

SUPREME COURT TAKES ANOTHER BITE OUT OF THE ADA; DECISION ALSO SUGGESTS LIMITATIONS ON POTENTIAL ENDA JURISDICTION

By the usual 5–4 vote, with the usual suspects in the majority and the dissent, the U.S. Supreme Court ruled that on Feb. 21 that yet another federal civil rights statute has unconstitutionally subjected state governments to lawsuits seeking monetary damages by their citizens. This time the offending legislation is Title I of the the American With Disabilities Act, a federal law passed in 1990 that forbids employment discrimination against qualified individuals with disabilities. (Not at issue in the case were the other titles of the ADA, covering public services and places of public accommodation.) The ruling in *Board of Trustees of University of Alabama v. Garrett*, 2001 WL 167628, was not unexpected, in light of prior rulings applying similar limitations to the Age Discrimination in Employment Act and the Fair Labor Standards Act, and in light of the general hostility toward the ADA implicit in the Court's 1999 decision in *Sutton v. United Air Lines*, 119 S.Ct.2139, and two companion cases decided at the same time, which had cut back sharply on the size of the "protected class" under the statute.

The usual gang of five was in the majority: Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy and O'Connor. The dissenters, the usual gang of four, were Justices Breyer, Stephens, Ginsburg and Souter.

The Court's opinion, written by Chief Justice William H. Rehnquist, takes the "New Federalism" approach to the 11th Amendment discovered by the Court in recent years, and applies it to the ADA, with devastating results. Under this approach, the 11th Amendment, which by its terms deprives the federal courts of jurisdiction to hear civil suits in law or equity brought by the citizens of one state against another state or a foreign country, is broadened to stand for the proposition that the states are generally immune from civil liability to their own citizens for violations of federal statutes. Unless the states have expressly waived their immunity, the immunity is apparently absolute in the cases of statutes enacted pursuant to Congress's enumerated powers under Article I of the Constitution. However, the Supreme Court has recognized that by ratifying the 14th Amendment, the states have impliedly waived their sovereign immunity with respect to claims under statutes enacted pursuant to Con-

gress's enumerated power under Section 5 of that amendment to enact laws enforcing 14th Amendment rights.

The ADA's application to state governments was premised by Congress on its 14th Amendment legislative powers to enforce the Equal Protection Clause. However, in recent years the Court has taken the position that such power is generally co-extensive with the Court's interpretation of the Equal Protection Clause, so that if a statute would impose liability for conduct that the Court would find not to violate Equal Protection, the Court may find the state to be immune from liability for such conduct. In addition, the Court has insisted that for Congress to abrogate state immunity, it must compile a legislative record documenting relevant state transgressions that require a federal remedy.

In this case, Rehnquist asserted that the ADA's application to state employment failed on both counts. Reviewing the legislative record, Rehnquist concluded that there was scant documentation of a particular problem of state employment discrimination against persons with disabilities. (Breyer's dissent, with an extended appendix summarizing the legislature record, shows that the hearings and committee report were replete with allegations of state discrimination, but Rehnquist observed that many of those were anecdotal reports rather than hard evidence, and that most of them related to public services rather than employment.) Perhaps more significantly, Rehnquist observed that the ADA went far beyond the dictates of the Equal Protection clause, by requiring reasonable accommodation and imposing liability in disparate impact cases (where the Equal Protection Clause has been construed by the Court, at least in the employment discrimination context, to be limited to disparate treatment claims of intentional discrimination). Rehnquist's analysis will be familiar to anyone who read the Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), applying the same analysis to the Age Discrimination in Employment Act.

Rehnquist's opinion restricted the Court's holding to Title I, the employment title, of the ADA, and emphasizes that the sovereign immunity concept applied only to state employment,

thus leaving county and municipal government's still subject to ADA liability. Furthermore, despite the reference to "law and equity" in the 11th Amendment, the Court's extension of sovereign immunity to suits not expressly covered by the 11th Amendment has not included a ban on equity jurisdiction, so state employees could still bring claims for equitable relief, although it appears that the states would be immune from claims for legal fees in cases where the plaintiffs prevailed in obtaining injunctive relief. This may leave open the theoretical possibility, at least in those states that have passed their own discrimination statutes applicable to public employment, for state employees to file suit in federal court under the ADA seeking injunctive relief, and attaching a damage claim under state law. However, state laws differ in the range of remedial options they provide for employees, in many cases falling short of what the ADA had to offer. The decision also does not directly affect federal jurisdiction under Section 504 of the Rehabilitation Act, which forbids disability discrimination by any program or entity receiving federal financial assistance, and it is likely that many state employers are federal assistance recipients. Whether Section 504 jurisdiction in this context will survive the Court majority's current campaign to shrink federal legislative power remains to be seen.

Justice Stephen Breyer's dissenting opinion does not take on the prior "New Federalism" cases, instead focusing on showing that Congress had amply documented the need for protection against disability discrimination by state employees, and arguing that the constitutional claims of persons with disabilities under the Equal Protection Clause are stronger than Rehnquist's opinion would concede.

The decision not only punches a hole in the protective safety net for persons with disabilities that the ADA was intended to provide, but also reinforces the lesson from *Kimel* that Congress may be similarly limited in efforts to enact a federal ban on sexual orientation and gender identity discrimination by state government employers. While the Supreme Court has specifically ruled in past cases that disability discrimination does not warrant strict or heightened scrutiny as a "suspect classification" under the Equal Protection Clause, the Court has not yet passed on this question regarding sexual orientation or gender identity. (The Employment Discrimination Act would ban discrimination on the basis of sexual orientation, and some advocates contend that the bill should be amended to add gender identity, thus embracing the equality claims of the transgender community as well.) Most lower federal courts have treated such claims as being subject only to rational basis review, however, suggesting that the *Garrett* analysis would apply to any attempt by

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Congress to subject state employers to monetary liability for sexual orientation or gender identity discrimination. This suggests that the legislative proponents of ENDA need to ensure that a full

record is compiled documenting such discrimination by state employers. ENDA is already less comprehensive than other federal civil rights statutes in eschewing any obligation of affirmative ac-

tion or any liability for disparate impact claims, and so might pass the *Garrett* test on that score. A.S.L.

LESBIAN/GAY LEGAL NEWS

Third Circuit Rejects Public School Harassment Policy on Constitutional Grounds

A unanimous panel of the U.S. Court of Appeals for the 3rd Circuit ruled in *Saxe v. State College Area School District*, 2001 WL 123852 (Feb. 14), that a public school anti-harassment code unconstitutional penalizes speech and conduct protected by the First Amendment. The ruling reversed a decision by U.S. District Judge James F. McClure, Jr. (M.D. Pa.), who had found that all the conduct covered by the policy was also prohibited by federal law governing educational institutions that receive federal funding, a conclusion with which the appeals panel emphatically disagreed.

The State College Area School District adopted its Anti-Harassment Policy in August 1999. The broad-ranging policy, stating its goal as "providing all students with a safe, secure, and nurturing school environment," defines harassment as follows: "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."

The Policy gives the following examples of harassment: "Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures."

Students or employees of the district charged with harassment would be subject to a wide range of penalties, including dismissal or termination, depending upon the severity of their offense.

Plaintiff David Saxe, a member of the Pennsylvania state board of education who resides in the State College area, is the guardian of two public school students. Saxe and his wards are self-described Christians who believe that homosexuality is a sin, and that they must be free to say so publicly, including in the schools. Saxe brought suit on behalf of his wards, alleging that the policy would unconstitutionally deter them from speaking freely on this subject.

District Judge McClure granted the school district's motion to dismiss on the pleadings, finding the policy facially constitutional, since it was

premised on deterring or punishing conduct that has the effect of "interfering with a student's educational performance" or which creates a "hostile atmosphere." McClure found that the policy did not prohibit "anything that is not already prohibited by law," and thus could not be unconstitutional.

In reversing McClure's decision, Circuit Judge Alito found it flawed on both counts. First, Title VI of the Civil Rights Act of 1964, which applies to educational institutions, and Title IX of the Education Amendments of 1972, contain specific lists of prohibited bases for discrimination, and neither list includes sexual orientation or "other personal characteristics." Clearly, the State College policy covers forms of harassment that go beyond those expressly covered by federal law. And, while federal law allows students to bring suits for harassment, the Alito noted that the standards for proving such cases require a showing of severe and pervasive misconduct, not merely that somebody was offended or upset. Relying on the recent Supreme Court decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), Alito found that a school's liability in such cases is "limited to cases in which the school 'acts with deliberate indifference to known acts of harassment' and those acts have 'a systemic effect on educational programs and activities.'"

As to the constitutional issue, Alito found that the district court's assertion that "harassment has never been considered to be protected activity under the First Amendment" "exaggerates the current state of the case law in this area." Indeed, the Supreme Court struck down a municipal hate speech ordinance in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), precisely on the ground that some harassing speech has constitutional protection. Wrote Alito, "Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint. Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection."

Alito then analyzed the First Amendment issue based on the assumption that existing federal anti-harassment laws applicable to schools are constitutional. First, Alito found that the State College policy "prohibits harassment based on personal characteristics that are not protected under federal law... Insofar as the policy attempts to prevent students from making negative comments

about each others' 'appearance,' 'clothing,' and 'social skills,' it may be brave, futile, or merely silly. But attempting to proscribe negative comments about 'values,' as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse — the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about 'values' may offend is not cause for its prohibition, but rather the reason for its protection."

Furthermore, Alito noted that the Policy extends beyond harassment that denies a student equal access to the educational program, by covering speech "that merely has the 'purpose' of harassing another," even if the speech does not actually create a "hostile environment" as such. "This formulation, by focusing on the speakers' motive rather than the effect of speech on the learning environment, appears to sweep in those 'simple acts of teasing and name-calling' that the *Davis* Court explicitly held were insufficient for liability."

Consequently, the court concluded that the State College policy violates the First Amendment, and reversed the district court. The court made clear that a public school can adopt regulations "more protective than existing law," so long as "those regulations do not offend the Constitution." But it emphasized that any viewpoint-based regulation would be subject to searching First Amendment scrutiny, suggesting that only truly severe harassing conduct can subject a student or employee of the school district to disciplinary action. A.S.L.

Ohio Appeals Court Upholds Denial of Name Change Sought by Lesbian Partners

An Ohio appeals court refused to overturn a trial court's determination denying two lesbian partners the right to change their last names to a new, common surname on the basis that giving court approval to the use of the same surname by two unmarried cohabitants would be against Ohio's public policy of promoting marriage. *Matter of Jennifer Lane Bicknell*, 2001 WL 121147 (Ohio App., 12th Dist., Feb.12, 2001).

The Appellants, Jennifer Bicknell and Belinda Priddy, could have adopted a new name under common law by simply using the new name, which is permissible except if done for fraudulent purposes. However, for reasons not given in the opinion by Presiding Judge Powell, the women filed an application for a name change with the

probate court, pursuant to an Ohio statute, which states, in relevant part, "Upon proof that proper notice was given and that the facts ... show reasonable and proper cause for changing the name of the applicant, the court may order the change of name." The Appellants sought to show that the only standard the court ought to consider was whether they had a fraudulent purposes, not whether the name change would be against public policy. The appeals court disagreed. Judge Powell's opinion stated that court approval of a name change requires additional considerations. The court upheld the trial court's view that the phrase "reasonable and proper" in the statute could mean more than just "not done for fraudulent purposes."

The court cited *Name Change of Handley*, 107 Ohio Misc. 2d 24 (Probate Ct., 2000), in which the court found that the public has a proprietary interest in the name Santa Claus and so permitting a man to change his name to Santa Claus would be against public policy. Although the Appellants argued that there is no public policy preventing unmarried people from sharing the same name, the court noted that in 1991 the legislature abolished common law marriages, and cited a number of cases upholding the principle that Ohio law favors solemnized marriages over cohabitation. That the Appellants were not asking for judicial sanction of their cohabitation, only the right to change their last names apparently went over the judges' heads (indeed, from the description of their relationship, it seems like they certainly would have preferred just to get married).

Nor was their equal protection argument persuasive to the courts, that denying unmarried couples the opportunity to share a common surname bears no rational relationship to a legitimate governmental purpose. They argued that they were discriminated against based on marital status and sexual orientation, because they were unmarried and unable to marry. Judge Powell wrote, "the fact that the applicant can not legally marry her 'long term partner' because they are both women does not alter the basic conclusion of law that this court finds to be true, i.e., that it is not 'reasonable and proper' to change the surnames of cohabiting couples, because to do so would be to give an 'aura of propriety and official sanction' to their cohabitation." Furthermore, Judge Powell held that the trial court did not distinguish between unmarried heterosexual couples and unmarried homosexual couples. In addition, he wrote, the trial court's distinction between married and unmarried couples was a rational basis for treating the two groups differently in order to promote a legitimate governmental interest favoring marriage. Accordingly, Judge Powell could find no basis upon which to hold that the trial court's decision was an abuse of discretion.

Judge Valen wrote a very vigorous dissent, finding that the reasoning of the majority and the probate court was specious and simply a cover for sexual orientation discrimination, the courts' real

agenda. As Judge Valen stated, "The unspoken argument against granting appellants' requests for name changes is that it might be equated to approval of the appellants' alternative lifestyle and that the trial court is entitled to withhold such approval as it deems proper." Valen debunked their arguments that cohabitation of unmarried partners contravenes public policy and that refusing to grant the name change somehow protects the sanctity of marriage, citing several statutes that gave special recognition to unmarried, cohabiting couples, such as the domestic violence statute that gives the same protection to common-law spouses as to all other spouses. The dissenter pointed out that the abolition of common law marriages was the result of the need to eliminate problems of proof with respect to whether two people were legally married, which caused uncertainty in the courts, and not to promote solemnized marriages over cohabitation. To the contrary, Valen wrote that the courts should be promoting the public policy of maintaining accurate records of names by liberally granting name change requests. Otherwise, people would effect name changes by common law, whereby they would simply begin using the name without registering it with the authorities. The dissent cited numerous cases and one statute giving homosexuals certain rights, such as the right to adopt, retain child custody following a divorce, and be protected from domestic violence, supporting the argument that there was no public policy in Ohio adverse to same-sex partners cohabiting. *Elaine Chapnik*

Ohio Appeals Court Refuses to Recognize Lesbian Co-Parent

An ingenious attempt to use an ambiguous Ohio statute to obtain legal recognition of a lesbian co-parent has failed. On Feb. 16, the Court of Appeals of Ohio in Hamilton County upheld the refusal of a trial court to grant legal parenting rights to Shelly Zachritz for the five children she is raising with her partner, Teri Bonfield. *In re Joseph Ray*, 2001 WL 127666.

According to the court's per curiam opinion, Shelly and Teri have resided together in a "committed same-sex relationship" since 1988. In that time, Teri has adopted two children and bore three others through anonymous donor insemination. Shelly participated in all this activity and has been the primary caregiver for the children. However, because Ohio courts have not been willing to approve "second-parent adoptions" under the state's archaic adoption statute, Shelly has been unable to adopt the children.

