found that the employer acted in good faith and that the short lapse in coverage did not prejudice the plaintiff. (The employee did eventually exercise his rights under COBRA to pay for extended coverage, and his lapse in coverage was about six weeks long.) Another source of contention in the case was whether the plaintiff was a qualified person with a disability, so as to be able to maintain actions against the employer under the ADA and the New Jersey Law Against Discrimination. The court of appeals upheld the district court's determination that the plaintiff was estopped from claiming that heavy lifting was not an essential element of his job, because he had so indicated on a social security disability claim form. In any event, the court of appeals noted that the plaintiff, a warehouse manager, had conceded that at the time he lost his job he was physically unable to work. Neither the ADA nor the New Jersey state ban on disability discrimination would preclude an employer from dismissing an employee whose physically disabling condition makes it impossible for him to perform the essential elements of his job. The court also upheld the district court's decision to require the plaintiff's lawyer to pay the attorney fees for Aetna Insurance Company, a named defendant that won dismissal from the case on grounds that it was not a proper party to the suit, on the ground that suing Aetna under the ADA, NJLAD and ERISA was "frivolous, meritless and vexatious." As the court pointed out, Aetna was not plaintiff's employer, and all duties imposed by the statutes in this case fall on employers, not insurance companies.

Federal — 8th Circuit — In an important ruling in the ongoing battle over sovereign immunity and civil rights law, a divided panel of the U.S. Court of Appeals for the 8th Circuit has ruled that a public sector federal funding recipient waives sovereign immunity for discrimination claims brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794. Ruling in *Doe v. State of Nebraska*, 345 F.3d 593 (8th Cir., Oct. 7, 2003), a case concerning alleged HIV-related discrimination in foster and adoptive programs in Nebraska, the court rejected an argument that state agencies would enjoy sovereign immunity as per the Supreme Court's recent decision under the ADA. Writing for the majority of the panel, Circuit Judge Richard Arnold rejected the state's argument that it had not knowingly waived its sovereign immunity by accepting federal funds for its foster care and adoption programs, and also rejected the contention that the federal government's conditioning receipt of assistance on submission to the non-discrimination requirements of Section 504 constituted improper coercion. The federal government can decide that its money should not be used to fund programs that discriminate against qualified people with disabilities. Dissenting, Circuit Judge Bowman found merit to the state's argument that it had not "knowingly" waived its immunity, but also rejected the coercion argument. There is some variance among the circuits in their treatment of these issues, which suggests that the question will get up to the Supreme Court before long, especially since the Court has removed the ADA as a basis for state employee suits for disability discrimination.

Federal — D.C. District Court — Lambda Legal now has two lawsuits representing applicants who were rejected for Foreign Service jobs by the U.S. State Department on grounds of their HIV status. Lambda filed suit on Sept. 3 on behalf of Lorenzo Taylor, a 47–year-old federal employee with a Foreign Service degree from Georgetown University who was highly qualified for a foreign posting, but rejected on these grounds. On Oct. 29, Lambda filed its second suit, on behalf of Kyle Smith, a college student from Columbus, Ohio, whose appointment had been approved pending medical screening. When his doctor disclosed his HIV status, the Foreign Service informed Smith he was no longer qualified and would not be considered for employment. According to Lambda Legal, Smith has been living with HIV for seven years and successfully managing his condition with medication, have never experienced any HIV-related illness. Ironically, the Foreign Service is shorthanded, especially with respect to linguistically talented people qualified for overseas postings. *Lambda Press Release*, Oct. 29.

California — Lambda Legal reports that its formal appeal of a decision by Kaiser Permanente health plan's refusal to cover a kidney transplant for an HIV+ plan participant has moved the insurer to change its position. In an Oct. 8 press release, Lambda announced that Kaiser has informed its client, John Carl, that he will be covered. Now he just has to find a donor no easy task!

Louisiana — In rejecting an argument that a defendant who pled guilty to selling cocaine received an excessive sentence due to failure of the trial judge to take into account adequately the effect of his HIV_ status, the Louisiana Court of Appeal, 3rd Circuit, found that the trial record reflected that the judge did consider the defendant's HIV status and adequately took it into consideration by, for one thing, requiring that the sentences be served simultaneously rather than consecutively. *State v. Collins*, 2003 WL 22304493 (Oct. 8, 2003). In another case, decided Oct. 28, the Louisiana Court of Appeal, 5th Circuit, following a 1997 decision from the state's 4th Circuit that had been denied review by the state supreme court, held that the HIV+ status of a repeat felony offender was not a factor to be considered in applying the state's Habitual Offender Law. *State v. Jackson*, 2003 WL 22439727. In so doing, the court upheld imposition of a 20 year prison sentence on a man who contends that he has AIDS, where the triggering offense was shoplifting goods from a K-Mart worth about $250. Donald Jackson was described as a five-time felony offender. In Louisiana, shoplifting goods worth more than $100 constitutes felony.

