BOY SCOUTS ON HIGH COURT AGENDA; SUPREME COURT WILL REVIEW NEW JERSEY SUPREME COURT DECISION IN DALE

Placing a high profile gay rights case on its agenda for the first time since Romer v. Evans, the U.S. Supreme Court announced on January 14 that it will review the federal constitutional issues decided by the New Jersey Supreme Court in Dale v. Boy Scouts of America, 734 A.2d 1196, 160 N.J. 562 (Aug. 4, 1999). The case will be argued this spring and probably decided by the end of the Court’s term late in June or early in July. Lambda Legal Defense & Education Fund represents respondent James Dale.

In this case, the state court ruled that the Boy Scouts of America had violated New Jersey’s law banning sexual orientation discrimination in places of public accommodation by expelling James Dale from his assistant scoutmaster position after learning through a newspaper article that he was a leader of the lesbian and gay student organization at Rutgers University. As part of its ruling, the New Jersey court rejected the Boy Scouts’ argument that they were privileged under the U.S. Constitution to maintain a policy against letting lesbians or gay men be members or leaders in their organization. The New Jersey court’s ruling that the Scouts are a place of public accommodation and that their policy violates the state law is, of course, immune from U.S. Supreme Court review, as the New Jersey Supreme Court is the definitive exponent of the meaning of New Jersey state law.

Thus, the U.S. Supreme Court’s consideration of this case will focus solely on the federal constitutional privilege claimed by the Scouts. Although this claimed privilege was variously characterized during different stages of the litigation, the New Jersey court dealt with it under the rubrics of freedom of intimate and expressive association. The Scouts argued that as each individual troop consists of a small number of individuals who spend time together in a relatively intimate setting, the right of intimate association protected the organization’s decision about whom to exclude from positions of membership or leadership on the troop level. They also argued that the right of expressive association was at stake; that as a private organization, the Scouts have a right to define their mission and expressive purpose and to exclude from membership and leadership positions those whose beliefs and values are inconsistent with the organization’s mission.

In her opinion for the New Jersey Supreme Court, Chief Justice Deborah Poritz rejected both of these constitutional claims. As to the intimate association claim, which is rooted in dicta from the late Justice William Brennan’s plurality opinion in Roberts v. U.S. Jaycees, 468 U.S. 609 (1984), Poritz noted that the Supreme Court had rejected intimate association claims in situations involving private clubs that had as few as 15 or 20 members, not much different from a Boy Scout troop in size, and that the concept of intimate association really applied more properly to family units and people living together. It seems likely that the Scouts will attempt to dispute this ruling before the U.S. Supreme Court by emphasizing Scout activities such as camping in the wilderness during which members of a troop may share the same tent and engage in various contact sports.

On the expressive association claim, the Scouts hung their collective hats on the Supreme Court’s unanimous ruling in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), in which the Court found that the state of Massachusetts had violated the right of expressive association of a private group that runs Boston’s annual St. Patrick’s Day Parade by requiring the group to let the Irish-American Gay, Lesbian & Bisexual Group of Boston participate in the parade. Justice David Souter’s opinion for the Court in Hurley held that a parade is a quintessential expressive activity, engaged in to communicate the parade organizer’s message to those who would view or hear about the parade, and that as such the organizer had a constitutional right to determine what the message would be and to exclude groups whose participation would dilute or contradict that message. In Dale, the Scouts argue that they have defined their mission and message to embody a heterosexual norm and a view of homosexuality as immoral, and thus that they are privileged by the right of expressive association to exclude lesbians and gay men from their organization.

Focusing particularly on Dale as an assistant Scout master, the Scouts argued that keeping him in that leadership position as an openly gay man would provide a role model for the boys in his troop that is contradictory with the mission and goals of Boy Scouts. In advancing this argument, the Scouts pointed to the traditional Scout oath, which requires Scouts to be “morally straight” and lead a “clean” life. In the view of the BSA, being gay is not “clean” and “morally straight.”

Rejecting this argument, Chief Justice Poritz found no evidentiary that when these provisions of the oath were adopted, their framers had any message about homosexuality in mind. Reviewing the trial record, which contained all the basic documents of Scouting, Poritz found that there was nowhere any official expression about homosexuality that would be contradicted by allowing Dale to be a member and a leader, and that opposition to homosexuality was not part of the mission and core values of the organization.

The New Jersey Supreme Court’s decision was unanimous, unlike the Massachusetts Supreme Judicial Court’s decision in Hurley that was reversed by the U.S. Supreme Court, unifying a court whose members have been appointed by both Republican and Democratic governors. (Indeed, Chief Justice Poritz, author of the court’s opinion, was appointed by Republican Governor Christine Whitman.) Nonetheless, predicting what the U.S. Supreme Court will do with this case is difficult. One question not really well developed in Hurley but crucial to Dale is whether it is appropriate for a court, enforcing a civil rights law against a membership organization, to contradict the organization’s own view of its mission, as that view is articulated in carrying out the challenged policy. Of course, this very point was at issue in Roberts v. U.S. Jaycees, where the respondent organization argued that maintaining an exclusively male membership was an essential part of its identity and mission of developing the community and leadership skills of young businessmen; in that case, the Court found that there was no particular political or social point of view embraced by the Jaycees that would be undermined or contradicted by admitting women as member. While there are crucial distinctions between the factual contexts of Dale and Hurley, the core issues are similar enough to make the unanimous Hurley ruling, by a Court whose membership has not changed since then, appear rather daunting in the Dale case. Also, it is not quite so easy to dismiss the intimate association claim, when one considers the rather closer personal association that a Boy Scout troop’s members will have than is the case in a Jaycee, Rotary or Kiwanis chapter.

Evan Wolfson, the senior staff attorney at Lambda who has represented James Dale in the litigation and successfully argued his case in the New Jersey Supreme Court, will undoubtedly face several hostile members of the Court in arguing this case, and has his task cut out for him. A.S.L.
In a 9–1 en banc ruling, the Oregon Court of Appeals held on Jan. 26 that the city of Portland had the legislatively authority to empower individuals suffering discrimination outlawed by municipal ordinance to sue to vindicate their rights. Sims & City of Portland v. Besaue’s Cafe, 2000 WL 633094. The decision overturned a ruling by the circuit court dismissing a discrimination case on the ground that the city lacked the power to authorize a private citizen to file a suit in state court to vindicate a right established only by municipal law.

There is an opinion for the court by Judge Armstrong which apparently represents the views of 5 members of the court, a concurring opinion by Judge Linder that reflects the views of four members, and a dissent by Judge Edmonds.

Armstrong’s opinion, which is rather broader than Linder’s, observes that the Portland ordinance covers sexual orientation, which Oregon’s state civil rights law does not, and this particular discrimination claim apparently involves sexual orientation. (None of the opinions specifically addresses the facts of the underlying claim, the only dispute before the court being over whether the lawsuit could even be filed.) Armstrong finds support in Oregon precedents for the proposition that a municipality “can enlarge the common-law duties and liabilities of private parties” and, insofar as the trial courts of general jurisdiction in Oregon are authorized by state law to entertain claims pertaining to such rights, the city’s action in authorizing private suits for the enforcement of its civil rights ordinance is not in any way purporting to “enlarge” the “jurisdiction” of the state trial courts, as the defendants had alleged.