Section 3109 of the Ohio statutes allows a parent to file a motion "for shared parenting" which will be granted if "shared parenting is in the best interest of the children and approved by the court." In that case, "the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order." Teri filed such a motion, arguing

that Shelly is, de facto, a parent of Teri's five children. Teri argued in support of her motion that the term parent is not specifically defined for this section, so the court could adopt a broad, reality-based definition.

The court rejected this argument, however, in a short opinion that appeared to signal some regret at the limitations of judicial power. The court noted that a definition of "parent-child relationship" appears elsewhere in the Ohio statutes and has been applied in past cases to disputes arising under the shared parenting statute. That definition makes clear that only a "natural or adoptive" parent is a legal parent within the meaning of the statute.

"Although we have concluded that existing Ohio law does not permit Teri and Shelly to enter into a shared-parenting plan, we do not intend to discredit their goal of providing a stable environment for the children's growth," wrote the court. "Our respect for such a goal does not, however, provide us with an appropriate basis for disregarding the relevant statutory language. It is for the legislature, not this court, to recognize a broader definition of 'parent' than that currently contained in the Revised Code."

The court also rejected the argument that refusing to grant a shared parenting order violates Teri's constitutional right to decide how to raise her children. The court observed that Teri's decision to co-parent with Shelly is not entitled to legal recognition, so long as the state doesn't try to interfere with that right. The proper place to assert the constitutional right would be in opposition to any attempt by the state to prevent Shelly and Teri from co-parenting. A.S.L.

7th Circuit Adopts Bizarre Evidentiary Analysis to Reject Habeas Petition by Man Convicted of Murder After Admission of Prejudicial Evidence — Gay Porn

According to the U.S. Court of Appeals for the 7th Circuit, evidence that a murder defendant owned gay porn is admissible to support a prosecution theory of "homosexual overkill" — a term that appears to refer to the type of especially brutal attack to which some gay men fall victim. The paradox — that evidence the defendant enjoyed viewing homosexual acts should be admissible as proof of his "motive" to murder a presumed sex partner — is never addressed by the court. In an opinion by Judge Evans, the court rejects defendant Joachim Dressler's argument that admission into evidence of the legally obtained magazines and videos violated the First Amendment, as well as his arguments grounded in Wisconsin evidence law. *Dressler v. McCaughtry*, 2001 WL 82852 (Feb. 1).

James Madden set out to raise money for an environmental group by knocking on doors in the small town of Raymond, Wisconsin. Two days later his legs and torso were found in yellow plastic bags in a nearby field. His skull and arms

turned up two weeks later — also in yellow plastic bags. Tests revealed that Madden was the victim of a vicious attack that continued after his death. Dressler, a married man with children who lived on Madden's route, admitted to once owning yellow plastic bags; pursuant to a warrant, police searched Dressler's home, seizing firearms, knives, and a briefcase containing magazine photos of mutilation victims, and several commercially available videos depicting violent acts. Also seized were magazines and tapes depicting non-violent gay sex.

Several weeks later, Dressler told a neighbor that he had killed Madden, although he blamed a shooting accident. Dressler was arrested and charged with first degree murder. At trial, prosecution expert James Jentzen argued that Madden's dismemberment was "consistent with homosexual overkill." There was no evidence in the case that the victim was homosexual or that the murder involved homosexual contact, nor did any physical evidence link Dressler to the victim. The trial court admitted, over Dressler's objections, the magazines and videotapes as "other acts" evidence under Wisconsin Statute sec. 904.04(2), holding that they were relevant to the State's theory of homosexual overkill because "they were probative of Dressler's homosexuality and fascination with violence" — and thus proved motive.

The defense claimed that Dressler's confession to his neighbor was a fantasy, comprised of bits and pieces of actual experiences — a phenomenon it called "confabulation" and attributed to Dressler's alcoholism. One of those actual experiences, apparently, was a visit, two weeks after Madden's death, from Keith Erickson, who came to inquire about a car Dressler was selling. The two men ended up shooting rifles in Dressler's backyard and — according to the court — "[w]hen they were finished shooting" they had sex. Erickson testified at trial (over defendant's objections). That testimony, along with the videos and magazines, played a prominent role in the government's case. The jury convicted Dressler, who will be eligible for parole in 2051.

Seeking post-conviction relief in the trial court, Dressler claimed that the government's use of the photos and tapes violated the First Amendment. The trial court denied Dressler's motion without explanation. His appeals in the Wisconsin courts, and his petition for certiorari to the United States Supreme Court, were denied. On April 22, 1997, Dressler petitioned the United States District Court for the Eastern District of Wisconsin for a writ of habeas corpus. Magistrate Judge William Callahan rejected Dressler's First Amendment argument on both procedural and substantive grounds; however, he found the argument to be "debatable among jurists of reason" and certified the issue for appeal.

Writing for the 7th Circuit panel, Judge Evans first addressed the First Amendment issue. Dressler claimed that admitting legally-obtained pornography into evidence "effectively eviscer-

ate[d] the First Amendment protection to look at, read or possess such materials" and thus conflicted with the Supreme Court's First Amendment jurisprudence. The court wrote: "The fundamental flaw in Dressler's First Amendment argument . . . is that he was not convicted of possessing, distributing, or looking at the videos and pictures in question. Although they may have helped convict Dressler of murder, he never explains how his right to possess or look at them was affected by their use as evidence against him. . . . Innocent citizens, who presumably would not face a mountain of other circumstantial evidence of their guilt, need not fear a murder prosecution based on the mere possession of lawful videotapes and photographs. The guilty, however, should be wary." This passage appears to subvert the presumption of innocence. The materials were admissible, the court seems to be saying, because Dressler was found guilty. But he was found guilty in large part because the materials were admitted.

The court then explained why, in its view, it was permissible for the jury that convicted Dressler to draw logical inferences from his possession of photos and tapes: "If Dressler were accused of causing an explosion, a jury could logically infer his guilt from the fact that a bomb-making manual was found at his home. There is no principled way to distinguish Dressler's videotapes and pictures from the bomber's manual." The court's logic is weak — a bomb manual makes it possible to build a bomb; there is no suggestion that any of the materials possessed by Dressler made it possible for him to murder Madden. The analogy (to the extent it seems to compare photos of consensual homosexual intercourse to bomb-making instructions) is also patently offensive. The court then turned to the evidentiary question. The court noted that the admissibility question was beyond the scope of the certificate of appealability; in addition, it observed, evidentiary rulings of state trial courts are normally not subject to habeas review. Nonetheless, it proceeded to decide the issue. Judge Evans first addressed the relevance of the evidence. He wrote: "A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant. . . . Similarly, a person who possesses photographs of homosexual acts coupled with depictions of extreme violence might be more inclined to commit a crime exhibiting the characteristics of homosexual overkill." In fact, it may be possible to construct a syllogism under which evidence of possession of non-violent gay porn increases the likelihood that Dressler murdered Madden. But it may be just as easy to construct a syllogism in which the possession of porn makes it less likely that he did so, under the theory that the use of pornography as an outlet reduces the desire to commit antisocial acts. Moreover, the court's use of the phrase "coupled with" seems to suggest, incorrectly, that some of the materials possessed by Dressler wedded homosexuality to violence.

Having found the evidence to be relevant, the court failed to consider whether it was more prejudicial than probative (an essential step in any admissibility decision). Yet evidence that Dressler, a married man with children, collected homosexual porn and engaged in homosexual acts while his family was away, would seem to be highly prejudicial. As to the propensity question, the court held: "Although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, sec. 904.04(2) contains an exception to the rule of inadmissibility for evidence offered to prove, among other things, motive, intent, plan, or absence of mistake or accident. Here, the pictures depicting violence were offered to prove Dressler's fascination with death and mutilation, and this trait is undeniably probative of a motive, intent, or plan to commit a vicious murder. . . . Finally, the pictures of homosexual acts, given the State's homosexual overkill theory, clearly go to motive."

For courts interpreting the character evidence rules to stretch the meaning of "motive," "intent," and "plan" is commonplace. But how the possession of homosexual porn — depicting non-violent, consensual gay acts — supports a homosexual overkill theory remains a mystery. Indeed, the court accepted the government's "homosexual overkill" theory despite the fact that, in the entire body of federal and state case law available on Lexis and Westlaw, the phrase "homosexual overkill" *never* appears outside the Dressler case. (Search done February 14, 2001.)

Dressler filed a petition for rehearing with the Seventh Circuit Court of Appeals on February 14, 2001. This writer, who learned about the case when he was asked to write about it for the *Lesbian/Gay Law Notes*, helped Wisconsin solo practitioner James Mathie draft the petition for rehearing. *Fred A. Bernstein*

Federal Court Allows Connecticut Lesbian Co-Parent to Pursue Equal Protection Claim Against State Agency Employees; Rejects Family-Based Due Process Claim

In a mixed ruling on a motion to dismiss, U.S. District Chief Judge Covello (D. Conn.) ruled Feb. 12 that a lesbian co-parent could maintain an Equal Protection claim against state child welfare agency officials who excluded her from participation in matters involving her partner's child, but could not maintain a Due Process claim for interference with her family rights. *Zavatsky v. Anderson*, 2001 WL 170469.

Karen Zavatsky and her partner, unnamed in the decision, live together in East Haven, Connecticut. In 1989, her partner gave birth to their son, Terrel Alston, who has suffered from various psychological disturbances and has been in and out of treatment programs ever since. Zavatsky and her partner presented documentation to the Department of Children And Families (DCF) about the nature of their relationship beginning in

mid-May 1997. Later in 1997, while Terrel was a committed patient at Hall-Brooke Hospital in Westport, a psychiatric facility, several of the named defendants, employees of DCF, petitioned the Juvenile Court to declare Terrel a neglected child and place him in foster care. In her complaint, Zavatsky alleges that the defendants “concealed” from the court the nature of her family relationship with her partner and Terrel, and that this violated DCF rules about including parents’ non-marital partners in such situations. The state court placed Terrel in foster care in response to the petition. Zavatsky alleges that while Terrel has been in foster care, the defendants refused to acknowledge the family unit, or to accord Zavatsky any right of participation in “conferencing and planning relating to” Terrel. She also alleged that the defendants refused to provide information or to allow contact at various times, and excluded her from the family reunification program, and that had she and her partner been a heterosexual couple, she would have been allowed to participate.

Based on these factual allegations, Zavatsky brought suit in federal court under 42 USC sec. 1983, alleging violation of her due process and equal protection rights, and adding a supplementary claim of violation of state constitutional law. (Connecticut also has a sexual orientation discrimination statute, but it is not mentioned in the court’s decision.) The defendants moved to dismiss, asserting that Zavatsky failed to state a cognizable federal claim and that, in any event, they were qualifiedly immune from suit because no established federal rights had been violated.

Judge Covello granted the motion to dismiss regarding the claim of interference with family rights, but denied the motion as it related to the equal protection claim. Covello found that there is a well-established federal constitutional right to protection from state interference with family integrity, but that the existing cases have recognized that right almost exclusively in the context of traditional married spouses and their children. Although there are cases stretching the right to include more distant relatives, Covello found scant support for the proposition that Zavatsky’s relationship with her partner and partner’s child would fall within this area of established law. This finding is important, because the qualified immunity doctrine would shelter the defendants from liability for their discretionary acts unless a person in their position could be held to know that their actions violated a federally-protected right.

Wrote Covello, “the relationship between Zavatsky and Terrel does not appear to be one previously recognized by courts as triggering the right to family integrity.” After setting out a variety of factors that a court might consider in making such a determination, Covello wrote: “The court recognizes that over the course of this case, Zavatsky could potentially answer these questions in a way that would suggest a very loving and intimate relationship between her and Terrel. Under the cur-

rent state of the law, however, even such an intimate and committed relationship is insufficient to trigger the protection afforded families under the Fourteenth Amendment.” Consequently, this part of Zavatsky’s claim was dismissed.

On the other hand, Covello found that Zavatsky had stated a cognizable constitutional claim by alleging that the defendants had departed from the DCF rule on the rights of partners of parents to participate in proceedings involving their partners’ children, solely on the basis of her sexual orientation. Although the court found that sexual orientation is not a “suspect classification,” citing *Romer v. Evans*, 517 U.S. 620 (1996) in the usual sloppy way for this proposition (*Romer* did not address the question), on the other hand it found, at least based on the allegations in Zavatsky’s complaint, deemed to be true for purposes of the motion to dismiss, that an allegation of unequal treatment based solely on a person’s sexual orientation does state an equal protection claim, and that once *Romer* was decided, the principal was established that a government agency’s sexual orientation discrimination without any articulated rational justification is unconstitutional. “Whether the resulting facts here are sufficient to overcome the presumption of rationality is a close question,” Covello wrote, but the court placed particular emphasis on the allegation that the defendants were violating the department’s own rules. “Zavatsky has stated an equal protection violation because there would appear to be no ‘readily apparent’ justification for the defendants’ deviation from the agency’s internal policy... Without any rational basis for the defendants’ classification, the court cannot, at this stage, conclude that Zavatsky’s complaint fails to allege a violation of a constitutional right.”

The court did dismiss all claims against two of the named defendants, because Zavatsky’s complaint failed to specify their personal involvement in the decisions being challenged. It also appeared that Zavatsky’s counsel may have been less than clear in describing the supplemental claims, because the court agreed with the defendants that those claims should be dismissed to the extent that they sought to use 42 USC sec. 1983 as a vehicle to present state constitutional claims. But the court concluded that the complaint could be construed to advance the state claims separately from the sec. 1983 claims, and on that basis refused to dismiss the state constitutional claims. Thus, Zavatsky will be entitled to proceed against the agency employees on her equal protection and state constitutional claims. A.S.L.

Federal Court Holds Transsexual Stated 8th Amendment Claim for Denial of Treatment in Prison

While dismissing claims brought pursuant to the 14th Amendment and 42 USC 1983, a Pennsylvania federal district court sustained a transsexual prisoner’s claims under the 8th Amendment and

state medical malpractice law for the failure of prison officials to attend properly to her medical needs while incarcerated. *Wolfe v. Horn*, 2001 WL 76332 (E.D. Pa., Jan. 29). The opinion demonstrates the tremendous deference given by courts to medical professionals, whose assessment of whether ongoing hormone therapy or other types of treatment are medically “necessary” or “appropriate” can dramatically impact the lives of those men and women who are transitioning.