Louisiana — Lambda Legal announced on Oct. 8 that the Kentwood Manor nursing home has changed course and agreed to open its home to Lambda's client, Cecil Little, an HIV+ man who needs nursing home care due to a stroke. Lambda had filed discrimination complaints under Section 504 of the Rehabilitation Act against six Louisiana nursing homes that had turned down Little because of his HIV status. It will continue the discrimination cases against the other five homes. Jonathan Givner of Lambda's AIDS Project, representing Little, indicated that the refusal of nursing homes to deal with PWA's is a growing problem nationwide.

Michigan — A man charged with criminal sexual conduct for carrying out anal intercourse on a 13–year-old girl should have been allowed to introduce evidence about his HIV+ status, according to a per curiam ruling by the Court of Appeals of Michigan in *People v. Bush*, 2003 WL 22271453 (Oct. 2, 2003), but the trial court's refusal to allow introduction in this case would not justify reversing the guilty verdict rendered by the jury, since the court of appeals found that this evidence would not have been outcome determinative in light of the entire trial record. The defendant, who is HIV+, claimed that evidence of his HIV status would be provative on the issue whether he had actually penetrated his victim, since, presumably, she is HIV-negative. (At least, that is the presumption of the court, which stated in a footnoe: "Although the record is unclear as to whether the victim was tested, it is unlikely that the victim would not be tested given the serious nature of these communicable diseases [referring both to HIV and hepatitis]. It is similarly unlikely that, if the victim tested positive, the prosecution would not have proffered evidence in that regard."

Ohio — An HIV+ man lost his $5 million jury award when the Court of Appeals of Ohio, 8th District, ruled on Oct. 9 in *Rich v. McDonald's Corp.*, 2003 Wl 22305136, that the defendant was entitled to its request for interrogatories to the jury rather than a general verdict in this complicated case. Among the things complicating the case is the continuing uncertainty about the availability of the Americans With Disabilities as a source of protection against discrimination for asymptomatic HIV+ men. The jury was sufficient puzzled by what it had been told on this point that it sent out a question for clarification, which the judge rather blew off. The judge also rejected defendant McDonald's Corporation's attempt to make the jury's task more focused by posing specific factual questions underyling the analysis of whether a person is a "qualified person with a disability" within the meaning of the statute. McDonald's defense in the case is not so much that they did not discriminate against Mr. Rich, but rather that he is not entitled to bring a disability discrimination suit. Unfortunately for Rich, it appears to be solidly established in Ohio law that jury interrogatories should be made available when a party requests them, even though the law does not give a party an absolute right to have a specific question posed to the jury, regardless of the trial judge's view as to whether the proposed question was calculated to elicit probative information or might be unduly prejudicial to one side. A.S.L.

AIDS Legislative Notes

California — On Oct. 11, California Governor Gray Davis signed two HIV-AIDS related bills. A.B. 879 mandates that the state Health Department for a task force to create treatment guidelines for individuals who suffer inadvertent or accidental needlestick injuries that may expose them to HIV transmission. A.B. 1676 concerns HIV testing for pregnant women, requiring physicians to notify pregnant women that HIV testing will be included in their routine prenatal testing unless they opt out, and providing counseling for those who test positive. At the same time, Davis vetoed two bills that were intended to liberalize the laws dealing with injecting equipment in order to make such equipment more readily available in order to combat needle-sharing. Davis has generally been unsympathetic to such efforts when, in his opinion, they might contribute to the problem of drug abuse. AIDS organizations expressed consternation over the vetoes, but gratitude for the signings. Governor-elect Arnold Schwarzenegger had asked Davis not to take action on any of the measures pending at the time of the recall election, displaying stunning ignorance, since it appears that under California law many of the measures passed by the legislature would have automatically been enacted had Davis not taken action on them, including the two needle measures that he vetoed (and that, presumably, Schwarzenegger might have vetoed as well).

AIDS International Note:

United Kingdom — In the first such prosecution in England and Wales, an HIV+ asylum-seeker has been convicted of deliberately infecting two women with HIV. Prosecutors claimed that Mohammed Dica, who arrived in the U.K. in 1992, had recklessly gambled with women's lives. Prosecutor Mark Gadsden told Inner London Crown Court that Dica had behaved "coldly and callously." The jury was also told that due to his illness Dica has only a few years to live, but that should not generate sympathy for him, and Judge Nicholas Philpot told Dica that he can expect a lengthy prison term when sentence is imposed on him in November. *Daily Mail*, Oct. 15. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

The Williams Fellowship at UCLA Law School — The Williams Project at UCLA Law School has announced an additional donation from its founder, Charles R. Williams, to support the establishment beginning in 2004 of a fellowship program to provide a recent law school graduate or practicing lawyer who is interested in pursuing a career in law teaching the opportunity to spend two years at UCLA, researching and writing on sexuality and law subjects and gaining some experience as a teacher and law faculty member. The unique program will involve the Williams Fellow fully in the work of the Project, including its publication and public events programs. The fellow will receive an annual stipend of $45,000 plus benefits and a budget for research assistance, travel and conference fees. Candidates must hold a JD degree from an ABA-accredited law school and have a strong academic record that would make them a competitive candidate for law teaching jobs upon completion of the fellowship. Applications for the first fellowship must be received by Dec. 1, 2003, including a cover letter, current resume, law school transcript, three letters of recommendation (including two from legal academics familiar with the candidate's scholarly potential), a list of any published works by the candidate, and a detailed research proposal not to exceed ten pages in length. Applications should be sent to: Williams Fellowship c/o Brad Sears, Director, The Williams Project, Box 951476, Los Angeles, CA 90095–1476. Brad Sears can be contacted at sears@law.ucla.edu. Full details about the project can be found at its website: www.law.ucla.edu/williamsproject.