The defendant was not contending that Portland lacks legislative power to enact a law banning employment discrimination on the basis of sexual orientation. Rather, defendant argued that the statutory authorization of a lawsuit by a private party went beyond the municipality’s capacity, apparently conceding that the city could have authorized a suit on its own behalf to enforce the ordinance but could not empower individuals to act as virtual attorneys general for this purpose.

In the concurring opinion, Judge Linder expressed unease about the sweep of the opinion for the court, whose broad dicta might be construed to authorize the city to legislate on a variety of subjects that are traditionally the exclusive domain of the state legislature. Linder preferred to conduct a narrower analysis into the authority of the city to ban various forms of discrimination by private parties and to afford a judicial remedy for violations, and found support in Oregon cases for those propositions.

Judge Edmonds, the dissenter, accepted the defendant’s argument that the ordinance worked an improper expansion of the state courts’ jurisdiction, contending that only the state legislature or the people speaking through constitutional action could endow the courts with broader authority to entertain claims of rights founded solely on municipal law.

The three, lengthy opinions are focused almost entirely on questions of home rule legislative authority in Oregon, and thus probably not of great interest to those outside the state. What is of particular interest, however, is Judge Linder’s description of the enactment of the ordinance, concluding with the following statement: “The city’s nondiscrimination provisions are far from novel, at least in their fundamental terms. They reflect a now-familiar and commonplace policy of equal access and nondiscrimination in areas basic to the most minimal quality of life in our communities: employment, housing, and public accommodation. In that regard, it is not surprising that defendants do not dispute the legitimacy of the city’s regulatory goal or the city’s general authority to legislate to that end. The days of doubting that so-called ‘civil rights law’ reflects compelling public interests are long past. Nor is there doubt that those policies are of equal or greater concern to municipalities than they may be to states or to the nation as a whole.” A.S.L.

Man Loses Same-Sex Sexual Harassment Appeal in 8th Circuit

The U.S. Court of Appeals for the 8th Circuit affirmed a Minnesota District Court’s granting of summary judgment against a male plaintiff who failed to establish a prima facie case of same-sex sexual harassment, constructive discharge and intentional infliction of emotional distress against his county law enforcement former employer. Klein v. McGonean, 1999 WL 1211830 (Dec. 20). In an academic decision, the court emphasized the crucial factors of timing, the severity and pervasiveness of the harassment and the causal nexus between the harassment and the victim’s protected group status.

Reynold Klein worked as a communications aide in the Hennepin County Sheriff’s Office from 1980 to 1996. More than ten months after his resignation, Klein filed a charge with the EEOC claiming his resignation was a constructive discharge because of a hostile work environment. After receiving a right to sue letter, he filed an action against Hennepin County, its Sheriff, its former Sheriff, former Captain Donald Vodegel and Klein’s supervisor Charles Venske for sexual harassment and constructive discharge under Title VII, U.S.C. §1983, and the Minnesota Human Rights Act, and for intentional infliction of emotional distress. Klein stated in his brief that he was harassed because he was perceived as gay and that he “would not have been treated the same way if he had been a woman.” Klein eventually dropped the charges against the two sheriffs.

Klein alleges that his supervisor, Charles Venske, told him, “[I]f I ever find out that you’re a queer, I’ll fire you,” that he was denied business cards when given to all other office employees, was formally disciplined for “flush[ing] a toilet with his foot,” and was threatened with discipline for calling in sick 55 minutes before his shift. He also claimed that Venske spoke of Klein’s perceived sexual orientation with others in the office and filed unjustifiably low performance ratings and assigned to him menial tasks.

Days before he resigned, Klein found Venske and six co-workers standing behind his desk in a semi-circle “as a symbol of their solidarity among themselves and against [him].” Klein alleged that Venske failed to respond adequately to the incidents of harassment against him and he was allegedly told by Venske that he was “...nothing but a fucking homo.” When Klein reported these incidents including those created by Venske to Venske’s supervisor, Donald Vodegel, Vodegel allegedly told Klein that “[the harassers] are grown men. No, you can’t change them.” Klein also listed other incidents that occurred sometime over the past 16 years.

Damaging Klein’s case were several factors that eventually led to a summary judgment against him. There was no evidence Klein ever filed a formal complaint against the defendants with the county human resources department and many of his allegations were unsupported by dates but did span his 16 years with the office. The district court dismissed all claims, ruling that the Title VII claims were not timely and that Klein had not made out a prima facie case that the violations alleged were severe or pervasive or based on sex, and that his §1983 claim failed due to lack of a prima facie case for constructive discharge.

On appeal, Klein argued that there are material issues of fact related to his claims and to whether a hostile work environment caused him to be constructively discharged. The appellees argued the points made by the trial court judge as well as claims of qualified immunity for supervisor Venske and former captain Vodegel.

Writing for the 8th Circuit panel, Circuit Judge Murphy reviewed the summary judgment de novo and ruled that “mere allegations which are not supported with specific facts are not enough to withstand [the motion].” Because Klein filed his Title VII charge with the EEOC on 1/21/97, he had to have demonstrated that
The U.S. Court of Appeals for the 9th Circuit has affirmed a same-sex harassment verdict. The court ruled that plaintiff Stephen Kelly was entitled to judgment against the individual named defendants for employment discrimination. Kelly v. City of Oakland, 2000 W.L. 16552 (Jan. 12). According to the unanimous appellate panel, a heterosexual park ranger’s civil rights were violated when he was subjected to four years of chronic sexual harassment by his male supervisor. Liability was premised on 42 U.S.C. sections 1983 and 1985, Title VII, and the California Fair Employment and Housing Act.

Plaintiff Stephen Kelly was hired as a municipal park ranger in 1985, and became a member of the city’s police department in that capacity. He alleged that his supervisor, Kent McNab, began to harass him sexually after he separated from his wife in 1989. According to the evidence presented at trial, McNab watched Kelly change clothes in the locker room almost every working day; he insisted that Kelly take meal breaks with him; he would call Kelly at home for reasons unrelated to work; he changed Kelly’s work schedule so that the two would have to work together; he arrived uninvited at Kelly’s parents’ and girlfriend’s house when Kelly was there; McNab’s evaluations of Kelly’s work performance were lower than previous evaluations conducted by other supervisors.

Kelly complained to his immediate supervisors about McNab’s conduct, as did other two other rangers and the departmental secretary. The chief park ranger’s work diary contained four references to the complaints he had received, yet no effective action was taken to correct the situation. In August of 1993, Kelly resigned his position, and filed charges under federal and state civil rights and anti-discrimination laws against McNab, his supervisors, and the city of Oakland. (Kelly’s causes of action for intentional infliction of emotional distress and invasion of privacy were dismissed during the pre-trial phases of the case.)

After a ten day trial, the jury rendered a verdict in Kelly’s favor against the city, McNab and the chief park ranger. The jury awarded Kelly $380,000 in compensatory damages and assessed $35,000 in punitive damages against McNab. The district court also awarded Kelly $564,060 in attorney’s fees.