Wolfe, a male-to-female preoperative transsexual, who legally changed her name from James to Jessica in 1996, struggled with a gender identity disorder from an early age. District Judge Brody acknowledged that her medical history reflects depression, alcoholism and suicidal impulses. Since 1996, Wolfe has undergone extensive hormone therapy under the supervision of an endocrinologist from the Persad Center in Pittsburgh. As well as taking Estrace and Lupron to suppress Wolfe’s production of testosterone, Wolfe was also prescribed Prozac for depression. On March 13, 1996, Wolfe was arrested and detained at Allegheny County Jail, but she was able to continue her hormone treatment while incarcerated. (The opinion does not specify the reasons for her arrest.)

On July 29, 1996, after being sentenced to a minimum of five years imprisonment, Wolfe was transferred to SCI-Pittsburgh, where she also received treatment. However, in August, 1996, Wolfe was transferred to SCI-Camp Hill, where she was examined by Dr. John Mitchell Hume. Despite Wolfe’s explanation about her medical condition and the necessity of continuing her hormone therapy, Hume told Wolfe that he would discontinue her treatment, and noted on her chart that the hormones posed a health risk to Wolfe because she smoked, was forty pounds overweight, and had marginally elevated blood pressure. Hume did, however, refer Wolfe to another psychiatrist for a second opinion. Even though that psychiatrist allegedly promised to reinstate Wolfe’s hormone therapy, Hume refused to approve the treatment because there was no notation of this promise in Wolfe’s file. Hume prescribed psychotherapy, group therapy and Prozac. Hume did not, however offer to gradually taper-off the hormones, did not advise Wolfe that she would experience withdrawal symptoms, and did not monitor her progress through withdrawal.

In late September 1996, after Wolfe had exhausted her last supply of Estrace, she suffered severe withdrawal symptoms, including headaches, nausea, vomiting, cramps, hot flashes and hair loss. In addition, Wolfe’s masculine traits reemerged, including a deeper voice, diminished breast size and additional body hair, which also exacerbated Wolfe’s depression. In October 1996, Hume told Wolfe that she had “survived the withdrawal” and would no longer receive any hormones. Dr. Martin Lasky, the Medical Director at SCI-Camp Hill, affirmed Hume’s recommendations, and after personally evaluating Wolfe upon

her arrival, instructed a physician's assistant not to refill Wolfe's Estrace prescription. Wolfe appealed this decision to Kenneth Kyler, Superintendent of Camp-Hill, and Martin Horn, the Secretary of the Pennsylvania Department of Corrections. Neither Kyler nor Horn interfered with Hume and Lasky's medical determinations.

In November 1996, Wolfe was transferred to SCI-Mahanoy, where she is still incarcerated. At this facility, she was evaluated by Dr. Louis Martin, and Peter Baddick. Neither reinitiated her hormone therapy. Martin initially provided Wolfe with counseling sessions and prescribed her Prozac. However, in January 1997, Baddick determined that he would not recommend treatment at that time. Several months later, Baddick reported that he would not prescribe hormone therapy because surgery was not available, and because the hormones might increase Wolfe's risk of cancer and thrombophlebitis. Wolfe appealed this decision to Martin Dragovich, then-Superintendent of SCI-Mahanoy unsuccessfully. Throughout her incarceration, Wolfe has been identified as "James," housed with male prisoners, and prohibited from wearing female undergarments, makeup or long hair.

As an initial matter, Judge Brody noted that Wolfe was now seeking neither a sex change operation nor the commencement of hormone therapy. Rather, "she seeks some form of therapy to alleviate her suffering from transsexualism while in prison." In considering the defendants' motion for summary judgment, the court first analyzed Wolfe's 8th Amendment claim, which required her to show that there was (1) "deliberate indifference" (2) to her "serious" medical need. The court acknowledged that transsexualism is a "serious" medical condition, and proceeded to address whether the defendants had been deliberately indifferent. The court found it noteworthy that Wolfe was already under the care of medical professionals when convicted, and contrasted her case with those cases involving prisoners who sought to initiate a new course of medical treatment after incarceration. The court was hesitant to second-guess the medical judgment of the prison officials who were treating Wolfe, but did point out that, although Wolfe had received "some" medical attention while in prison, it was unclear from the record whether she had in fact received any treatment for transsexualism, as opposed to merely her depression. Because this question was still unresolved, the court denied summary judgment on Wolfe's 8th Amendment claim as to whether the defendants were "deliberately indifferent" to her gender identity disorder.

With regard to her equal protection claim, Brody noted that Wolfe could point to no other "similarly situated" prisoners who sought treatment for transsexualism, let alone demonstrate whether their claims were taken "seriously." The court found that no other prisoners were allowed to wear makeup or cross-dress, and rejected any analogy Wolfe tried to draw between those prison-

ers who wanted to wear their hair long for reasons of religious observance. Finally, the court maintained that because the prison's policy was grounded in a legitimate penological concern - "security concerns" resulting from "Wolfe's becoming 'feminized' in an all-male prison" - her equal protection claim failed. Ultimately, the court determined that her Fourteenth Amendment claims had no merit, and were merely "deliberate indifference allegations under the cloak of equal protection."

The court then addressed the defendants' defense of qualified immunity to Wolfe's sec. 1983 claim for money damages. The court reiterated that state officials are entitled to qualified immunity if "their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." However, the court was required to assess "whether these officials knew or should have known that their actions violated clearly established law, given the information that they possessed." Because Kyler, Dragovich and Horn were lay prison administrators and not medical professionals, the court determined that they might reasonably have believed that Wolfe was receiving "some" treatment for her transsexualism. The court found it "objectively reasonable" for them to rely on the assessment of the medical professionals, and found qualified immunity appropriate. In a footnote, Judge Brody noted that while Wolfe's claims for injunctive relief were moot against Kyler and Dragovich, her request for injunctive relief against Horn remained.

On the other hand, Defendants Lasky, Hume, Martin and Baddick were private individuals who were not entitled to qualified immunity under sec. 1983. Therefore, the court addressed these defendants' alternative defenses. The court found that there was an issue of fact, precluding summary judgment, on the issue of whether Wolfe knew or should have known that the October 1996 decision not to give her hormones was a "final" decision, causing the statute of limitations to begin to run, due to statements by Hume that he needed medical records from Persad in order to render a final decision about her course of treatment. The court also rejected any defense of issue preclusion based on other claims previously brought by Wolfe in *Wolfe v. Commonwealth of Pennsylvania*, C.A. 98-1132 (W.D. Pa. 1998), because in that case, the court had only determined that (1) Wolfe had no constitutional right to a sex change, (2) Wolfe did not have a constitutional right to serve her sentence in a state hospital, as opposed to an all-male correctional facility, and (3) the Constitution does not recognize preoperative transsexuals as a protected class. The issues raised by Wolfe in this case were sufficiently distinct as to avoid any claim of issue preclusion.

The Court also discredited the argument by Hume, Baddick and Martin that Wolfe's complaint should be dismissed for failure to produce evidence of "physical injury," emphasizing that

in addition to mental and emotional suffering, Wolfe also experienced physical harm in the form of headaches, nausea, growth of body hair (etc.), which clearly satisfied the "physical injury" requirement. Baddick's defense that Wolfe was attempting to hold him liable under a theory of respondeat superior was without merit because there had been a sufficient showing of Baddick's personal involvement in this case, including his own examination of Wolfe and determination of what treatment would be appropriate, along with his reporting to Wolfe that she would not receive hormone therapy. The court refused to consider Baddick's defense of "good faith" on summary judgment, noting that this defense required determinations of credibility and the weighing of evidence, which were factual assessments rather than legal ones.

Finally, the court sustained Wolfe's claims of medical malpractice against Hume and Martin for the same reasons offered for its 8th Amendment "deliberate indifference" analysis - "because there is a triable fact issue concerning deliberate indifference to serious medical needs, there is also a fact question concerning negligent malpractice under Pennsylvania law." The court did add a footnote, however, suggesting that even though these claims had survived summary judgment, at trial the defendants might be found to have been neither deliberately indifferent nor negligent. Finally, Lasky's and Baddick's argument that Wolfe's medical expert had not used "the magic words" - i.e., that their testimony was rendered within a "reasonable degree of medical certainty" - was also dismissed as immaterial by the court.

In total, the court sustained an 8th Amendment claim of "deliberate indifference" against Horn with regard to injunctive relief only. However, Wolfe's claims for money damages against Hume, Martin, Lasky, and Baddick survived, along with her state law claim of medical malpractice. Her equal protection claim failed entirely, and Dragovich, Horn and Kyler escaped any monetary liability under sec. 1983 due to their qualified immunity. With the exception of the court's relatively dismissive analysis in the equal protection section of the opinion, the court's disposition and language demonstrated an increased sensitivity to the plight of transsexual prisoners who are dependent on the care of medical professionals, who may range from ill-informed to thoroughly trans-phobic. *Sharon McGowan*

Wisconsin Appeals Court Rejects Challenge to Madison Teachers DP Benefits Program

Rejecting a challenge mounted by three residents of the city of Madison, the Court of Appeals of Wisconsin has ruled that local school districts have the statutory authority to pay for health insurance coverage for their employees' unmarried domestic partners. *Pitchard v. Madison Metropolitan School District*, 2001 WL 108716 (Feb.

8). The unanimous appellate panel concluded that Wisconsin state law grants school districts expansive powers to structure the benefits they choose to offer to their employees, and affirmed Dane County Circuit Court Judge Angela B. Bartell's order dismissing the plaintiffs' complaint for injunctive relief.

Since 1997, the collective bargaining agreement between the Madison Metropolitan School District and Madison Teachers, Inc. has allowed eligible teachers to register for health insurance benefits as an individual or as a family. Under the contract, family coverage includes either an employee's spouse and dependent children, or an employee's "designated family partner" (DFP) and dependent children. To qualify for DFP coverage, the participants must be 18 or older, unmarried for at least six months, and must live together and be in a "relationship of mutual support, caring and commitment and intend to remain in such a relationship in the immediate future." According to Bob Nader, acting director of the school district's human resource office, 74 of the district's 4,100 workers have registered for domestic partner coverage (*Capital Times*, Feb. 8).

Helen Pritchard, Mason Sproul and Stephan Tadevich, three taxpayers from Madison, maintained that the provisions of the collective bargaining agreement relating to domestic partner benefits were *ultra vires*, and objected to the use of public funds to pay for such benefits. According to the plaintiffs, since Wisconsin law (Wis. Stat. Secs. 66.185) explicitly permits a school district to provide benefits to its "employees, officers, and their spouses and dependent children," by omission, school districts are forbidden to provide benefits to other categories of individuals such as domestic partners. The appellate court disagreed.

Writing on behalf of the three-judge panel (with the stoicism expected from an opinion focusing on statutory construction), Judge Margaret Vergeront explained that under Wisconsin law, the statutory duties and powers of school boards must be broadly construed. The court traced the legislative history of the statute cited by the plaintiffs, and found no evidence that there was an intent to limit the otherwise explicitly broad discretion given to school boards to negotiate contracts and benefits with for their employees.

The court declined to address the plaintiffs' argument that providing health care benefits to DFP's is against Wisconsin public policy. Judge Vergeront wrote: "We agree with the trial court that it is not the role of the trial court, just as it is not the role of this court, to weigh the social and political policy implications of the manner in which the District has chosen to exercise the powers granted to it by the legislature."

The court's decision opens the door for other school districts and local governmental entities in Wisconsin to provide health care benefits to domestic partners. Additionally, the rationale underlying the court's opinion presumably would al-

low additional employment fringe benefits - such as bereavement leave or life insurance - also to be extended to domestic partners.

Lambda Legal Defense & Education Fund submitted an amicus brief co-authored by Lambda senior counsel Patricia M. Logue and staff attorney Marvin C. Peguese in support of the school district's defense of the benefits program. *Ian Chesir-Teran*

Self-Defense and Heat of Passion Inapplicable to Murder of Gay Mississippi Man

Steven Allen Sanders, serving a life sentence for murder, sought unsuccessfully to appeal the rejection of testimony about sexual activities between himself and his same-sex victim that occurred sixteen years before the murder. On February 1, the Supreme Court of Mississippi affirmed rejection of the testimony as irrelevant to Sanders's claim of self-defense. *Sanders v. State of Mississippi*, 2001 WL 83933 (Miss.).

In 1981, at age 15, Sanders ran away from home, moved in with, and became involved sexually with Marvin Watts, a "much older man." After several months "the romance waned, Sanders moved out, repented his homosexuality, and began a heterosexual life which he still maintains." In 1998 after Sanders again moved in with Watts to save money, Watts made sexual advances which Sanders rejected. After a few days Watts asked Sanders to leave. Sanders left, returning two days later to retrieve his property. Sanders, who had been drinking, argued with Watts. Sanders testified that Watts (who had grabbed his arm earlier) jumped up when Sanders tried to pass. The court could not determine whether Watts was seated or standing when Sanders struck him on the arm and head with a hammer. Sanders discarded the hammer in bushes outside the apartment and ingested cocaine. Sanders returned to the apartment twice that afternoon to steal appliances, at which times, he testified, Watts was sitting on the couch snoring. The next day Watts was found dead from a penetrating blow to the head.

At trial Sanders argued self-defense, contending that the entire history of his relationship with Watts was material, relevant, and probative of the issue of his state of mind at the time he struck Watts. Sanders' attorney argued that Watts had forced sexual contact on him, causing Sanders to fear Watts. The prosecutor countered that details of Sanders' relationship with Watts 16 years earlier were too far removed to be relevant, and that Sanders had gotten before the jury testimony to the fact that he had been involved in a homosexual relationship with Watts 16 years earlier but did not wish to continue it. The Supreme Court held that, by failing to proffer the facts to which Sanders would testify had the objection not been sustained, Sanders' lawyer failed to properly preserve the testimony, rendering the court incapable of determining materiality. The court also held that the trial court properly refused Sanders' prof-

ferred jury instruction defining heat of passion because the proposed instruction incorrectly excluded the language "passion or anger suddenly aroused at the time by some immediate and reasonable provocation." *Mark Major*

Illinois Appellate Court Rejects Convicted Murderer's Attempt to Invoke Homophobia of Other Potential Killers as a Defense

On Jan. 5, an Illinois Appellate Court held that a defendant accused of the murder of a homosexual man may not introduce evidence of other possible suspects for the crime based solely upon the prior homophobic acts of the other persons. *State v. Nitz*, 2001 WL 87734.

Richard C. Nitz stood trial for the brutal murder, which included a decapitation, of Michael Miley, a homosexual man. At Nitz's first trial, the jury convicted him of first degree murder and imposed a death sentence. The Illinois Supreme Court reversed, finding that Nitz was unfit to stand trial because he was taking psychotropic medications during trial, and remanded the case for a new trial. *State v. Nitz*, 173 Ill.2d 151, 670 N.E.2d 672 (1996). At the second trial, Nitz was convicted of first degree murder and sentenced to life in prison. Nitz appealed the verdict, claiming, among other things, that he was not permitted to present evidence concerning other possible suspects to the crime.