Lambda Legal, a national gay rights and AIDS public interest law firm, seeks a Staff Attorney for its Southern Regional Office. Founded in 1973 and headquartered in New York City, Lambda has regional offices in Atlanta, Los Angeles, Chicago, and Dallas. The Southern Regional Office has seven staff members, including two attorney positions. Lambda Legal's law reform, policy, and education work encompasses a wide range of areas, including federal and state constitutional law issues; discrimination in employment, benefits, housing, insurance, schools and other areas; harassment and violence; anti-gay ballot initiatives; access to healthcare and HIV-related treatments; child custody, visitation and adoption; the freedom to marry; and sodomy law reform. Lambda has been involved in many recent Supreme Court cases, including Lawrence v. Texas, Garrett v.University of Alabama Board of Trustees, Dale v. Boy Scouts of America, Troxel v. Granville, and Board of Regents of University of Wisconsin v. Southworth. More information about Lambda can be found at www.lambdalegal.org. The staff attorney will help serve the ten states (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia) in the Southern Region and increase Lambda Legal's presence as a force for civil rights there. The attorney will handle all aspects of litigation in precedent-setting cases, as well as engage in education efforts and policy advocacy. Litigation responsibilities include devising litigation strategies to produce the greatest positive impact most efficiently, conducting each stage of litigation in trial and appellate courts, writing amicus briefs, organizing amicus strategies, supervising Lambda Legal cooperating attorneys, assisting with the screening of requests for legal assistance, and investigating and developing potential new matters. In addition, staff attorneys often consult with private lawyers who are handling matters related to Lambda Legal's areas of expertise, advocate with government agencies and officials, and advise policy makers. The attorney will speak, write, and help implement education strategies to change dialogue and advance public knowledge about HIV, sexual orientation, and transgendered people. The education work involves frequent interviews with print, television and radio reporters. Some travel is required. Qualifications: Applicants should have a minimum of four years experience as a practicing attorney, including litigation experience that prepares the applicant to handle law reform litigation. Applicants should possess a high level of inde-

pendence and initiative, good judgment, excellent speaking and writing abilities, the ability to produce the highest caliber legal work, creativity, and a willingness to work with others toward the most effective strategies and initiatives to advance civil rights. In addition, the successful candidate will have the ability to talk about legal and other complex issues in clear, persuasive terms for non-lawyer audiences. Working at Lambda Legal requires a demonstrated awareness of and commitment to the concerns of the communities Lambda represents, and a commitment to diversity within Lambda and in the work that we do. Salary: Salary is commensurate with experience. Excellent employer-paid benefits package including medical, dental, life and long term disability insurance and generous employer contribution to retirement account. Generous vacation. Application: Send r,sum,, writing sample, and letter of interest by November 25, 2003 to: Patricia M. Logue, Interim Legal Director, Lambda Legal, 1 E. Adams, Suite 1008, Chicago, IL 60603. People of color and people with disabilities are especially encouraged to apply.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Adler, Libby, *An Essay on the Production of Youth Prostitution*, 55 Maine L. Rev. 157 (2003).

Cameron, Samuel, and Alan Collins, *Estimates of a Model of Male Participation in the Market for Female Heterosexual Prostitution Services*, 16 European J. L. & Econ. 271 (Nov. 2003).

Cohon, Maureen B., *Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 Duquesne L. Rev. 495 (Spring 2003).

Conlin, Michelle, *Unmarried America*, Business Week, October 20, 2003, pages 106–116. This is an extraordinary article about the demographic trends of American families and the potential impact on business and the law. Includes statistics, charts and graphs. Very useful reading for lesbian/gay/bi/trans legal advocates.

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Vol. 10, No. 6 (Nov.-Dec. 2003) of the *Gay and Lesbian Review*, a literary and opinion journal published under the auspices of The Open Gate, an education foundation established by lesbian and gay alumni of Harvard University, includes several essays reacting to the Supreme Court's decision in *Lawrence v. Texas*, including contributions by Bernadette Brooten, Jo Ann Citron, John Rechy, Evan Wolfson, Kerry Howley, and a brief essay by your *Law Notes* editor, Arthur S. Leonard.

The Fall 2003 issue of *Dissent*, a journal of opinion, features a discussion of *Lawrence v. Texas* by Jean L. Cohen and the "conservative case for gay marriage" by Murray Hausknecht.

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EDITOR'S NOTE:

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