On appeal, the Ninth Circuit ruled that Kelly was not entitled to judgment against the individual named defendants for employment discrimination based on “hostile work environment;” since it was not clearly established during the relevant time period that hostile environment same-sex harassment was actionable under federal law, these defendants enjoyed qualified immunity from suit. The court therefore reversed the jury’s verdict against the city’s senior park ranger. However, the court affirmed the jury’s verdict against McNab for “quid pro quo” harassment, a cause of action that has been well established since the 1980s, relying on the evidence in the record that he had offered Kelly better work evaluations in exchange for sexual favors.

Writing on behalf of the three-judge appellate panel, Circuit Judge Noonan explained that “the federal right to be free from such demeaning demands was clear without need for a specific holding by a court that such conduct violated an employee’s civil rights.” Noonan was implicitly referring to the U.S. Supreme Court’s 1998 ruling in Oncale v. Sundowner Servs., Inc., 523 U.S. 75 (1998), in which the high court ruled that same-sex hostile environment harassment is actionable under federal anti-discrimination law.

The plaintiff was represented by Norman I. Lustig, Ian Chesir-Teran.

Iowa Appeals Court Refuses to Shift Custody From Mother on “Morality” Grounds

In Shea v. Shea, 2000 WL 62941 (Jan. 26), the Iowa Court of Appeals refused to overturn a custody determination in a case where the father alleged that the mother was morally unfit due to her activities as a stripper and her “interest in a lesbian relationship.” Woodbury County District Judge Phillip S. Dandos had awarded joint legal custody to the divorcing parents, but awarded physical care of the children to Rhonda, the wife, rather than Timon, the husband.

Evidence presented to the trial court included claims that Timon was physically abusive to Rhonda in the presence of the children, and also had a drug dependency problem. On the plus side, Timon could provide “family values and a nice family home” (not further discussed or specified). Rhonda apparently had past alcohol difficulties which she had overcome, and was living in a crowded home with her mother where the two children (girls) sometimes slept in the same bed with her. Judge Dandos had decided it was in the best interest of the girls to live with Rhonda, evidently placing great weight on Timon’s past misconduct and discounting the morality allegations against Rhonda.

In reviewing the case de novo, wrote Judge Miller for the court, “we should elevate no one negative behavior to the point where it becomes the sole dispositive factor or it cleanses the other spouse of prior sins. Making a custody assessment demands judges look at both the affirmative and negative attributes of each parent and their plans for future care of the children.” Finding that Judge Dandos had done exactly that, the court of appeals found that his decision did not warrant reversal, as it was supported by the facts in the trial record. A.S.L.

Federal Court Refuses to Dismiss Claim of Hostile Work Environment Created by Co-Workers’ Homophobic Slurs

U.S. District Court Judge Elfwing ruled on Nov. 24, 1999, that a plaintiff’s claim of a hostile work environment created by anti-lesbian verbal harassment was actionable under Title VII of the Civil Rights Act of 1964. Samborski v. West Valley Nuclear Services Co., Inc., 1999 WL 1293351 (W.D.N.Y.) (slip opinion).

Dawn Samborski was employed at West Valley Nuclear Services, Co., Inc. She alleged that she encountered verbal harassment of an anti-lesbian nature from her male co-workers, who subjected her to constant ridicule because she did not meet her male co-workers’ expectations of what a woman should look like. Her fellow employees regularly made offensive statements to her, such as saying she had a nice penis, or that “even lesbians smoke cigars” upon giving her a cigar. She further alleged that her employer knew of this behavior and took no steps to stop it. She claimed that she was discriminated against on the basis of sex under Title VII and the NY State Human Rights Law (Exec. Law Secs. 290–301).

The employer filed a motion to dismiss, arguing that all of the hostile behaviors and slurs that Samborski alleged were homophobic rather than sexist, demonstrating discrimination on the basis of sexual orientation, which is not actionable under Title VII or Exec. Law secs. 290–301. The defendant did not attempt to show that Samborski failed to allege sufficiently egregious facts to constitute a “hostile working environment” under Title VII. The only question before the court was whether the plaintiff’s basis
for her claim stemmed from treatment she allegedly received because she was a lesbian or because of her sex. (At no point in the opinion is it made clear whether or not the plaintiff is a lesbian.)

Judge Elfvin cited *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), for the proposition that an “inference of discrimination” based on sex may be found even where workplace harassment was not “motivated by sexual desire.” In *Oncale*, the U.S. Supreme Court found that a Title VII violation existed in a situation where a male employee suffered from a hostile working environment created by his male co-workers, who mistakenly believed he was gay. Elfvin further quoted *Oncale* to the effect that “the inquiry demanded is ‘careful consideration of the social context in which particular behavior occurs and is experienced by its target,’ and a determination whether discrimination occurred because of sex.”

Samborski’s position was that she was exposed to working conditions to which her fellow male employees were not. She argued that these conditions exemplified hostility directed toward women, indicating disparate treatment based on sex. Judge Elfvin agreed with her position, citing cases such as *Oncale* (“the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a person who suffered adverse working conditions because he or she did not fit a social stereotype is entitled to relief under Title VII), and *Galdieri-Ambrosini v. Nat. Realty & Development*, 136 F. 3d 276 (2nd Cir. 1998) (holding that “evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender”).

Because the plaintiff presented a plausible legal theory and alleged sufficient evidence of the existence of a hostile working environment based on sex to state a claim under Title VII and the NY State Human Rights Law, the court refused to grant the defendant’s motion to dismiss.

**Elaine Chapnik**

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**Same-Sex Harassment Plaintiff Encouraged to Identify Attackers as Homosexual**

In a Title VII harassment case brought by a gay-appearing heterosexual man, U.S. District Chief Judge Bartlett (W.D. Mo.) denied summary judgement, preserving the plaintiff’s chance to present a jury with “credible evidence that the harasser is homosexual.” *Fry v. Holmes Freight Lines, Inc.*, 72 F.Supp.2d 1074 (Nov. 15, 1999).

During his employment at Holmes Freight Lines, four male dockworker/drivers regularly subjected Michael Fry to verbal abuse of the type inflicted by heterosexual men on gay or “effeminate” men, including such statements as:

“Do you want to suck my dick?” or “take it in the butt?,” “Whose dick have you been sucking?,” telling others “This is Sally. He’s everybody’s bitch” and would “suck your dick 70; and psychological abuse including: sticking a wet finger in Fry’s ear, kissing or touching the back of his neck, throwing him to the ground and attempting to grab his genitals, grabbing Fry’s wrist and simulating sexual intercourse, placing a lighter flame under Fry’s pants, taking Fry’s lunch but returning it minutes later, and placing a lighter to Fry’s newspaper while he was reading it. Fry was the only employee subjected to this conduct, and his complaints to management brought no result. Judge Bartlett’s opinion straightforwardly states: “Fry believes his co-workers may have treated him this way because they thought he was a homosexual. In fact, Fry is not a homosexual,” and cites a doctor’s report stating that Fry “was devastated at being taunted as a homosexual, and was physically intimidated by his co-workers,” resulting in various maladies.