At trial, as part of its explanation of the crime, the State introduced evidence concerning Nitz's homophobia. In response, Nitz wanted to introduce evidence of other people in the community who were homophobic. Nitz also wanted to attack some of the State's witnesses based upon their alleged homophobia. Apparently, one witness was married to a known homophobe, and two others had been involved in the shooting of another homosexual the night before Miley was killed. The trial court refused to hear this evidence.

Judge Kuehn, writing for the Appellate Court, affirmed the finding of the trial court. The Court held that the trial court properly exercised its discretion in refusing to allow evidence of other people who harbored bigoted feelings towards homosexuals in the community. Proof of homophobia lacks relevancy unless that homophobia can be linked to the crime itself. Citing *People v. Smith*, 122 Ill.App.3d 609, 461 N.E.2d 534 (1984), the court asserted that without facts showing a connection between the other homophobic individuals and the murder of Miley, introducing evidence of homophobia to support a claim that someone else committed the murder is nothing more than "rank speculation," and such evidence was properly excluded. Consequently, the Appellate Court rejected the appeal and affirmed Nitz's conviction and sentence in full. *Todd V. Lamb*

Sexual Stereotyping Claim Survives Dismissal Attempt

In *Jones v. Pacific Rail Services*, 2001 WL 127645 (Feb. 14), U.S. District Judge Kennelly (N.D. Ill.) rejected a motion to dismiss a Title VII claim premised on sexual stereotyping of a man.

Terrence Jones has worked for Pacific Rail Service as a groundsman since February 1999. He claims that a male co-worker named Fred continually harassed him in the men's locker room by making statements such as "your hands are so soft — what are you doing after work?" and "why don't you come strip for me?" Jones claims he complained to the company, but that it took no corrective action to end the harassment. In his legal complaint, Jones alleges hostile environment sexual harassment in count 1 and harassment based on failure to conform to sexual stereotypes in count 2. Pacific Rail filed an answer to count 1, but moved to dismiss count 2 for failure to state a legal claim.

In rejecting the motion, Judge Kennelly noted that the Supreme Court has ruled in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), that harassment claims under Title VII can be brought by men who are being harassed by other men, provided the plaintiff can show he is being harassed because of his sex. "*Oncale* does not on its face preclude a plaintiff from advancing a theory of same-sex harassment based on his perceived non-conformance to gender-based stereotypes," wrote the judge, pointing out that the Supreme Court had recognized gender-stereotyping as a basis for Title VII liability in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Furthermore, the court noted that the 7th Circuit has upheld a sexual harassment claim based on gender stereotyping in *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1998), vacated and remanded, 523 U.S. 1001 (1998). Although the Supreme Court vacated the Belleville decision for reconsideration in light of *Oncale*, Judge Kennelly asserted that *Belleville* was decided on two alternative theories, only one of which was discredited by the *Oncale* court: that harassment of a sexual nature is always actionable under Title VII. The other theory, upholding a claim of harassment based on failure to conform to gender stereotypes, continues to be followed by district courts in the 7th Circuit.

While denying the motion to dismiss, the court commented: "It remains to be seen, of course, whether Jones actually will be able to establish that he was harassed based on his gender, but that is an issue for another day." A.S.L.

2nd Circuit Says Employee Can Be Fired for Dating

On Jan. 8, the U.S. Court of Appeals for the 2nd Circuit affirmed that an employee fired for engaging in a romantic relationship with a coworker may not seek relief under the New York law barring termination based on an employee's "recrea-

tional activities" outside the office. *McCavitt v. Swiss Reinsurance America Corporation*, 2001 WL 15587.

Jess D. McCavitt, a former Swiss Reinsurance officer, brought suit in 1999 claiming that he was passed over for promotion and then fired when higher-ups learned he was dating another employee. Although Swiss Reinsurance had no written anti-fraternization policy, the company successfully argued that termination on the basis of an employee's romantic relationships was not forbidden by the New York Labor Law.

In its per curiam opinion on the appeal, the court held that the statute protecting employees from being fired for off-the-clock activities such as sports, exercise, reading or watching television should not be expanded. In recent years, a series of district court rulings held that cohabitation and personal friendships were protected recreational activities. But the 2nd Circuit criticized these rulings as overly broad and favored a statutory construction that preserved the common law rule of employment-at-will. In so doing, the court may have diminished the potential for using the labor law's "recreational activities" provision as a vehicle for securing greater workplace protections for lesbians and gay men, although, strictly speaking, the federal court's interpretation of the state statute does not bind the state courts as precedent.

Circuit Judge J. McLaughlin "grudgingly" concurred in a separate opinion. Although he considered the circuit court bound by precedent, Judge McLaughlin wrote that permitting termination for dating "would doom the majority of the population to the life of a Trappist monk." The opinion went on to note that since "[r]omance has a distinctly distinguished history of originating in office contacts," the New York Court of Appeals should rule definitively that dating is a protected activity. *T. J. Tu*

Civil Litigation Notes

In *Davidson 1992 Associates v. Corbett*, NYLJ, 2/21/01 (N.Y.C. Civ. Ct., Bronx Co.), the court found that a 1999 New York Court of Appeals decision precludes the application of the *Braschi* non-traditional family recognition factors to housing covered by the federal Section 8 program. In this case, the surviving partner, a woman who had been listed with the landlord for many years as a "home care attendant," claimed that she had a non-traditional family relationship with the male tenant. The court agreed that under *Braschi* she would be entitled to stay in the apartment, but found that *Evans v. Franco*, 93 N.Y.2d 823, 710 N.E.2d 261, 687 N.Y.S.2d 615 (1999), precludes her claim, holding that the question whether somebody has a right to stay in Section 8 housing is a matter of federal, not state, law. This holding is significant for same-sex partners in Section 8 housing.

John Passanante was too fussy about where he wanted to live, evidently, because U.S. District Judge Cote found little merit to his housing discrimination claims against a real estate company managing federally-funded Section 8 housing in New York City. *Passanante v. R.Y. Management Co., Inc.*, 2001 WL 123858 (S.D.N.Y., Feb. 13, 2001). Passanante, who is gay and claims a mental disability, was on various waiting lists for public housing, but when he was offered apartments, he either rejected them as unsatisfactory or failed to do the necessary paperwork under Section 8 to qualify for the proffered housing. After dismissing all of Passanante's discrimination claims, the court reserved judgment on his pending defamation claims.

A gay employee may pursue his claims of religious and sexual orientation discrimination against an employer whose policies seemed dictated by Mormon pietism, as a result of a ruling by U.S. District Judge Joseph C. Spero (N.D. Cal.) rejecting the employer's motion for summary judgment in *Erdmann v. Tranquility, Inc.*, No. C-99-4880 JCS (Jan. 24, 2001) (reported in BNA Daily Labor Report No. 33, Feb. 16, 2001, p. A-2). Del Erdmann, a nursing administrator at the Tranquility home, did not keep his homosexual orientation a secret, but did not tell most co-workers that he was gay. He was summoned into a conference by his supervisor after a fellow employee said he was "uncomfortable" around Erdmann. The supervisor told Erdmann that homosexuals are "immoral, indecent, and they just want to be promiscuous and go to bed with everybody." The supervisor, a devout Mormon, told Erdmann that he should tell other employees that he was a monogamous gay man who was not interested in going to bed with everybody at the workplace. She also told Erdmann subsequently that if he didn't become heterosexual and a Mormon, he would "go to hell." Erdmann also alleges that there was a prayer session after each daily staff meeting, and that he felt pressured to participate. In rejecting the summary judgment motion, Judge Spero found that Erdmann's allegations could be believed by a jury to constitute severe and pervasive harassment as required to find a Title VII violation of religious discrimination. The opinion is not officially reported.

Here's a strange sort of Catch-22. In *Okokuro v. Commonwealth of Pennsylvania*, 2001 WL 185547 (E.D.Pa., Feb. 2001) (not officially reported; exact date of issue not specified in opinion), U.S. District Judge James M. Kelly granted partial summary judgment against the plaintiff in an employment discrimination case brought under Title VII. Although the plaintiff did not mention anything about it in his original complaint to the EEOC or in his subsequent pro se complaint to the court, at some point during discovery he added to his national origin and race discrimination claim allegations that the employer, the Pennsylvania Department of Public Welfare, had discriminated against him because he was perceived

as being a homosexual. In its motion for summary judgment, the state contended that Okokuro could not include this allegation in his case, because he had not included it in his complaint to the EEOC and thus failed to exhaust administrative remedies as to this allegation. Judge Kelly agreed, and granted summary judgment on any sexual orientation discrimination claim. Of course, no mention is made in the opinion that the EEOC does not have jurisdiction of claims concerning sexual orientation discrimination against state employers, so that any attempt by Okokuro to file such a claim with the EEOC would have been futile. To the extent that a state employee can assert a sexual orientation discrimination claim against his employer in a jurisdiction that does not expressly outlaw sexual orientation discrimination, such claim would have to be premised on a violation of the Equal Protection Clause, which presumably would require no exhaustion of remedies. But Mr. Okokuro, being a pro se litigant, didn't know about that, presumably.

In a lengthy opinion issued on Feb. 22, U.S. District Judge Thomas Griesa (S.D.N.Y.) countermanded a jury award of \$80,000 in compensatory damages to Ellen Fitzgerald, a former associate at the law firm of Ford Marrin Esposito Witmeyer & Gleaser, LLP, who claimed sexual harassment and constructive discharge in violation of Title VII. 2001 WL 180053. Among other elements of Fitzgerald's claim of hostile environment sexual harassment, she asserted that various others at the firm had referred to her as a lesbian and as "butch" on various occasions. Although this had apparently impressed the jury, Judge Griesa granted the defendant's motion for judgment as a matter of law, finding that on balance Fitzgerald had failed to establish that the environment at the firm was sufficiently hostile to meet the high standard set by the Supreme Court in its sexual harassment cases.

A jury in Alameda County, California, awarded \$500,000 to Scott Hoey-Custock, a San Francisco police officer who claims he was washed out of the Oakland police training program because he is gay and in retaliation for his complaints about anti-gay harassment by fellow police academy recruits. *San Francisco Chronicle*, Feb. 17.

U.S. District Judge John Coughenour in Seattle dismissed a discrimination claim brought by gay former police officer Dan Mathewson at the close of the evidence, finding that Mathewson fell woefully short of proving a case of intentional discrimination based on sexual orientation. Coughenour found convincing that the Department's refusal to rehire Mathewson after he had quit and then reapplied was fully justified by the record of civilian complaints against him for rough policing in the Capitol Hill area of the city, and that the refusal to rehire had nothing to do with his sexual orientation. Evidently the court was particularly impressed by the testimony of Police Chief Norm Stamper, who said he had worked hard to build bridges to the gay community and had found it

"sad" that he couldn't justify rehiring Mathewson. *Seattle Times*, Feb. 13.

Consistent with its general hostility to same-sex harassment claims, the U.S. Court of Appeals for the 4th Circuit reversed a jury verdict and award of damages to Christopher Lack in *Lack v. Wal-Mart Stores, Inc.*, 2001 WL 119999 (Feb. 13). Lack alleged that the male assistant manager of his store created a hostile environment by engaging in harassing conduct of a sexual nature, and also retaliated against him when he complained by making his work schedule worse. The court of appeals, in an opinion by Circuit Judge King, found that Lack failed to prove he was subjected to the offensive behavior because he is a man, noting that women had also complained about the manager's conduct. The court also rejected Lack's argument that some of the conduct could be characterized as sexual solicitations and come-ons. A.S.L.

Illinois Judicial Ethics Board Charges Judge With Anti-Gay Bias

The Illinois Judicial Inquiry Board filed a complaint before the Illinois Courts Commission on February 5, charging that Circuit Judge Susan J. McDunn allowed her personal views about lesbians to interfere with her performance in two uncontested adoption cases involving lesbian couples. According to the complaint, McDunn did all she could do to delay ruling on the petitions, and appointed the anti-gay Family Research Council as a "secondary guardian" in one of the cases, to ensure that somebody would be present to oppose the adoptions. When the presiding judge in the court, responding to a complaint about McDunn's actions, reassigned the two cases to himself and granted the adoptions, McDunn attempted to counter this action by issuing conflicting orders. After the 1st District Appellate Court rebuked McDunn for her actions, she was reassigned to administrative duties, pending the JIB's determination of charges against her. Now that JIB has filed formal charges before the Commission, McDunn's administrative assignment has been continued. Lambda Legal Defense Fund represented the lesbian couples in getting the matters reassigned and the adoptions approved, and has been pursuing the disciplinary action against Judge McDunn. Commenting on the complaint by JIB, Lambda senior counsel Patricia Logue said that what McDunn had done to Lambda's clients "was really extraordinary and merits this complaint" but is not typical of the Illinois judiciary, according to a Feb. 5 report in the *Chicago Daily Law Bulletin*. A.S.L.

Boy Scouts Developments

At a New York City Council contracts committee hearing on Feb. 26 devoted to investigating whether the City should terminate relations with the Boy Scouts, Deryck A. Palmer, a lawyer who

serves on the Greater New York Councils board of the Boy Scouts testified that the local board disagrees with the national organization's anti-gay policy. *We denounce the national policy; we do not think it is right,*" said Palmer. *"We would like to be an agent of change. We ask you to join us to be an agent of change."* Members of the committee concluded that rather than go forward with a measure to terminate the relationship, they should give the local council a reasonable period of time to seek a change of policy from the national organization. Prior to the hearing, there were reports in the press that Council President Peter Vallone, an announced candidate for mayor, had been trying to broker some kind of deal behind the scenes to resolve the problem. *New York City law prohibits sexual orientation discrimination in places of public accommodations, and City policies forbid contracting with non-religious private entities that do not follow such a policy. City Schools Chancellor Harold O. Levy had previously ruled that schools operated by the Board of Education may not sponsor Scout troops under the current circumstances, but that the Scouts can continue to have access to school buildings for meeting space on the same basis as other outside organizations.* *New York Times*, Feb. 27; *Newsday*, Feb. 26.

Reacting to attacks on the Boy Scouts for their anti-gay discriminatory policies, Rep. Steve Nass (R-Whitewater) offered a resolution in the Wisconsin State Assembly honoring the Boy Scouts and denigrating their critics. Supporters of gay rights managed to get the resolution amended, or as openly-gay Rep. Mark Pocan (D-Madison) said, "neutered." As amended, the resolution passed 80-15. But the day-long acrimonious debate led to an uproar and an apology when Rep. Mike Huebsch (R-Onalaska) made comments reflecting on the sexual orientation of Rep. Tim Carpenter (D-Milwaukee), a bachelor who has refused to discuss his sexual orientation but who helped lead the charge on behalf of the gay rights supporters. Huebsch later issued an apology. *Capital Times*, Feb. 14, 15 & 16.

A charity operated by the *Orlando Sentinel* newspaper in Florida has decided to stop giving grants to programs run by the Boy Scouts because of that organization's anti-gay policies. The publisher announced the change of policy on Feb. 14, according to the Feb. 15 issue of the newspaper.

Boy Scout troops in Fox Valley, Wisconsin, stand to lose all funding from United Way Fox Cities, as a result of a vote in January by the charity's board to stop funding organizations that discriminate based on sexual orientation. *Milwaukee Journal Sentinel*, Feb. 7.

The Connecticut Commission on Human Rights and Opportunities has reaffirmed its position that the State Employee Charitable Campaign may not include the Boy Scouts among its recipients because of that organization's discriminatory membership policies. The Commission had given a similar ruling last spring, but a new ruling was requested by Campaign officials in

light of the Supreme Court's opinion in the *Dale* case. According to the new Commission ruling, while the Scouts may "exclude persons in the exercise of its First Amendment rights; as a result, such an organization may not, however, be entitled to benefits conferred by the government if that organization discriminates... [A] constitutional right to discriminate does not equate with a right to have the government sanction or support an organization's discriminatory policies." Press Release, Gay & Lesbian Advocates & Defenders, Feb. 9.

Maureen Glover, a former employee of the United Way of Monmouth County, New Jersey, filed a complaint with the N.J. Division of Civil Rights against her former employer, claiming that it had subjected her to a hostile environment by requiring her to continue writing checks to the Boy Scouts of America, in violation of the agency's own non-discrimination policy that bars sexual orientation discrimination. "Acting as finance director of an organization that supports an agency that blatantly discriminated against a minority of which I am a member has been a source of considerable stress to me," wrote Glover in her letter resigning from the agency. *Bergen Record*, Feb. 26.

The Portland, Oregon, Police Department has discontinued a Boy Scouts-affiliated Explorers training program, and has reconstituted it as a Police Cadet Program. The decision was made after Mayor Vera Katz, the police commissioner, had the city attorney's office examine the Explorer's association with the Scouts. The chief deputy city attorney reported that the affiliation violates the city's civil rights ordinance, which bars sexual orientation discrimination, and also violates provisions barring the city from contracting with discriminatory employers. Police Chief Mark Kroeker approved the move, saying "We didn't want to keep a name that is still connected with the Boy Scouts. I signed a letter that it's time to change this because of the policy of the city." This was in contrast to the Los Angeles, California, Sheriff's Department, which is continuing to negotiate with the Boy Scouts to see whether they could reach an agreement "where the bylaws can be adjusted or modified to more closely meet the values of the sheriff's office," according to a department spokesman. Portland observers have criticized the public school district for allowing the Boy Scouts to continue recruiting in the schools, especially in light of prior action by the school board kicking out military recruiters due to the Defense Department's anti-gay policies. *Portland Oregonian*, Feb. 12. In Madison, Wisconsin, Police Chief Richard Williams decided to leave the existing Explorer program in place, noting that it was operated under the rubric of the separately-incorporated Learning for Life program, which officially does not maintain the same discriminatory policies for participants as the Boy Scouts traditional programs. *Capital Times*, Feb. 15.

The New Jersey State Education Department has been updating its administrative code, which was last revised in 1975, to reflect subsequent legislative developments, among them the passage of New Jersey's Gay Rights Law in 1993. A spokesman for the New Jersey School Boards Association told the *Bergen Record* (Feb. 9) that a revision of the non-discrimination requirements of the Code could lead to all Boy Scout troops being expelled from public schools in New Jersey, although the Education Department released a statement that the matter was still under discussion.

The United Way of Central Massachusetts voted to withhold funds from all agencies, including the Boy Scouts, that discriminate on the basis of sexual orientation. Contributions made in response to last year's United Way campaign will not be affected by the new policy. Last year, the organization dispenses approximately \$3.8 million to 37 different agencies. *Providence Journal*, Feb. 16.

In Madison, Wisconsin, the Orchard Ridge United Church of Christ has withdrawn its sponsorship of a Boy Scout troop because of the anti-gay policies of the Scouts, which Rev. Winton Boyd said was "inconsistent with our policy of affirming and welcoming gay and lesbian people" to the church. The First Congregational Church, also affiliated with United Church of Christ, is considering ending its ties to another Boy Scout troop. *Grand Rapids Press*, Feb. 17. Washington Park United Church of Christ in Denver held a "separation" ceremony on Feb. 11 to mark the termination of its affiliation with Boy Scout Troop 89 over the anti-gay policy issue. Recited the assembled congregants: "With utmost humility we stand in opposition to the Boy Scouts of America's discriminatory policy... against our gay and lesbian brothers and sisters." *Memphis Commercial Appeal*, Feb. 17.

The United Way of Tucson and Southern Arizona has announced that, in accord with Tucson city policy, it will deny "unrestricted dollars" to any organization that discriminates based on sexual orientation. However, donors can make directed donations that will not be subject to this policy. The United Way board justified its new policy by saying that it had traditionally tracked local, state and federal law in determining recipient eligibility, and so was just following up on Tucson's recent action in adopting such a policy for its own financial assistance to non-profit groups. *Tucson Citizen*, Jan. 30.

The Jewish Community Center in York, Pennsylvania, decided against dropping its sponsorship of a Scout troop, but to work within the Scouts to try to change the anti-gay policy. In particular, the JCC will insist that the troop it sponsors comply with the JCC's non-discrimination policy, which includes sexual orientation. The JCC has sponsored Troop 37 since 1941. *York Daily Record*, Feb. 6. A.S.L.

Criminal Litigation Notes

The war against child pornography may have claimed an "innocent victim" when the N.Y. Court of Appeals unanimously affirmed the conviction of Paul Fraser on February 20. *People of New York v. Fraser*, NYLJ, 2/21/01. Fraser, a retired Air Force captain and certified social worker, had been invited by the Oneida County Deputy Commissioner of Mental Health to join a work group to develop a treatment program for persons convicted of child pornography crimes. He decided on his own to compile information he thought would be useful to this task, including selections of child pornography obtained from the internet. Fraser claims he did so after looking at NY statutes and concluding that the law against possession of such material had an exception for "scientific research." When he brought his computer in to have the hard drive replaced, a technician noticed that there were graphic files with suspicious titles, copied them and turned them over to the police. Fraser was convicted of possessing a sexual performance by a child, sentenced to five years probation, 550 hours of community service, and a \$1,000 fine, which sentenced was affirmed by the Appellate Division. The Court of Appeals rejected his argument that the statute was unconstitutional as applied to him, and rejected his claim that he had made an honest mistake of law, pointing out that the affirmative defense upon which he sought to rely was contained in a section of the criminal code that explicitly did not apply to the possession of child pornography provision. Furthermore, the court rejected his technical argument that a graphic file does not come within the definition of prohibited matter under the child porn statute.

The *Los Angeles Times* reported Feb. 24 that a panel of the California 2nd District Court of Appeal had voted 2-1 on Feb. 23 to remove Superior Court Judge Kathryn Ann Stoltz from determining whether Robert Rosenkrantz should be paroled. Rosenkrantz was convicted murdering Steven Redman, who had outed Rosenkrantz to his family and then apparently provoked the distraught Rosenkrantz. Rosenkrantz has been in prison for 16 years of a 17-to-life sentence, and Governor Gray Davis has refused to parol him. Judge Stoltz was challenged by the state as not impartial in the case due to her prior rulings.

Dary Byczek, accused of yelling derogatory remarks at his lesbian neighbors and writing anti-lesbian graffiti on his truck, was sentenced by Lafayette County, Wisconsin, Circuit Judge William Johnston to one year probation for disorderly conduct. Johnston did not find Byczek guilty of a hate crime. However, Byczek is still facing charges of violating restraining orders and bail jumping, based on complaints filed by the neighbors with local law enforcement authorities. The women had received a restraining order against him from the Green County Court Commissioner, which he allegedly disobeyed. *Wisconsin State Journal*, Feb. 25. A.S.L.

Legislative Notes

For the ninth consecutive session, the N.Y. State Assembly has passed a bill that would outlaw discrimination on the basis of sexual orientation in employment, housing, public accommodations, education and credit, this time by a margin of 113–33, with almost 40% of the Republicans in the Assembly crossing the aisle to support the Democratic bill. Empire State Pride Agenda director Matt Foreman contends that there are enough votes for passage in the Republican-controlled Senate, but the question whether the bill will come to a vote will be decided by the Republican leadership, which has always succeeded in keeping it bottled up in committee in the past. Because of municipal and county sexual orientation discrimination measures, a majority of New Yorkers now live in jurisdictions where such discrimination is unlawful, but the local measures vary greatly in their remedial provisions. *New York Blade News*, Feb. 16.

The Berkeley, California, City Council voted unanimously on Feb. 20 in support of a proposal to require city contractors to provide the same benefits to registered partners of employees that are provided to spouses. The city attorney was directed to present draft legislation for the council to consider in April. Berkeley would be the fourth city in the U.S. to adopt such a requirement, following San Francisco, Los Angeles, and Seattle. *Contra Costa Times*, Feb. 22.

The Arizona Senate Commerce Committee voted on Jan. 31 in favor of a bill to protect citizens of that state from employment discrimination on the basis of sexual orientation. *Arizona Republic*, Feb. 1.

Residents of Royal Oak, Michigan, will be voting May 1 on a proposed amendment to the city's human rights ordinance that would prohibit discrimination on the basis of sexual orientation. The city council voted 4–3 to place the proposal on the ballot, together with a bond issue for fire department improvements. *Detroit News*, Feb. 15.

The Arkansas House Judiciary Committee rejected a hate crime bill that had previously been approved by the state's Senate. The bill died in a tie vote on Feb. 20. *Memphis Commercial Appeal*, Feb. 21.

The West Virginia Senate voted 20–12 on Feb. 23 to approve a hate crime bill that includes sexual orientation. A similar bill passed the Senate last year, but died in the House Judiciary Committee. In the interim, elections have changed the composition of the House, and the current chair of the Committee is a supporter of the bill. *Charleston Gazette*, Feb. 24.

The New Mexico House of Representatives voted 35–31 against a bill that would have added "sexual orientation" to the state's civil rights laws. All but one Republican member voted against the bill, but nine Democrats crossed party lines to vote against, thus defeating the measure in the House, which is narrowly controlled by the

Democrats. There is a possibility that a second vote will be scheduled, if enough defecting Democrats can be persuaded to change their minds. *Santa Fe New Mexican*, Feb. 16.

San Francisco Mayor Willie Brown and the Board of Supervisors were expected to shortly approve a change in the city's employee benefits program to provide coverage for sex reassignment procedures for transgendered city employees. The benefits would become available beginning July 1. Reflecting the difficulty of the surgery involved, the cost of male-to-female surgery is about half of the cost of male-to-female surgery. San Francisco will be the only governmental jurisdiction in the US providing such coverage. It was briefly available in Minnesota, but the coverage for state employees there was phased out in 1998. *Washington Post*, Feb. 17.

Houston Mayor Lee Brown withdrew a proposal before the City Council to provide employee benefits for same-sex partners of city employees, stating that he would first concentrate on getting the Council to pass a law banning sexual orientation discrimination against city employees. But opponents, unsatisfied with the strategic withdrawal, vowed to petition for a city charter change to bar providing employee benefits to anyone but employees, their legal spouses and dependent children. *Houston Chronicle*, Feb. 15. While the debate was going on, the *Houston Chronicle* reported on Feb. 12 that 7 of the nation's 10 largest cities offer domestic partnership benefits to their employees. The three holdouts? Houston, Dallas, and San Antonio, all in Texas. The article reported on the experience of employers who have offered such benefits, reporting based on interviews with human resources personnel that the plans have all proved less costly than had been anticipated due to the small number of people who signed up for the benefits relative to the number who were qualified to do so.

The Utah Senate rejected a law to provide enhanced penalties for bias-motivated crime by a 16–12 margin on Feb. 19. Ironically, just hours earlier the House of Representatives voted 54–17 in favor of a bill to create enhanced penalties for acts of terrorism against farmers and ranchers. The contrast was not lost on hate-crime bill sponsor Pete Suazo (D-Salt Lake City), who said that the difference between the two bills was "simply one of scope." *Salt Lake Tribune*, Feb. 20. ••• Embarrassed by the inconsistency, the Republican majority called up the hate crimes bill again on Feb. 20 and it passed by a vote of 21–5. The bill still needs House approval. *Salt Lake Tribune*, Feb. 21.

The Texas House Judicial Affairs Committee voted 7–2 on Feb. 19 to approve a hate crimes bill that includes "sexual orientation." A similar bill had been approved two weeks earlier by a Senate committee. A similar bill that was introduced in the prior session of the legislature was killed largely due to opposition by then-Governor George W. Bush, stifled in the Senate after having

passed the House. Unfortunately, the Senate committee vote was not positive enough to bring the measure to the floor, but proponents are working on increasing the margin, and the House sponsor plans to hold back from bringing the measure to the full House until after the Senate has acted. *Houston Chronicle*, Feb. 20.

The Colorado Senate Judiciary Committee voted 4–3 in favor of a measure to expand the state's hate crime law to include age, sexual orientation, and mental or physical disability, on Jan. 29. Last year, a similar bill passed the House but was killed in committee in the Senate, so the committee passage was seen as a hopeful sign for enactment this year. *Denver Post*, Jan. 30. ••• But in a Feb. 21 floor vote, a defecting Democrat in the closely-divided Senate helped Republicans defeat a measure that would have provided inheritance rights for same-sex couples where a member of the couple dies intestate. Republican opponents had criticized the bill as a foot in the door towards same-sex marriage. *Denver Post*, Feb. 22.

On Feb. 14, Valentine's Day, U.S. Rep. Jerrold Nadler reintroduced the Permanent Partners Immigration Act, which would amend federal immigration law to treat committed same-sex partners as spouses for purpose of immigration and naturalization rights. Last year's version of the bill picked up 50 co-sponsors, but never got out of the subcommittee to which it was referred. *Chicago Tribune*, Feb. 11.

Washington State legislators Sen. Pat Thibodeau and Rep. Ed Murray have introduced bills in the state legislature to establish civil unions for same-sex couples. *The Columbian*, Feb. 3. A.S.L.

Law & Society Notes

San Franciscans were shocked to learn about the brutal mauling death suffered by Diane Whipple, who was attacked by a dog owned by her neighbors. The next shock arose when they learned that Whipple, a lesbian, was survived by a domestic partner, Sharon Smith, who wanted to bring a wrongful death suit but was being advised that California law provides no cause of action for wrongful death in the case of a same-sex partner. Nonetheless, Smith plans to sue and hopes the courts will expand the concept of spouse to comprehend her case. *San Francisco Chronicle*, Feb. 19.