Holmes moved for summary dismissal of Fry’s hostile work environment action on the ground that Fry cannot demonstrate he was harassed because of his sex, characterizing its employees’ conduct as “schoolyard taunts” and “juvenile provocation.” Judge Bartlett denied the motion, citing the *Oncale* rule that same-sex harassment is actionable under Title VII where the plaintiff was discriminated against because of his sex, and reasoned, “The persistent sexual propositions, epithets, and offensive touchings engaged in by Fry’s co-workers suggest that one or all of them may be oriented toward members of the same sex.” (Is the implicit assumption that homophobic actions result from the perpetrators’ internal conflicts with their own homosexual impulses? Or that this is the way gay men make passes?) It is unclear if the Judge intended the statement “A same-sex plaintiff can establish that the defendant’s conduct was based on sex through ‘credible evidence that the harasser is homosexual’” to be the complete list of means to establish that the defendant’s conduct was based on sex, omitting thereby possible sex-plus or stereotyping theories (See “First Circuit Rejects Sexual Harassment Claim by Gay Man.”, *Law Notes*, November 1999).

One hopes that same-sex harassment Title VII plaintiffs will not in every case be compelled to try to identify their attackers as gay or bisexual to prevail. Foreshadowing the issue for a jury trial are Judge Bartlett’s observation that “If the conduct directed at Fry allows the inference that Fry was harassed because he is a man, then those acts constitute ‘credible evidence that the harasser is homosexual,’” versus Holmes’ argument that Fry’s “failure to inquire into the sexual history of his co-workers is fatal to his claim.”

**Mark Major**

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**11th Circuit Panel Upholds Broward County Zoning and Licensing Rules for Adult Businesses**

A unanimous 3–judge panel of the U.S. Court of Appeals for the 11th Circuit ruled Jan. 18 that a licensing and zoning ordinance for Eauduli”businesses adopted in Broward County, Florida, is neither facially unconstitutional nor unconstitutional as applied. *David Vincent, Inc. v. Broward County, Florida*, 2000 WL 33163. In her opinion for the court, Senior Circuit Judge Kravitch found that the district court had correctly applied an earlier decision of the 11th Circuit, ruling on the constitutionality of an earlier version of the ordinance, to rebuff the facial challenge, and the the court’s findings on the as-applied challenge did not show clear error. The district court had concluded that there were seven to nine sites available in the unincorporated areas of Broward County where adult businesses might theoretically locate, and found that this was sufficient to ensure adequate freedom of expression in the county.

The facial challenge focused on ways in which the newer ordinance narrowed availability of adult inventory in Broward by potentially reducing the number of adult businesses. The two differences were that the newer ordinance eliminated a waiver provision under which an adult business could remain in an otherwise unauthorized location if the particular community approved the use, and the new ordinance, unlike its predecessor, requires existing adult businesses to relocate to appropriately zoned spots within five years of its enactment. (The old ordinance had grandfathered existing adult businesses and allowed them to remain in situ.) The court found that these differences were not sufficient to change the constitutionality of the ordinance, which was previously upheld in *International Euteriae of America v. Broward County*, 941 F.2d 1157 (11th Cir. 1991).

In the as-applied challenge, the plaintiff organization of adult businesses contended that the new zoning rules failed the 1st Amendment freedom of expression test by so limiting the availability of appropriate sites as to deprive local residents of access to adult publications. In particular, the plaintiffs argued that various sites found to be available by the district court were not available, as a practical matter. For example, one site counted by the district court would have to be assembled by a business by obtaining rights to several sites and combining them; another was possibly contaminated from a car repair facility, and many of the sites lacked sidewalks and appropriate lighting. The court dismissed these complaints, pointing out that the constitutional requirement is only that sufficient sites are theoretically available, not that they could be easily obtained or developed for the purpose. Furthermore, the court rejected the plaintiffs’ argument that seven to nine sites was not a sufficient number for unincorporated areas
of Broward County. Judge Kravitch noted that as more incorporated municipalities gobbled up unincorporated county land, the amount of space and population to be served by adult businesses subject to the ordinance was decreasing, and so the number of such businesses that could be supported outside the municipalities was shrinking as well. Under the circumstances, the court found that the spaces theoretically available were adequate to preserve the free speech rights at issue. A.S.L.

Albany County (NY) Family Court Leaves Lesbian Co-Parent Out in the Cold

In Matter of William G. TT v. Siobhan, NYLJ, 1/12/2000 (Albany Co., Family Court), Judge Gerard Maney determined that a lesbian co-parent who is the former partner of a biological mother embroiled in a custody suit with her children’s biological father, has no standing to intervene in the matter.

Petitioner William is the biological father of Liam and Faolain, young children who have been living in the custody of their mother. William seeks joint custody, and also protests that his visitation rights have been violated. On Nov. 16, 1999, Anita BB, the mother’s “former partner” who evidently still lives with the mother and the children, filed a motion seeking to intervene in the custody proceeding. She alleged that she has “shared all custodial and parental duties” with the mother, and seeks to intervene to preserve the current custody arrangement so she can continue her relationship with the children.

Judge Maney found that under the N.Y. Domestic Relations Law biological parents have a superior claim to custody over all non-related persons, in the absence of extraordinary circumstances, and implicitly finds that such circumstances do not exist in the case of an “unrelated” same-sex co-parent. Since neither of the biological parents had surrendered custody or been deemed unfit by the court, Anita would lack standing to seek custody or visitation and thus would not have a “real and substantial interest” in the outcome of the custody dispute between the biological parents. Thus, intervention could not be granted.

This case could be Exhibit A for the proposition that existing family law structures in New York are inadequate to deal fairly with the family arrangements of lesbians and gay men. How could a woman who has participated as a de facto parent of two young children have no real or substantial interest in whether their custody remains with her former partner, who evidently has allowed her to continue her parental role, or is given over to the father, who may well seek to interfere with that relationship? A.S.L.

Miscellaneous Litigation Notes

It sounds good, but should we believe it? In Mihut v. Mihut, 1999 WL 1336082 (Tenn. Ct. App., Dec. 28), the court affirmed a custody grant to the father in a disputed case, where, among other things, the father alleged that the mother was unfit for custody because of her possible involvement in a lesbian affair and her exposure of the children to homoerotic literature alleged to be present in her car. The mother denied these allegations. The trial court awarded custody to the father, purporting to base it on a long litany of the mother’s failings (which sound pretty convincing as recited in Judge Highers’ opinion for the court of appeals) and the father’s merits. In discussing the trial court’s decision, Highers states, “The court specifically disarmed the allegations of Mrs. Mihut’s drug and alcohol abuse and alleged lesbian relationship in making the custody determination. The court based its determination on the close relationship between Mr. Mihut and the children and the fact that he had devoted more time and effort to their upbringing.” If this is all accurate, it sounds great. But should we believe it?