Representatives of southern Louisiana Presbyterians narrowly defeated a proposal to forbid same-sex unions in their churches at a meeting of the Presbytery of South Louisiana on Feb. 20. However, there was an indication that some voted no not because they supported same-sex ceremonies but because they felt that the broadly-worded resolution might incidentally also ban baptizing children of single mothers or performing marriages for heterosexual couples who had cohabitated prior to marrying. Local presbyteries nation-

wide are voting on the proposal, which had been submitted to the local groups for approval by a national body last year. *Times-Picayune*, New Orleans, Feb. 24.

The school board in Madison, Wisconsin, voted to appoint a full-time counselor to work with gay and lesbian students, making Madison the fifth such public school system to take such a step, after San Francisco, Boston, Minneapolis and Seattle. *Milwaukee Journal Sentinel*, Feb. 27.

The Jefferson County, Kentucky, School Board voted to expand its sexual harassment policy, which had previously covered specific types of harassment (not including sexual orientation), to cover all forms of harassment. The Board amended its Student Bill of Rights to authorize filing of complaints when a student has been discriminated against "for any reason." Gay advocates, who testified at the hearing, were disappointed that the Board did not specifically insert sexual orientation into the policy, but expressed pleasure that sexual orientation complaints will clearly be covered by the new policy. *Louisville Courier-Journal*, Feb. 27.

Emerson Electric's annual shareholder meeting included a vote on a shareholder resolution to require the corporation to adopt a written policy banning sexual orientation discrimination. Emerson officials contend that the company does not discriminate, but that their practice is to limit their written policy to forms of discrimination covered by federal civil rights statutes. Janice Van Cleve, a former Army intelligence officer who spoke in favor of the shareholder resolution, received a warm welcome from management officials, who complimented her on her "professional presentation" and invited her to meet with the company's human resources people to discuss the matter further. Although the resolution received only about 12 percent of the vote, Van Cleve expressed confidence that the company will voluntarily adopt a written policy soon. *St. Louis Post-Dispatch*, Feb. 7.

U.S. Attorney General John Ashcroft, whose troubled confirmation process was complicated by charges of anti-gay animus in his past record (most notably in his opposition to Senate confirmation of openly-gay Jim Hormel as ambassador to Luxembourg), met Feb. 22 with leaders of the Log Cabin Republicans, a gay Republican group that had endorsed his confirmation. A Log Cabin spokesperson said that the organization would be a "resource" to Ashcroft on "civil rights issues." *Washington Post*, *San Francisco Chronicle*, Feb. 23.

Despite appeals from international human rights groups and gay rights organizations, Missouri officials refused to stop the execution of Stanley Lingar, a gay man who was sentenced to death for the brutal 1985 murder of Thomas Allen. There seems no doubt that Lingar committed the crime, but criticism focused on possible jury bias during the sentencing phase of his case as a result of the prosecution's presentation of evi-

dence concerning his sexuality. A co-defendant pled guilty and testified against Lingar in exchange for a prison term. *Los Angeles Times*, Feb. 8. A.S.L.

Registered Partnership Not Marriage, Says Advocate General in European Court of Justice

On Feb. 22, Advocate General Jean Mischo of the European Court of Justice in Luxembourg (E.C.J.) delivered his Opinion (currently available in French and four other languages but not English at <http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en>) in Joined Cases C-122/99 P and C-125/99 P, *D. and Sweden v. Council*, appeals from a Jan. 28, 1999 decision of the Court of First Instance in Case T-274/97 (available in French at <http://europa.eu.int/jurisp/cgi-bin/formfonct.pl?lang=en>), [March 1999] LGLN. The case concerns the refusal by the Council (the main E.C. legislative institution) to treat the Swedish same-sex registered partnership of a Council employee as equivalent to a marriage in relation to an employment benefit. The Swedish, Danish and Dutch governments have intervened on the side of D. Advocate General Mischo's Opinion, which is not binding on the E.C.J. but could prove highly persuasive, urges the E.C.J. to dismiss the appeals.

Advocate General Mischo rejected D's three main arguments: (1) the term "married official" in the European Community's Staff Regulations should be interpreted as including an official who has entered into a Swedish same-sex registered partnership, because Swedish law treats a registered partnership as equivalent to a marriage; (2) the failure of the Staff Regulations to include such a partnership within this term violates the principle of equal treatment; (3) this failure also constitutes an obstacle to free movement of workers contrary to Article 39 of the E.C. Treaty, because it discourages Swedish (and Danish and Dutch) workers with same-sex registered partners from leaving their Member States to seek work in other Member States.

First, he concluded that "marriage" in the Staff Regulations must be given an autonomous and uniform interpretation, based on the situation in the whole of the E.C. rather than in a single Member State. Because only 3 of 15 Member States (Denmark, the Netherlands and Sweden) have passed full, equivalent-to-marriage, registered partnership laws, it could not be said that there had been a general social evolution in the E.C. permitting the inclusion of a same-sex registered partnership within the concept of "marriage." Indeed, a 1998 amendment to the Staff Regulations, prohibiting sexual orientation discrimination by the E.C. against its officials, provides that it is "without prejudice to the relevant provisions requiring a specific marital status."

Second, he found no violation of the principle of equal treatment, and no need to justify the unequal treatment, because an official who is party to

a registered partnership is not in a situation that is comparable to that of a married official. Even in Swedish law, marriage and registered partnership are two juridically distinct categories, with different names and different legal consequences (e.g., in relation to adoption or joint custody of children). The E.C.J.'s holding in Case C-249/96, *Grant v. South-West Trains*, [1998] ECR I-621, that E.C. law did not require equal treatment of unmarried different-sex and same-sex partners, meant that E.C. law did not require equal treatment of married different-sex and registered same-sex partners. His view was not affected by the European Court of Human Rights' statement in *Salgueiro v. Portugal* (Dec. 21, 1999), that distinctions based on sexual orientation generally cannot be tolerated under the European Convention on Human Rights. (He did not cite recent binding and non-binding E.C. measures on sexual orientation discrimination, see [Jan. and Feb. 2001] L.G.L.N.)

Third, free movement of workers does not require that a worker be able to enjoy, in the social system of the host Member State, benefits that are identical to those of his or her own Member State. Advocate General Mischo thus urged the E.C.J., whose judgment could be delivered by July 2001, to leave the question of equal treatment of married different-sex and same-sex registered partners to the E.C. legislature. *Robert Wintemute*

International Notes

According to a bulletin circulated by the International Lesbian and Gay Association, an Islamic court in Bosaso, Somalia, has sentenced a lesbian couple to death — for being a lesbian couple. Bosaso is identified as the commercial capital of a self-declared autonomous region of Puntland in northeast Somalia, which is culturally very conservative and where the population submits to strict Islamic law administered by religious courts. The couple had been living in a committed relationship. The court found them guilty of "exercising unnatural behavior" and sentenced them on Feb. 19 to death by stoning. Ironically, the women, who didn't realize they were doing anything "wrong," came to the attention of authorities when one accused the other of "mistreating" her by refusing to pay for needed medical treatment. A BBC news report quoted by ILGA said the courthouse was packed with hundreds of people who applauded the verdict and cheered when the judge handed down the death sentence. The sentence and execution have not been officially confirmed, and international human rights organizations have contacted the Somali government to protest. ••• Later news reports indicate that local officials are denying to the BBC that the incident occurred as had been reported.

Ken Livingstone, first elected mayor of London, England, announced that he has set aside 100,000 pounds in his budget to establish an office for registration of domestic partnerships. Liv-

Livingstone is considering a proposal to waive the license fee for the first 100 same-sex couples who apply, as a way of publicizing this policy, which would bring London in line with other major world capitals where same-sex couples can formalize their relationships, such as San Francisco, New York, Amsterdam and Paris. Livingstone also plans to perform such ceremonies himself, and to make the London Assembly headquarters available in case any local town halls resist performing such ceremonies. *Times of London*, Feb. 27.

Guyana has been convulsed by debate about gay rights since the National Assembly voted on Jan. 4, 55-0, to approve a bill that would place a ban on sexual orientation discrimination in the nation's constitution. The measure has been sent to the president, but he has indicated his intention to send it back to the Assembly for further consideration in light of outraged arguments that have been raised by leaders of religious groups who were evidently caught unawares by the passage. *Stabroek News*, Jan. 26.

A tragedy sparks a welcome legal reform: In 1999, an anti-gay terrorist set off a bomb at London's Admiral Duncan, a gay bar, killing three and injuring many others. It was observed at the time that Julian Dykes, whose wife Andrea was killed in the bombing, was awarded 10,000 pounds compensation under England's criminal compensation system, but that Gary Partridge, whose partner John Light was killed, received nothing. The essential unfairness of this elicited much press comment. Now the Labor Government has unveiled a proposal to revise the rules governing crime victim compensation so as to recognize same-sex partners on the same basis as opposite-sex partners. (The Crime Injuries Compensation Authority presently recognizes unmarried opposite-sex cohabiting couples for purposes of victim compensation.) If approved, the proposed changes could come into force as early as April. They were introduced in the House of Lords by Lord Bassam on Feb. 19. *Daily Mail*, *The Independent-London*, Feb. 20.

On the eve of his retirement as Chief of the Defence Staff in the United Kingdom, General Sir Charles Guthrie stated that his views on the issue of gays in the military had been vindicated by the successful lifting of the ban. "I was one of those people who never thought homosexuality would

make a difference and the measures we have taken have proved me right," he said, asserting that there had always been gays in the military service, and that the Service had perfectly effective means to accommodate their presence. *Daily Telegraph*, Feb. 16.

An Employment Tribunal in London has awarded 140,000 pounds in damages to a transsexual doctor who proved that her former training school, the National School of Hypnosis and Advanced Psychotherapy, had blocked her accreditation after learning that she had been born male. *The Independent-London*, Feb. 9.

In Canada, parliament member Svend Robinson has introduced a bill that would open up legal marriage to same-sex couples. He argued that as gay and lesbian partners have been held entitled to equal treatment by the Canadian Supreme Court under the Charter of Rights, there is no good reason to deny them the same legal arrangements as everyone else. Robinson, a New Democratic Party member, was joined in his introductory statement by Liberal MP's Bill Graham and Carolyn Bennett, and Bloc Quebecois MP Real Menard. The bill was seconded in the House by NDP member Libby Davies, and has the declared support of Conservative Scott Bryson. The bill is given little chance of success as a private member bill, but Robinson expressed hope that the Liberal party would bring it up for consideration. *National Post*, Feb. 15.

Canada's *National Post* reported Feb. 1 that a Swedish parliamentary committee has recommended authorizing homosexual couples to adopt children, having concluded that same-sex parents are as capable as opposite-sex couples of giving children "a balanced upbringing." The Justice Minister, Thomas Bodstrom, has expressed support for the recommendation.

In Egypt, gay groups expressed anger that the government had closed down 13 Turkish baths in Cairo that were the main social meeting place for gay men. This action followed on the closure of several web sites for gays on government orders. Government officials claimed that the bathhouse closures had to do with the physical safety of the structures, and asserted that some will reopen after renovations. *Daily Telegraph*, Feb. 15.

Mexico's Fine Arts Palace was the scene of a Valentine's Day demonstration for recognition of

same-sex partners. The event was scheduled to focus public attention on two bills pending in the Mexico City Legislative Assembly to establish a domestic partnership registration system in the city. The city's only openly gay legislator, Enoe Uranga, told the press that the demonstrators were not seeking same-sex marriage, just registration and recognition for their relationships. *Arizona Republic*, Feb. 15; *Houston Chronicle*, Feb. 18.

Religious leaders in the Cayman Islands, a British territory, have started a petition drive protesting the decision by the British government to abolish sodomy laws in the territories. *The Record*, Northern N.J., Feb. 5. A.S.L.

Professional Notes

Michael Adams, Associate Director of the ACLU's Lesbian & Gay Rights and AIDS/HIV Projects, will be leaving that organization to join Lambda Legal Defense & Education Fund as Deputy Legal Director during March. Adams has been with the ACLU's New York office for four years, during which he has been involved in a wide variety of cases, perhaps most notably the on-going effort to get the Florida courts to invalidate that state's explicit statutory ban on adoptions by gay people.

New York attorneys Martha E. Stark and Matthew L. Moore have been elected by the board of Lambda Legal Defense & Education Fund to be its co-chairs. Stark is a portfolio manager at The Edna McConnell Clark Foundation and has been Lambda's board treasurer. Moore is an attorney at Davis Polk & Wardwell. They succeed Cynthia H. Hyndman of the Chicago law firm Robinson Curley & Clayton, and Donald M. Millinger, special counsel at the Guggenheim Museum. Lambda is the nation's oldest and largest lesbian and gay public interest law firm.

Rudy Serra was named one of ten "Lawyers of the Year" in the December 25, 2000, issue of *The Michigan Lawyer's Weekly*, for his work on gay advocacy issues and his defense of men unfairly prosecuted for gross indecency under archaic state sex crimes laws. Serra is co-chair of the Sexual Orientation and Gender Identity Committee of the Michigan State Bar's Open Justice Commission. A.S.L.

AIDS & RELATED LEGAL NOTES

Massachusetts High Court Justice Finds Absolute Protection for HIV Confidentiality in State Law

Reversing a lower court order that would have required a criminal defendant to reveal his HIV status, Justice Martha Sosman, sitting as a single justice of the court, ruled Feb. 15 in *Commonwealth of Massachusetts v. Ortiz*, No. SJ-2001-0055, that a state HIV confidentiality

law provides absolute protection against compelled disclosure of an individual's HIV status.

Defendant Luis Ortiz was arrested on Jan. 22, 2001, when police responded to calls about a disturbance in an apartment in Springfield, finding Ortiz covered in blood and wielding a "large butcher knife." When police ordered him to drop the weapon, he advanced on the officers, brandishing the knife. Even after one of the officers shot Ortiz, he continued to resist and had to be

forcibly restrained. During the course of this arrest, the police officers were exposed to a lot of blood, and due to the emergency nature of the situation had been unable to take any protective measures to prevent exposure. One of the officers immediately began prophylactic treatment to prevent HIV infection, but two others decided instead to seek an order compelling Ortiz to reveal whether he is HIV+, as they preferred to avoid

taking the medication (with potentially severe side effects) if they didn't have to do so.

When Ortiz was brought before the Springfield District Court for arraignment on Jan. 25, the prosecution moved for an order that Ortiz disclose "any and all medical conditions which he suffers or has been diagnosed in the past relating to infectious disease." Defense counsel objected based on the 5th Amendment, undoubtedly concerned that the charges against Ortiz would escalate if HIV was in the picture. At the conclusion of the argument, the trial judge granted the state's motion, but ordered that any information Ortiz revealed not be used in determining how to charge him. The order was stayed pending appeal, and the matter was brought promptly before a single justice of the state's highest court, who heard argument on Feb. 14 and ruled the next day.