New Jersey Superior Court Judge George L. Seltzer rejected the state’s motion to dismiss the case of Scott v. New Jersey Air National Guard, in which Robert Scott, an avowed heterosexual, claimed he was subjected to harassment by fellow Guard members who thought he was gay because he is unmarried, shares an apartment with some male flight attendants, and has no girlfriend and then was punished for complaining about the harassment. Seltzer rejected the state’s argument that this was an internal military matter that should not be handled in the courts, according to a Jan. 8 Associated Press report; Seltzer still has to decide whether Scott was on a “federal” or a “state” mission at the time of the alleged harassment and retaliation; if the former, the state court would be without jurisdiction. A New Jersey statute bars discrimination on the basis of sexual orientation, but would have no effect on federal actions.

Justin Fischer, a participant in the brutal murder of Pfc. Barry Winchell, pled guilty to two counts of obstructing justice and three counts of lying to investigators, and was sentenced to 12.5 years in prison. Fischer goaded Calvin Glover into committing the murder, and supplied Glover with the murder weapon, a baseball bat. Winchell’s mother expressed dismay at this turn of events and vowed to bring a wrongful death suit against Fischer and Glover. Glover, convicted at a court martial, was sentenced to life in prison with possibility of parole.

The Triangle Foundation, a gay rights group in Detroit, issued a press release Jan. 25 denouncing the jury verdict finding Justin Wallace, an accused murderer, to be guilty only of manslaughter in a case where a “gay panic” defense was introduced. According to the Triangle release, no evidence was introduced that the victim, Alexander Charles, was gay, or that he made any sexual advances toward Wallace, but nonetheless trial judge George Crockett, Ill., Wayne County Circuit Court, allowed the defense to argue to the jury that Wallace was fending off a sexual advance when he shot Alexander, age 16, to death.

The Irish Lesbian & Gay Organization, once again waging its annual battle for a permit to hold a St. Patrick’s Day march on New York City’s 5th Avenue on the same date as the gay/exclusionary march run by the Ancient Order of Hibernians, has won a chance at a jury trial. According to a Jan. 26 report in the New York Post that did not identify the judge, a federal jury will hear ILGO’s first amendment claim against the City of New York and Mayor Rudolph Giuliani (who may well be the world’s least successful 1st Amendment defendant). A.S.L.

Public School Developments

The Boston Globe (Jan. 25) reported that the Boston public schools have launched a program aimed at supporting gay, lesbian, bisexual and transgender students in the school system, called The Safe Schools Project. The Massachusetts Education Department provided a $40,000 grant to help hire staff and beginning training programs to assist students in forming and running gay/straight alliances to help promote acceptance of such students in their schools.

Would that all school administrations were thus enlightened. In California, U.S. District Judge David O. Carter announced he would rule Feb. 4 on a request for a preliminary injunction in a pending lawsuit by students seeking to form a gay/straight alliance at El Modena High School. The school board voted to forbid the group from meeting in the school, stating that they found the club’s name offensive and feared that “inappropriate subjects” might be discussed by the students during their meetings, such as human sexuality and reproduction subjects as to which, according to this school board, students must remain ignorant for as long as possible in furtherance of their education. (We know, it sounds strange, but in the U.S. we confide public school policy to person who are elected without regard to their intelligence, knowledge, or suitability to make such policy.) Three days of hearings were held on the petition for preliminary relief, during which students and teachers testified as to the need for a gay/straight alliance at the school. Judge Carter stated that no matter how he rules, he hopes the case will be appealed so that a more authoritative ruling can be had on the issue. Los Angeles Times, Jan. 27.

The California State Labor Commission has ruled that the Hemet, California, school district unlawfully discriminated against a gay teacher when it removed a girl from his class at her par-
Lambda Legal Defense Fund announced plans to file suit against school officials in Washoe County, Nevada, for failure to stop harassment of a gay student who was forced to withdraw from high school without graduating. The complaint in *Henkle v. Gregory* was to be filed in U.S. District Court in Reno, Nevada, on Jan. 28. The suit charges a violation of Derek Henkle’s right to equal protection of the laws, contends that school officials violated Henkle’s first right to equal protection of the laws, and also raises state tort claims of negligence and infliction of emotional distress. In an earlier case decided on equal protection grounds, *Nabozny v. Podlesny*, Lambda won nearly $1 million in damages for a high school student who had to leave school due to harassment that school officials refused to confront. A.S.L.

**Legislative & Administrative Notes**

Ohio’s Republican Governor, Robert Taft, caused consternation among lesbian and gay political leaders in that state by issuing a new executive order on discrimination by state government that did not include a specific ban on sexual orientation discrimination. Prior governors George Voinovich and Richard Celeste had specifically included sexual orientation in their anti-bias executive orders. The executive order, issued over the summer, specifically mentions “race, color, religion, sex, national origin, handicap, age or ancestry,” bases for discrimination that are covered by Ohio statutes, which do not cover sexual orientation. A spokesperson for the governor stated, “We’re against discrimination against anybody for any reason, and that includes sexual orientation,” and claimed that there is a clause in the order that adopts a general non-discrimination principle that could be applied to all groups not covered by federal or state law. But gay leaders were not mollified; Brian Shinn, president of Stonewall Democrats of Central Ohio, characterized this as a major setback for gay rights in the state. *Columbus Dispatch*, Jan. 13.

As the Vermont legislature gets down to work responding to the decision in *Baker v. State of Vermont*, 1999 WL 1211709 (Dec. 20) that the legislature must accord to same-sex couples the same rights that opposite-sex couples get from marriage, the *Boston Globe* reported that the governor’s office had been flooded with phone calls, faxes, and e-mails, many from out-of-state, urging action in one direction or another. The flood began when a conservative, anti-gay radio personality urged her listeners to let the leaders of Vermont know that they were strongly opposed to same-sex marriage or domestic partnership. The first wave of such communications set off panic among some gay groups, which then encouraged their members to communicate their support for same-sex marriage to the governor. The pro-marriage wave eventually outnumbered the anti-marriage wave, leading some to caution that Vermonters are resentful from outsiders telling them what to do. *Boston Globe*, Jan. 14.

On Jan. 26, the California State Assembly voted 41–23 in favor of S.B. 118, a measure originally introduced in the passed by the state senate by Sen. Tom Hayden, which expands the definition of those eligible for unpaid work leave under the state’s Family Rights Act to include grandparents, siblings, adult children, domestic partners and roommates. Some changes made in the Assembly require the bill to go back to the Senate for further consideration. Hayden’s stated rationale for the bill was that it would give job protection to the growing number of unmarried partners, siblings and others who are primary caregivers for sick friends or relatives. *BNA Daily Labor Report*, Jan. 28.

The city council in Boulder, Colorado, is considering an amendments to its Human Rights Ordinance, which already prohibits sexual orientation discrimination, to add discrimination based on gender identity, which would provide protection to all “gender variants,” described as people who have a “persistent sense that one’s gender identity is incongruent with one’s biological sex.” This would clearly extend protection to both pre- and post-operative transsexuals. However, the provision would only apply to people age 21 or older, based on city officials’ perception that youths might not have a persistent sense of gender yet. They clearly need a briefing from transgendered youth! The City Attorney estimates that about 400 residents of the city are in need of this type of protection. One wonders how he gathered his data. *Denver Post*, Jan. 28.

The Colorado Senate Judiciary Committee voted 4–4 on a proposed hate crimes law. The failure to achieve majority support was widely attributed to the inclusion of sexual orientation coverage in the bill. *Denver Post*, Jan. 27.

For several years, Virginia House of Delegates member Karen Darner has been seeking to repeal the Commonwealth’s sodomy law as applied to consenting adults, without success. Now she is pursuing a new strategy, having introduced a bill that would reduce the penalty for oral sex from a $2500 fine to a $250 fine, bringing it in the misdemeanor range. Darner argues that treating consensual oral sex as a felony is totally disproportionate, as it means the loss of voting rights as well as the imposition of criminal penalties. H.B. 718 would make such offenses a Class 4 misdemeanor, generally dispensing with jail time altogether. The Virginia appellate courts are now considering constitutional challenges to the sodomy law arising from the convictions of men arrested in a vice squad sweep of a city park in Roanoke. *Roanoke Times & World News*, Jan. 26. A.S.L.

**Britain Formally Lifts Armed Forces Ban**

On January 12, the United Kingdom government formally lifted the ban on lesbian, gay and bisexual members of the armed forces, in compliance with the judgments of the European Court of Human Rights in *Lustig-Prean & Beckett and Smith & Grady* (see [1999] LGLN 149).

The text of Defence Secretary Geoffrey Hoon’s statement to the House of Commons can be found in a press release at http://www.mod.uk/news/prs/002_00.htm. He began by noting that the new policy “reflected the Court’s conclusion that legally we are obliged to adopt an approach which regards sexual orientation as essentially a private matter for the individual.” The policy involves “a code of conduct to govern the attitude and approach to the personal relationships of those serving in the Armed Forces” which “will apply across the forces, regardless of Service, rank, gender or sexual orientation.” “As all personal behaviour will be regulated by the Code of Conduct with the object of maintaining the operational effectiveness of the three Services, there is no longer a reason to deny homosexuals the opportunity of a career in the Armed Forces. ... As no primary or secondary legislation is required, with effect from today, homosexuality will no longer be a bar to service in Britain’s Armed Forces.” (Unlike in the U.S., the U.K. ban was an administrative policy that had never formally been codified in a statute or regulations. And since 1994, no special criminal laws have applied to sexual activity involving members of the armed forces.)

The new “Armed Forces Code of Social Conduct” (see URL above) is incredibly vague. “Examples of behaviour which can undermine ... trust and cohesion, and therefore damage the morale or discipline of a unit (and hence its operational effectiveness) include: unwelcome sexual attention in the form of physical or verbal conduct; over-familiarity with the spouses or partners of other Service personnel; displays of affection which might cause offence to others; behaviour which damages or hazards the marriage or personal relationships of Service personnel or civilian colleagues within the wider defence community; and taking sexual advantage of subordinates. It is important to acknowledge in the tightly knit military community a need for mutual respect and a requirement to avoid conduct which offends others.” (Emphasis added.) An overall “Service Test” will be applied: “Have
the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service? In assessing whether to take action, Commanding Officers will consider a series of key criteria [not listed in the Code]. According to Geoffrey Hoon’s statement, “commanders will have to apply this Service Test through the exercise of their good judgement, discretion and common sense.” It remains to be seen whether lesbian, gay and bisexual members of the armed forces will be treated equally under this highly discretionary code, in particular with regard to the criterion of the offensiveness of conduct. However, the Code is a major improvement on the former blanket ban.

The Code says nothing about the position of openly lesbian, gay or bisexual members of the armed forces, as opposed to those who are closeted but exposed by third parties, as in Lustig-Peevan & Beckett and Smith & Grady. However, the press release’s Notes for Editors state that “[t]he Armed Forces will no longer require people to disclose their sexual orientation either at the recruitment stage, or during their service in the Forces. If people declare themselves to be homosexuals, then that is a matter for them. No special arrangements will be made for anyone who has made such a declaration. ... Knowledge of an individual’s sexual orientation is not a basis for discrimination.” The Notes also indicate that “[t]hose who have in the past been discharged for being homosexual, may rejoin the Forces as long as they continue to meet the usual entry requirements for personnel seeking reinstatement and have the up-to-date skills we need.”

In the debate following Geoffrey Hoon’s statement, one Conservative M.P. asked: “Will gay partners be allowed to share married quarters?” Hoon replied: “I make it clear that homosexual couples will not have rights or access to service quarters because they will not be married and will not therefore be treated any differently from other unmarried couples.” Another Conservative M.P. expressed his displeasure at the Strasbourg Court’s judgments. “Does [Hoon] not understand the resentment that is felt by some of us in this country that the power to decide the composition of Her Majesty’s armed forces has been usurped by a bunch of foreign judges in some continental city, when it should be decided by the people of this country and by this Parliament? Does he realise that he has created an enormous minefield in which housing will be only one factor?”

Other issues will certainly arise, such as survivor’s pensions for same-sex partners of military personnel. (See, e.g., the Public Sector Pension Investment Board Act, Statutes of Canada 1999, chapter 34 (Bill C–78), s. 136, http://www.parl.gc.ca/36/1/pb-e.htm, amending the Canadian Forces Superannuation Act by defining “survivor” as “a person ... cohabiting in a relationship of a conjugal nature with the contributor for at least one year immediately before the death of the contributor.”) Compared with the “don’t ask, don’t tell” policy in the U.S., the new U.K. policy could perhaps be crudely summarized as “you can tell, but don’t kiss!”

Robert Wintermute

• • • The Express reported Jan. 28 on the first British military member to voluntarily “come out” after the policy was lifted. A sailor on a Royal Navy destroyer “came out” to his mess-mates the evening of the announcement that the ban was lifted. Following his statement, the ship’s commander, Simon Ancona, issued a severe warning to the crew that anyone caught bullying the sailor would face disciplinary action. The sailor, who did not want his name to be published, said: “I was just fed up lying to people, especially when I went home at the weekends. People have asked where I have been and I had to make up somewhere because I had been to a gay club. I had my Navy life and I had my life at home. Coming out in the Navy has been a big weight off my shoulders. It has been like coming out for a second time.” The newspaper reported that the sailor did not appear to have any problems after coming out, and was generally well-liked on the ship. In another story, the newspaper reported that so far only one officer has resigned in protest against the policy change. Brigadier Pat Lawless, saying he was “very sad to leave” after 24 years in the service, said he could not “reconcile my strongly-held moral and military convictions as a soldier and a citizen with the Government decision.” But the Army’s Personnel Director, Andrew Ritchie, told the press that in general Service reaction to the policy change had been “muted and pragmatic.” A.S.L.

Other International Notes

British Home Secretary Jack Straw has decided to let the twins born in the U.S. through a surrogacy arrangement with sperm donated by a couple of British gay men to stay in the U.K., although he will not authorize the grant of British citizenship to them. According to Straw, under British law, which does not recognize these surrogacy arrangements, the twins’ legal parents are the surrogate mother, Rosalind Bellamy, and her husband, even though he is not biologically related to them and consented to his wife’s being inseminated with donor sperm for this purpose. The Express, Jan. 26.