Sosman observed that G. L. c. 111, sec. 70F provides that any HIV testing requires "written informed consent" from the patient, and that health care providers are forbidden from revealing the results of HIV testing to "anyone other than the person tested absent that person's 'written informed consent.'" According to Sosman, the statute "as worded... provides absolute confidentiality for HIV testing." No specific exceptions are set forth in the statute, which "strongly suggests that the Legislature did not intend there to be any exceptions." Sosman found any doubt on this point to be resolved by subsequent legislative history, in the form of numerous attempts to amend the statute to create exceptions, all of which have been unsuccessful to date. (One suspects that this decision may provide the fuel necessary to propel a new amendment into law, however.) Sosman noted, in particular, that some of the amendments have been aimed precisely at the situation of law enforcement personnel exposed to a defendant's blood, and that the legislature has heard the policy arguments surrounding this circumstance and has nonetheless refrained from amending the statute. Sosman also noted, however, the medical testimony showing that if prophylactic treatment is not commenced very quickly, it is unlikely to be effective in preventing HIV infection from taking hold after an exposure; consequently, the issue is in some sense moot for the police officers in this case who had refrained from immediate treatment.

"It is indisputable that these officers and their families have a compelling desire to know as much as possible about the risks they do or do not face as a result of this particular incident," wrote Sosman. "Although the information they seek may be of no actual medical benefit, their plight is compounded by the sheer uncertainty of what they face. No amount of telling them that the risk of acquiring HIV from this incident is 'minimal' will provide the reassurance that they need, and it is unquestionably agonizing to have to wait for months to learn for sure whether any of the officers have been infected with HIV as a result of the January 22 exposure. Nothing in this decision is

intended to minimize or belittle the difficulties these officers and their families face. This decision merely recognizes, as it must, that it is up to the Legislature to decide whether the concerns of these officers and others in their position, warrant any amendment to the strict confidentiality provisions... To date, when directly and repeatedly confronted with that question, the Legislature has decided that no amendment is warranted."

The state had tried to argue that, strictly construed, the statute only applies to health care providers who are privy to a patient's HIV information, while the district judge's order was to Ortiz himself, but Sosman was not persuaded by this argument, characterizing the distinction as "meaningless," since any knowledge Ortiz might have about his HIV status would be as a result of being tested. "Requiring him to disclose those test results is no different than requiring a health care provider to disclose those results. The import of sec. 70F is clear: The results of HIV testing are not to be disclosed without the patient's consent." A.S.L.

Federal Court Rules on Expert Qualifications in HIV Transmission Litigation

Expert testimony plays a crucial role in HIV transmission litigation. In *Erickson v. Baxter Healthcare Inc.*, 2001 WL 135709 (U.S. Dist. Ct., N.D. Ill., Feb. 9), District Judge Bucklo ruled on the plaintiff's challenges to several expert witnesses proffered by the defendants on plaintiff's claim that her decedent, a hemophiliac, was infected from tainted blood clotting medication in the early 1980s. Plaintiff's decedent died from complications of AIDS and hepatitis in 1998.

Walter Erickson was diagnosed with hereditary hemophilia at age 8, and received intravenous factor concentrates to prevent bleeding beginning when he was a teenager. From internal references in the opinion, it appears that Erickson was born around 1962, and thus would have been a teenager when AIDS began to show up in hemophiliacs around 1981-2. He left a widow, who brought this wrongful death action against several manufacturers of blood clotting medication. The complaint alleges that there were technologies in existence by 1981 to test for and eliminate the risk of hepatitis infection, which defendants did not use, and that the defendants were aware of the risk of viral transmission leading to AIDS well before they began to take any steps to avoid contamination of their medications, and failed to warn hemophiliacs like Mr. Erickson of the risk of infection.

Erickson's challenge to defendants' experts required the court to apply amended Federal Rule of Evidence 702, which was adopted to codify the principles flowing from the Supreme Court's important decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), requiring "that expert testimony must be reliable to be admissible." According to Judge Bucklo, there are

three aspects of the reliability determination: reliable data, reliable methodology, and reliable application of the methodology.

Erickson objected to the proffered testimony of Dr. Kingsley, whose opinion was that "chronic hepatitis B develops in only 5-10% of those who become infected." Kingsley did not identify any source for this figure other than his experience from years of work as an epidemiologist. The court ruled that this testimony would be inadmissible, stating: "Statistical evidence must have a specific source to be reliable; a number pulled out of the air is not 'scientific knowledge.' Dr. Kingsley is barred from offering statistics on viral chronicity in his testimony. For the same reasons, Dr. Holland [another defense expert] is also barred from testifying that evidence of primary HIV infection occurs in less than 20% of patients."

Kingsley was also offered to opine about when Mr. Erickson's infection occurred. Kingsley disagreed with Erickson's doctor, who would testify that the infection likely occurred in 1981. Kingsley, as an epidemiologist with more than twenty years of experience, "is qualified to testify about symptoms that are common to multiple viral illnesses," ruled the court, but there was "complete lack of support" for his speculations about when Erickson was infected. Judge Bucklo observed that the *Daubert* opinion is seven years old, so "defendants have had ample time to educate their expert witnesses about the type of support required for their opinions to be admissible."

The opinion next moves to Dr. Volberding, a frequent expert in AIDS litigation. Volberding was set to testify that Erickson's HIV infection did not interfere with the treatment protocol for hepatitis B or C, since Interferon, the drug of choice, can be prescribed for HIV+ patients. Responding to Erickson's complaint that Volberding cited no authority for that opinion, the defendants pointed to Volberding's resume, listing 159 articles, 29 reviews, 37 books, book chapters and monographs, among other things. "But the defendants cannot seriously expect Ms. Erickson to wade through 311 scientific texts without any references to specific pages to support the opinion in question," wrote the judge. "This would be, in legal terms, like bringing a motion and offering as support only a reference to the 'United States Code.' Dr. Volberding is barred from testifying about whether Mr. Erickson's HIV infection interfered with his treatment protocol for hepatitis."

However, the court found that Volberding was qualified to express an opinion about the state of knowledge in the medical community in 1981 concerning AIDS and factor concentrates, since at that time he was a practicing hematologist and oncologist. "Although it would be ideal to have a citation to some medical publication to support this proposition, he may testify about the standards or common knowledge of the hematology and oncology community." The court also held that two other defense experts could give their opinions about what the medical community be-

lieved at relevant times concerning particular treatments, subject of course to cross-examination if Erickson uncovered evidence that contrary views then prevailed.

As to Dr. Aledort, the court rejected some of Erickson's challenges, because his opinions were based on a review of actual medical records or were supported by peer reviewed published medical journal articles, but as in the case of Dr. Kingsley, the court refused to allow Aledort to give opinion testimony about the viability of treating an HIV+ person with interferon for his hepatitis infection, once again finding that the testimony rested on no authoritative source. And the court also rejected all testimony by Dr. Lazerson, who was offered to counter Erickson's doctor's opinion that physicians decided which clotting medication to prescribe based on convenience rather than on perceived superiority of particular kinds. Erickson's expert was relying on 8 published sources for that assertion, and Lazerson offered only his personal views and experiences to the contrary. The court found Lazerson's proffered opinions to be "largely irrelevant."

The court ruled out opinion testimony from Drs. Volberding, Aledort and Holland about the alleged source of Erickson's hepatitis infection, based on his deposition testimony that when he was a child, somebody told him he had suffered a needlestick injury. The court found this to be a totally unreliable basis for an expert opinion. The court also rejected attempts by Drs. Aledort and Holland to testify that Erickson had been an alcohol abuser, which behavior was a substantial cause of the liver disease from which he suffered. Neither of these doctors had any personal knowledge of Erickson's history, but were basing their statements on medical records that were fuzzy at best on the issue.

The opinion suggests that the *Daubert* standards, as amplified in Rule 702, set a very high bar for expert testimony regarding AIDS issues dating from the early years of the epidemic, and will rule out much that has passed as expert opinion in the pre-*Daubert* litigation over liability of the factor concentrate manufacturers for HIV transmission. A.S.L.

Court Denies Reimbursement for Medications Prescribed for HIV+ Patient

The U.S. District Court, S.D.N.Y., found that Connecticut General Life Insurance (CGLIC) was not responsible for prescription costs of nearly \$25,000 for which which Town Total Nutrition sought reimbursement on the account of an HIV+ patient. The prescriptions were for Ann Lee Chayt's prescription for immunoglobulin (IVIG) for a sinus condition. *Town Total Nutrition v. CIGNA*, 2001 WL 102351 (Feb. 7, 2001).

Town Total sued CGLIC under ERISA. Town Total filled prescriptions for Chayt related to her chronic bacterial sinusitis condition for 5 months in 1998. Chayt had been treated by Dr. Barbara

Starrett who has been treating HIV patients since 1983. Chayt also had Hepatitis C and according to Starrett had been an IV drug user. After surgeries in 1996 and 1997 failed to alleviate Chayt's sinus condition, one the patients of the doctor who performed the 1997 surgery told Chayt that IVIG had helped them with a similar sinus condition. Dr. Hift, the doctor who performed the surgery, believed that Chayt was still using IV drugs because she had track marks. He also advised Starrett that he thought a globulin test should be done prior to prescribing IVIG. Starrett did not have the test done, as she believed that people with HIV may not test accurately and that there was no test commercially available. Dr. Tyler Curiel, a doctor for the CGLIC, testified that there was a test commercially available. Starrett, asked to a "reasonable degree of medical certainty" of the necessity to prescribe IVIG, said that the "treatment deserves a try." Starrett took Chayt off IVIG after Chayt had recurring sinus infections.

At the time that Chayt was taking IVIG, she was also taking antiretroviral agents for HIV. The agents, she said, helped with the sinus condition, but was "insufficient." Curiel testified, as to treating adult HIV patients with HIV with IVIG, that the "consensus of his peers at the clinical and immunology level" was that there "was of no significant clinical benefit and was not cost-effective."

Judge Koeltl, in ruling for CGLIC, found that the IVIG treatment "was not essential for the necessary care and treatment of an injury or sickness" as use of IVIG in HIV patients had been limited to "pediatric populations and, in some instances, adult patients with advanced HIV." Chayt did not have advanced HIV. Koeltl noted Starrett's not having a globulin test done and that Chayt had asked about IVIG after talking to another patient. *Daniel R Schaffer*

HIV+ Plaintiff Loses Employment Discrimination Claims

In *Ihekwo v. City of Durham*, 2000 WL 33140712 (Dec. 24, 2000), U.S. District Judge Beaty (M.D. N.Car.) granted the City of Durham's motion for summary judgment as to HIV+ plaintiff Patrick Ihekwo's claims under the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Due Process Clause of the U.S. Constitution and other state law claims in violation of the North Carolina Equal Employment Practices Act.

Ihekwo is a Nigerian-born black male who worked as a parking garage attendant for the City and was subsequently promoted to a Records Keeper Specialist position with the City's Records Management Department ("RMD"). In January 1995, his physician told him that he had contracted HIV infection. He opted not to share this information with co-workers, but he suspects that unknown City employees obtained records of his prescription medications and conveyed this information to his co-workers. Ihekwo had no other evidence to support this belief and admits

that he did not know how his co-workers learned of his malady.

The City presented evidence that Ihekwo's co-workers did not have access to his personnel file or his medical records. Ihekwo alleges that during the latter part of 1996, several of his African-American co-workers frequently taunted and teased him, talked negatively about him, and made gestures at him because of his malady and because he was from Nigeria. Ihekwo alleged that he reported the taunts and comments to his immediate supervisor, John Parker, who recommended that Ihekwo detail his complaints in writing. Ihekwo also alleged that other incidents occurred to suggest that his co-workers knew of his sickness and that they took pains to avoid touching the same things that he had touched. Ihekwo even alleged that his co-workers made jokes about his imminent mortality and about getting infected with the virus.

In response to Ihekwo's letters, Parker and Margaret Bowers, the RMD Department Head, met with Ihekwo's alleged tormentors and investigated Ihekwo's complaints. After this consultation, the City referred Ihekwo to its Employees Assistance Program for psychological counseling and placed Ihekwo on paid leave for one month. Ihekwo took the leave, but did not undergo counseling because he felt it would not affect his co-workers' behavior. Moreover, Ihekwo refused counseling because he did not want to submit his medical information as a condition of receiving the counseling. In his deposition dated June 1, 2000, he stated that upon his return, his alleged tormentors had been fired and he faced no additional harassment. However, in his affidavit dated August 11, 2000, he stated that the harassment continued after he returned from leave and that no actions were taken to curtail it.

During spring 1997, Ihekwo and the other employees were notified that the RMD was being decentralized and that they would lose their jobs as part of a reduction in force. While meeting with superiors, Ihekwo was told that RMD clerks would receive priority status with the City and would be considered first for all transfer positions for which they applied and were qualified. Although the City disputes this, Ihekwo believed that his written letters triggered a conspiracy by the City, whereby the City eliminated the jobs of his alleged tormentors, decentralized his department, and offered him either undesirable job reassignments or reassignments requiring medical history disclosure. The City considered him for positions as a parking ticket writer, a position with the Cemeteries Department and a Records Clerk position with the Police Department. In turn, Ihekwo believed that the City considered him for the parking ticket writer position because it wanted him to be outside so that he would not infect the other employees, and for the Cemeteries position so that he would reflect on his own mortality.

Ihekwo alleged that the others in his department were transferred to more desirable positions immediately upon the decentralization of RMD. However, he provided no evidence about who was transferred and what qualifications each transferee possessed. Finally, he claimed that the City blacklisted him from receiving offers of employment from other municipalities in the state.

The court found that he could not present direct evidence of discrimination, and that he also failed to satisfy the three-step proof scheme for raising an inference of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pursuant to 32 U.S.C. sec. 12112 (d) of the ADA, a covered entity may require a medical examination after an offer of employment and condition an offer of employment on the results of such examination. Here, Ihekwo refused to comply with this requirement and was unable to provide sufficient evidence that this was not standard procedure.

The City presented evidence that it did not decentralize the RMD for the purpose of discriminating against Ihekwo, but rather sought to reduce costs. Ihekwo did not present any evidence that the City refused to offer him other, more desirable positions in violation of the ADA for which he was qualified at the time of the decentralization. As for the blacklisting charge, Ihekwo failed to produce sufficient evidence from which the court could conclude that medical information was included in his personnel file in violation of the ADA and that this conduct prevented him from getting another job.

The court dismissed Ihekwo's hostile work environment claim and Title VII race discrimination claim because he failed to follow the ADA's administrative requirements. Ihekwo's initial charge of discrimination was based upon a refusal to hire claim, which was filed within the requisite time. However, the hostile work environment claim was untimely, and Ihekwo's Title VII race discrimination claim was similarly dispatched because it was never before the Equal Employment Opportunity Commission.

The court's most interesting determination was Ihekwo's Section 1981 claim. The City argued that there could be no race discrimination because Ihekwo's tormentors were of the same skin color as Plaintiff, so it was really a national origin discrimination claim. The court declined to follow this reasoning, noting that the Supreme Court, in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), concluded that discrimination based upon a person's ancestry or ethnic characteristics is racial discrimination in light of the understanding of that concept when this post-Civil War statute was enacted. Whether there was racial discrimination or not, the court concluded that Ihekwo could not hold the City responsible for the actions of his co-workers.