The British media and political circles are convulsed with debate over the infamous Section 28 of the Local Government Act. Passed during the Thatcher Administration, Section 28 forbids publicly-funded local councils from providing funds for discussions of homosexuality in anything other than a negative light, and forbids teaching that gay relationships are an acceptable form of family life. Although Section 28 does not work directly on the curriculum of public schools, it is claimed that it has had a chilling effect on any instruction about homosexuality. P.M. Tony Blair campaigned for office on a pledge to repeal Section 28, and the vote, both in the English Parliament and in the new Scottish Parliament, will be coming up soon. Public debate on the measure is intense. Blair has vacillated over whether to give Labour members a free vote, or whether to impose party discipline on the question. When he floated a free vote trial balloon late in January, intense pressure from back-benchers and openly gay party members quickly drove him in the other direction, and Education Secretary David Blunkett was sent out to assure the public that the schools will continue to teach that hetero-marriage is the best foundation for family life. Only one Labour MP has actually come out against repeal, and the greatest danger to repeal is seen in the House of Lords, even with the reform under which most hereditary Lords were deprived of their seats. The Express, Jan. 28; The Guardian, Jan. 27.

Somewhat contradictory reports came out of South Africa over the final content of a new law banning discrimination that is supposed to be enacted shortly to meet a deadline set by the Constitution. The South African Constitution forbids the government from discriminating on a long list of enumerated grounds, including sexual orientation. The legislation will extend that policy into the private commercial sphere. While the inclusion of sexual orientation is not controversial, there has been argument over the inclusion of HIV status as a distinct category; it was included in the original bill, but now seems to have been relegated to a secondary list of categories that will not be included in the bill but are mandated for further study. However, at least one press report suggests that the law will be used to address the issue of HIV-related discrimination by insurance companies. At deadline, the law had passed one house of the parliament but still awaited consideration in the other house. The Daily Telegraph, Jan. 27; The Guardian, Jan. 26; Agence France Presse, Jan. 26.

Following on France’s enactment of the Civil Solidarity Pact legislation establishing formal recognition of domestic partnerships last year, Air France has announced an extension of its subsidized fares for employees’ spouses to same-sex couples who are registered under the new law. A company spokesperson said, “Our aim is to treat our staff and our clients who have legally registered their partnerships the same as married couples.” Wockner International News, Dec. 27.

Beginning Jan. 1, unmarried couples in Belgium have been able to form cohabitation contracts under a law adopted on Nov. 23, 1999, and to obtain official recognition of their relationships. However, there are doubts about the extent to which this recognition will lead to con-
AIDS & RELATED LEGAL NOTES

Supreme Court Refuses to Review Terrible 11th Circuit Opinion on Prisoners With HIV

The Supreme Court announced Jan. 18 that it had denied a petition for certiorari in Davis v. Hopper, No. 98–9663, 2000 WL 29361, thus leaving in place the 11th Circuit’s April 7, 1999, decision in Onishea v. Hopper, 171 F.3d 1289 (1999). In Onishea, the circuit court upheld the Alabama prison system’s policy of segregating HIV+ inmates and restricting them from participating in any activities with uninfected inmates, including religious services, use of library facilities, recreational programs, and all other contacts. The circuit court’s rationale was that it should defer to prison authorities’ judgment about their ability to control prisoners and prevent them from spreading HIV within the prison system. In so doing, the circuit court adopted a risk analysis that held, in effect, that because the consequences of HIV transmission are severe due to the lack of a cure for AIDS, any risk at all that transmission might occur should be considered a significant risk, and thus under federal disability law the prison system would have a defense to any discrimination claim brought on behalf of the HIV+ inmates.

Responding to the Supreme Court’s request for its views on the then-pending petition for certiorari, the Clinton Administration filed a brief with the Court early in January urging it not to hear the case. In its response to the Court, the Clinton Administration actually suggested that the circuit court’s handling of the case “may well be overbroad” and that perhaps it should have separately evaluated every activity from which HIV+ inmates are excluded and concluded that they should be allowed to participate in some of them, but ultimately argued that due to “the violence that is an inescapable part of prison life,” the circuit court’s conclusion was not so far out of line to justify the Supreme Court in taking the case. Advocates for people with HIV, who filed several amicus briefs with the Court urging it to take and reverse the case, argue that the rationale used by the 11th Circuit could significantly undermine the protection for HIV+ people under sec. 504 of the Rehabilitation Act and the Americans With Disabilities Act, through its anachronistic risk analysis (which doesn’t take account of current treatment data, being based on a trial record that predates current treatments) and its discordance with the purpose of the statutes. New York Times, Jan. 3. A.S.L.

Supreme Court Refuses to Review HIV Benefits Case

On Jan. 10, the Supreme Court announced its decision to deny certiorari in Doe v. Mutual of Omaha, 2000 WL 12573, denying certiorari in Doe v. Mutual of Omaha, 179 F.3d 557 (7th Cir. 1999), in which the 7th Circuit rejected a claim that HIV-caps in a health insurance policy violated the ADA’s ban on disability discrimination by places of public accommodations. The Circuit Court did find that an insurance company is a place of public accommodations under the ADA, but concluded that the statutory ban applied only to the following situations: where a person with a disability would be prevented from obtaining physical access to the company’s offices, or where the company would refuse to sell an insurance policy to a person with a disability. However, the court held that the contents of such policies would only be implicated if the insurer treated people with disabilities differently from people without disabilities. In the pending case, where the insurer placed a low life-time cap on HIV-related claims and not on other claims, the court found that the cap was there for all policy purchasers, regardless of their disabilities, and thus did not reflect inequitable treatment. The same rationale was recently followed by the 9th Circuit in Weyer v. 20th Century Fox Film Corp., 2000 WL 1643 (9th Cir., Jan. 3), which cited Doe v. Mutual as authority. These opinions do not deal directly with the question whether an employer-provided health plan can impose HIV-caps, which arises under the employment title of the ADA rather than the public accommodations title. To that issue, the courts are divided and the Equal Employment Opportunity Commission, which has enforcement authority for the employment title, has opined that caps are unlawful. However, the rationale of the 7th Circuit (and some other courts) can’t be helpful to those pursuing HIV caps claims under the employment title. A.S.L.

District Court Says Rehabilitation Act Protects Inexperienced Physician Who Transferred HIV Patient

The U.S. District Court for the District of Massachusetts ruled Jan. 7 that an obstetrician-gynecologist, Dr. Hee Man Chie, did not discriminate against Vickie Lesley, an HIV+ expectant mother, by transferring her care to another provider upon learning of her seropositive status. Lesley v. Chie, 2000 WL 19251. The court reasoned that Section 504 of the Rehabilitation Act of 1973 protects a healthcare provider’s bona fide medical treatment decision to transfer a patient’s care when the disability creates complications which the doctor lacks the experience or knowledge to address.