Section 1983 provides the exclusive remedy for the violation of rights guaranteed by Section 1981. In enacting Section 1983, Congress intended to impose liability only if a deliberate ac-

tion attributable to the municipality itself was the "moving force" behind the plaintiff's deprivation of rights. Ihekwo was unable to provide sufficient evidence to establish either that the City had an official policy or custom of racial discrimination in violation of Section 1981 or that the City showed a deliberate indifference to his treatment. Finally, the court dismissed Ihekwo's due process claim because he failed to show that he had a protected property interest. In North Carolina, an employee is presumed to be an employee-at-will absent a definite term of employment or a contract condition that provides for "for cause" termination only. Ihekwo had no employment contract and thus, no protected property interest. *Leo L. Wong*

Court-Martialed HIV+ Sailor Gets Excessive Sentence Thrown Out

In an interesting parody of the military's "Don't Ask, Don't Tell" policy toward gay and lesbian service members, an HIV+ *straight* sailor got booted for violating the "Do Tell" order. *U.S. v. Sorey*, 2001 WL 83172 (January 24). A military judge convicted Yeoman Third Class David E. Sorey of aggravated assault, breaking restriction and for disobeying a lawful order to inform any sexual partner of his HIV status and its inherent risks. He was sentenced to a maximum term of 43 months confinement, total forfeiture of pay and a bad conduct discharge. Sorey appealed to the US Navy-Marine Corps Court of Criminal Appeals, alleging an error in the findings of the trial court which Sorey believes prejudiced his substantial rights evidenced by the maximum sentence.

In April of 1989, Sorey was diagnosed HIV+ and was advised of the necessary precautions to minimize the risk of transmission to others and he understood that transmission to others could result in death to that individual. He acknowledged a lawful order given to him that prior to engaging in sex, he must inform his partner of his HIV+ status and of the attendant risks. He was restricted to base for 60 days, which he willfully broke one evening when he went to the apartment of "Ms. H." According to this woman's testimony, Sorey did not inform her of his HIV+ status prior to sex, but only told her that she had nothing to worry about and that she would be fine (the facts do not state whether the sex was protected or unprotected). Ms. H stated that she would not have had sex with Sorey had she known he was HIV+.

In his principal assignment of error, Sorey argued that the military judge erred in admitting a portion of Ms. H.'s victim-impact testimony during the presentencing case wherein she read from a college English essay she wrote years ago that described her feelings at that time of being a child of rape, who witnessed domestic violence and, as an adult, as a victim of domestic violence. Sorey further claimed that error was committed when the judge permitted her, over objection, to give her opinion on the appropriate length of confinement

("throw the key away" and "[h]e doesn't need to see the light of day"), form of illegal punishment ("[h]e needs to be castrated"), and rehabilitative potential ("you don't deserve to wear that uniform").

In an unpublished-non-precedent decision, Judge H. C. Cohen wrote on behalf of the tribunal that the findings were correct in law and fact and that there was no error materially prejudicial to Sorey in those findings. However, as to sentencing, the court did conclude that although admitting into evidence the content of Ms. H's English composition was not plain error, permitting her to read in a narrative manner was "fraught with danger" and was an abuse of discretion by the military judge. Ruling that the evidence should have been excluded, the court found prejudice by default in that they were "unable to determine how the inadmissible evidence affected the degree of punishment awarded." The court affirmed the findings but set aside the sentence and sent it back to the Judge Advocate General of the Navy for appropriate action.

The court based its reasoning upon the military judge's affirmative acceptance of improper evidence for consideration on punishment when the judge told Ms. H., "[y]ou can say anything you want, and I have to let you give your testimony in your own way as you are entitled to do," and by overruling the objection to such testimony. Furthermore, the testimony was not offered by the government for anything but aggravation as opposed to rebuttal and impeachment evidence or foundational evidence. "We presume the military judge followed his own ruling and considered the evidence he admitted, and we further presume that the evidence played a role in the level of punishment adjudged. This cannot be called harmless error." *K. Jacob Ruppert*

N.Y. Appellate Division Reaffirms Actual Exposure Rule for AIDS Phobia Claims

In a brief per curiam decision issued Jan. 11, the N.Y. Appellate Division, First Department, reaffirmed New York's adherence to the "actual exposure" rule in AIDS phobia claims. *Kelly v. Our Lady of Mercy Medical Center*, 719 N.Y.S.2d 50.

The defendant hospital, located in the Bronx, was treating many HIV+ patients in the early 1990s when this incident occurred. Patient Donna Kelly suffered an injury from a used lancet, and alleges that she has suffered severe emotional distress since the incident from fear of contracting AIDS. However, she has consistently tested HIV- over the past seven years, and there is no evidence that the lancet in question (which was discarded by a nurse before it could be tested) had been used on an AIDS patient. Indeed, the hospital contends that no AIDS patients were being treated on the floor of the hospital on which this incident occurred.

Under these circumstances, the court found that the plaintiff could not credibly allege a claim

of negligent infliction of emotional distress, and granted summary judgment for the hospital. Affirming, the Appellate Division found that the evidence supported this disposition. The appeals court also rejected the plaintiff's argument, raised for the first time during oral argument of the appeal, that the nurse's disposal of the lancet before it could be tested, created "special circumstances" justifying the emotional distress claim by creating uncertainty about the possibility of exposure in light of the patient population of the hospital. The court also rejected Kelly's attempt to make something of the fact that it took the hospital years to inform her that none of the other patients being treated on that floor were HIV+. The court noted that Kelly had never asked the hospital for that information, and had never raised such a claim at the trial court, thus waiving it. A.S.L.

AIDS Litigation Notes

In *Quinn v. Ultimo Enterprises, Ltd.*, 2001 WL 128242 (N.D. Ill., Feb. 9, 2001), District Judge Holderman almost cut in half the attorney fees requested by Kevin Quinn, who achieved a satisfactory settlement of his HIV-related employment discrimination claim in a one-day mediation session. According to the court's brief factual summary, Quinn, a sales employee, was fired after about 90 days of employment, the day after the company learned he was HIV+. Quinn filed suit under the ADA, and after brief discovery during which 4 depositions were taken, the case was resolved before a prior mediator, which Quinn receiving over \$200,000 in settlement of his claim. However, the mediation settlement did not cover attorney fees. Quinn filed a claim with the court, as prevailing party, for \$160,267.50 in fees, \$4,980.12 in costs, and \$3,723.72 in post-judgment interest, for a total of \$168,971.34, based on a claim of 528.5 billable hours of work by Quinn's attorneys. Judge Holderman evidently found this quite outrageous, characterizing this as a simple case with minimal discovery, resolved in a single day of mediation, and cut the total award down to \$88,520.12. In particular, Holderman found it "hard to imagine" that "with the advances made in electronic research" it was necessary for counsel to expend 43 hours on legal research in this case, cutting down the approved hours for legal research to 8!

The Appellate Court of Connecticut ruled in *Barese v. Clark*, 62 Conn. App. 58, 2001 WL 171904 (Feb. 27), the prosecutorial immunity shields a prosecuting attorney from liability to a crime victim for revealing in a criminal sentencing hearing that the defendant convicted of assaulting the victim had claimed at the time to be HIV+. The victim, who alleges that the prosecutor told her prior to the hearing that he would not mention the defendant's HIV status, filed suit alleging breach of privacy, fraud and intentional infliction of emotional distress. Without addressing the merits of plaintiff's tort claim, the appellate

court affirmed the New Haven Superior Court's conclusion that the prosecutor's statements during the sentencing hearing were well within the traditional immunity afforded prosecutors for statements made within the judicial process.

Alfred E. Gilliam of Bloomington, Indiana, was ordered to submit to HIV testing after he spit in the face of a jail corrections officer on Feb. 3. McLean County Associate Judge James Souk ordered the blood test in a Feb. 5 court session at which Gilliam was handcuffed to a wheelchair and had a medical mask placed over his face "to protect deputies and correctional officers from additional assaults." *Bloomington Pantagraph*, Feb. 7. To date, nobody has every contracted HIV from being the victim of spitting.

In *Mofield v. Bell*, 2001 WL 128383 (U.S.Ct.App., 6th Cir., Feb. 6) (unpublished disposition), the court rejected a claim by a prisoner under 42 U.S.C. sec. 1983 that his civil rights had been denied when he was transferred to a different location in retaliation for his complaints about medical care he received for his HIV infection. The court found that "HIV-infected inmates do not constitute a suspect class that is entitled to special consideration under the Equal Protection Clause," and that the prison's transfer policies "rationally furthered the legitimate state purpose of preventing the spread of a communicable disease." The court provided no explanation in its brief, unpublished disposition, about how it reached its conclusion concerning the rationality of the prison's policies. The court also rejected, as not timely raised, new allegations by Mofield about a variety of issues, some related to his HIV status.

Lester Gomez, an HIV+ resident of Marrero, Louisiana, pled guilty to raping two young boys in exchange for a promise of a life sentence. The prosecutor indicated that Gomez knew he was HIV+ when he committed his sexual assaults, but that so far the boys have tested negative for HIV. *Times-Picayune*, Feb. 7. A.S.L.

AIDS Public Policy Notes

The U.S. Centers for Disease Control announced at an AIDS conference held in Chicago early in February a major new initiative to step up counseling for people newly diagnosed with HIV infection in order to get them to cut down on activity that might spread the virus to others. CDC spokespersons program is aimed at cutting down the annual rate of new infections in the U.S. from 40,000 to 20,000. *Wall Street Journal*, Feb. 7.

The Pennsylvania State Health Department has proposed new rules requiring doctors to report the names of those who test HIV+ to the health department. HIV infection would be added to the list of 52 other reportable conditions and diseases. Doctors are already required to report AIDS diagnoses by patient names. *Pittsburgh Post-Gazette*, Feb. 22.

The Bush Administration's trade representative office announced that the new administration will not change a policy adopted last year by the Clinton Administration under which the U.S. will not oppose efforts by third world nations with significant AIDS problems to obtain inexpensive generic versions of drugs that are patented in the U.S. *Los Angeles Times*, Feb. 21. A.S.L.

AIDS Law International Notes

In Glasgow, Scotland, dentist William John Duff has been sentenced to 21 months in prison for "culpably and recklessly" exposing his patients to possible HIV infection by repeatedly using unsterilized equipment. The Dental Council had previously suspended Duff from practice after determining he was not following appropriate procedures. There is no mention in the news report on this about whether any of Duff's patients have actually been infected with HIV as a result of his faulty methods. *Birmingham Post*, Feb. 23.

Stephen Kelly was convicted Feb. 23 of recklessly endangering Ann Craig by repeatedly having sex with her when he knew he was HIV+. Ms. Craig was infected as a result of his actions. The High Court in Glasgow, Scotland, will be sentencing him during March. Kelly's attorney had argued that Ms. Craig knew he was infected when they began their relationship, which she denied. *Guardian*, Feb. 24. A.S.L.

AIDS Law & Society Notes

Bush Administration chief of staff Andrew Card created a mini-furor by suggesting that the White House would eliminate the National AIDS Policy Office. The day Card's statement appeared in *USA Today*, a White House spokesperson announced that Card had misspoken and the office would be maintained. *Wall Street Journal*, Feb. 8.

The U.S. Centers for Disease Control & Prevention on Feb. 5 issued a new study showing that 30% of young gay black men are HIV+ in 6 large U.S. cities: Baltimore, Dallas, Los Angeles, Miami, and New York. Among young gay men, 15% of Hispanics, 7% of Caucasians, and 3% of Asians were also found to be infected. Overall, the study found that 12.3% of the young gay men in these cities were HIV+. A co-author of the study described these figures as "strikingly high and worrisome... We have not been putting adequate resources into gay men of color. And we definitely need to bolster our efforts at reaching them." *New York Times*, Feb. 6.

The District of Columbia Health Department withdrew an AIDS pamphlet titled "A Christian Response to AIDS" after a protest by the ACLU. The pamphlet, printed with public funds, advised readers that "Jesus is our hope!" A Health Department spokesperson said that the pamphlet had been ordered from a publishing house that publishes a variety of brochures that the city routinely orders, and somebody apparently made a

mistake in spending \$380 for 1,000 copies of the pamphlet to distribute at public health fairs. *Washington Post*, Feb. 28.

The Pennsylvania Health Department has proposed adding HIV infection to the list of name-reportable conditions. At the present time, doctors are required to report the names of those diag-

nosed with AIDS, but the names of those testing HIV+ need not be reported. Health officials claim they can better target prevention programs if they can identify areas of the state with higher incidences of new HIV infection. *Pittsburgh Post-Gazette*, Feb. 22. A.S.L.

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Specially Noted:

Direct from the People's Republic of Vermont, the Vermont Law Review presents a comprehensive symposium issue (vol. 25, no. 1, Fall 2000) on Vermont Civil Unions, including the full text of the Vermont Supreme Court decision in Baker v. State, the full text of the Civil Unions Statute, and articles setting out the history of the litigation and the legislation, derived from a symposium held at Vermont Law School last fall. This will be an essential reference work for anybody laboring in the field of legal recognition for same-sex partners. Individual copies can be purchased from the Vermont Law Review for \$10 (a bargain!). Write to Business Manager, Vermont Law Review, Vermont Law School, PO Box 96, South Royalton, VT 05068. Individual articles noted above.

As widely reported in the press at the time, one of the amicus briefs filed in support of the Boy Scouts of America in the Dale case came from a group of gay folks who argued that the values of freedom of association were, in their view, stronger than the principles of non-discrimination, and thus they urged the Court to reverse the N.J. Supreme Court and uphold the right of the Boy Scouts to exclude whomever they like from their ranks. For a more fully articulated version of this viewpoint, see Richard Epstein's brief article about the case at 74 S. Cal. L. Rev. 119 (Nov. 2000), titled "The Constitutional Perils of Moderation: The Case of the Boy Scouts." To those who have been listening to him over the years, Epstein's analysis here will be nothing new in light of his past writing about the constitutional illegitimacy (in his view) of Title VII of the Civil

Rights Act of 1964. Epstein espouses a "radical libertarian" philosophy under which the constitutional guarantees of free speech, protection of private property, and personal liberty compel a strong distrust of any attempt by the government to dictate the associations and preferences of private actors in our economy, whether for-profit or not-for-profit entities. There is much support for such a viewpoint among gay conservatives of the Log Cabin Republican persuasion, and those who care to understand their point of view would be well-advised to read this economically-brief, skillfully-argued piece.

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EDITOR'S NOTE:

Due to an error in editing, the article in the February issue of *Law Notes* written by Travis J. Tu was incorrectly attributed to T.J. Travis. ••• 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.