The case arose in December of 1994 when Lesley began prenatal care with her longtime physician, Dr. Chie, an obstetrician/gynecologist in Leominster, Mass., with a practice that accepted Medicaid funding. Dr. Chie became aware of many complicating factors that made Lesley’s pregnancy high-risk: her severe manic depression, her treatment thereof with psychotropics associated with birth defects, a history of diabetes and a late term abortion earlier that year. He planned to consult with other doctors about these complications when necessary. In March 1995, Chie learned of Lesley’s seropositive status after routine prenatal blood work. Clinical trials conducted in 1994 by the Massachusetts Department of Public Health (DPH Advisory) revealed that mother-fetus HIV transmission was significantly reduced when the mother takes AZT orally during pregnancy, intravenously during labor and delivery, and the infant is given AZT upon birth. Dr. Chie had never before prescribed AZT to any patient or monitored a patient receiving AZT. Dr. Chie informed Lesley that although he had treated HIV+ genealogical patients, he had never before provided prenatal or obstetrical care to an HIV+ woman.

Dr. Chie immediately called Leominster Hospital pharmacy to inquire whether it had AZT in its formulary to be given intravenously during labor. The pharmacy informed him that the drug was unavailable and that he would have to contact a hospital committee for acquisition approval. Dr. Chie did so, but from March 29 to 30,
1994, the committee had not ruled on the request. Since Lesley was beginning her 14th month on March 30th, the time when oral AZT treatment should begin, Dr. Chie inquired at Worcester Memorial Hospital, one of the hospitals which participated in the clinical trials upon which the DPH Advisory was based, and discovered it had a program that gave AZT management treatment to pregnant mothers and infants. Dr. Chie informed Worcester Hospital that if he could not secure a doctor to serve as a consultant for the AZT therapy, he would transfer Lesley to Worcester Hospital to begin the oral AZT phase of the AZT therapy. Lesley’s primary care physician and psychiatrist concurred with the plan to transfer.

On March 30, 1995, Dr. Chie again told Lesley of his inexperience with AZT and pregnancy, that he could not secure consulting physicians with the necessary experience and knowledge thereof, that time was running out for her to begin AZT therapy and that she should consider treatment by the Worcester Hospital. Dr. Chie transferred Lesley’s care to Worcester Hospital that afternoon.

Lesley later sued Dr. Chie, alleging violation of her civil rights under the ADA, the Rehabilitation Act of 1973, and the Massachusetts Public Accommodation Law. She alleged that Dr. Chie transferred her care to Worcester Hospital because she was HIV+. The hospital was later dropped from the suit and the ADA claim was settled via stipulation. Parties cross-moved for summary judgment on the remaining two counts under the ADA and the state anti-discrimination law.

Judge Gorton granted summary judgment to Dr. Chie, finding that he did not discriminate against Lesley solely because of her disability (HIV). Gorton found that Lesley satisfied two of the four criteria for a prima facie case under Section 504: that Lesley was statutorily disabled, and that Chie’s practice is a “program or activity” that receives federal financial assistance. The court did not find it necessary to rule on whether Lesley was “otherwise qualified” for the program, because of Gorton’s conclusion that she had failed to establish discriminatory treatment by the doctor.

Relying primarily on the legislative history of the Rehabilitation Act, the court found that transferring Lesley’s care to a facility better able to treat her and her unborn child would not constitute discrimination solely on the basis of her HIV+ status. The judge reasoned that although a physician must make reasonable accommodations for persons with disabilities, the Act does not compel physicians receiving federal funds to treat an individual who requires care beyond the physician’s ability or expertise. The Act protects a provider who makes a referral, provided that the referral was part of a bona fide medical treatment decision and that a similar referral would be made if the person was not disabled. “Where treatment by a specialized facility is available as an alternative to treatment by a doctor who has no experience treating a life-threatening illness, the doctor cannot be expected to ignore what he believes to be the best interests of his patient and her fetus and treat the patient himself,” Gorton concluded.

The court further stated that even if Dr. Chie was able to treat the non-HIV related complications, the addition of yet another complication which he was unqualified to treat was reason enough to transfer Lesley’s care to Worcester. The only defense would have been if the transfer was medically inappropriate, a defense as to which no evidence was given or likely to have existed, in light of the overwhelming expert testimony supporting Dr. Chie’s decision and the contradictory testimony by Lesley’s lone expert claiming that no specialized knowledge is necessary to administer AZT (despite the DPH Advisory stating otherwise). Further damaging Lesley’s case was evidence that Dr. Chie had long treated HIV+ women in his practice and had continued to treat Lesley for some time after her HIV+ status.

Based upon this reasoning, the court found that Lesley likewise failed to establish a prima facie case under Massachusetts’ similar anti-discrimination statute. K. Jacob Ruppert

Virginia Supreme Court Refuses to Dismiss Emotional Distress Claim Against Mental Health Facility for Sexual Assault by HIV+ Inmate Against Another Inmate

Largely reversing a ruling by the circuit court that had sustained demurrers to all the plaintiff’s claim, the Virginia Supreme Court found in Delk v. Columbia/HCA Health Care Corp., 2000 WL 26998 (Jan. 14) that a woman confined in a mental institution could maintain an action for the institution’s negligence failure to protect her from an assault by another inmate who was HIV+, and could maintain an action for intentional infliction of emotional distress. However, the court sustained dismissal of a claim for negligent infliction of emotional distress, given the lack of a substantial physical injury suffered by the plaintiff.

Plaintiff Lilian Parker Delk was confined in the defendant’s institution, known as the Columbia Peninsula Center for Behavioral Health, for treatment of her severe bipolar condition. She claims special vulnerability due to the emotional aftereffects of childhood sexual assaults, and asserts that this special vulnerability was known to the Center staff. According to her complaint, “on or about February 26 or February 27, 1997, a male who is believed to have been a patient at the Defendant’s psychiatric facility at the time of the sexual assault, and who was also believed to be HIV positive, entered [Delk’s] room on the acute care unit of [the Center] and sexually assaulted her. Although members of the nursing staff observed and documented the presence of this unauthorized adult male in [Delk’s] room, no further actions occurred from the staff or management... No notation was made in [Delk’s] medical records regarding the sexual assault.” Delk argued that the Center had a duty to protect her in these circumstances, and that the known propensities of her alleged assailant would support a finding that the Center breached that duty by not restraining him and protecting her. The Center persuaded the lower court that on these facts it had no duty and the claims should be dismissed.

In an opinion for the court, Justice Leroy R. Hassell, Sr., found that with one exception the plaintiff’s legal theories were sufficient to withstand the motion based on the pleadings. Hassell found that Delk’s complaint contained sufficient allegations “which, if proven, would establish the existence of a special relationship between her and Columbia Peninsula Center... and, thus, would give rise to a duty on the part of the defendants to protect her from third persons.” The normal rule is that a person has no duty to protect another from the actions of a third. The court also rejected the argument that as this assault was not foreseeable, the Center could not be held negligent for failing to prevent it. Hassell found that Delk’s allegations sufficiently raised the possibility that this assault was foreseeable, by asserting her special vulnerability, known to the defendants, and alleging that the Center was also aware of the alleged assailant’s “troubled history, predisposition, disturbing interaction with other patients, and medical condition.” The court also found relevant to the negligence cause of action the allegation that the Center’s staff knew of the incident but took no action.

Hassell also found that the trial court erred in dismissing Delk’s claim that the Center breached a duty to control the assailant, finding that as the assailant was also an inmate of the institution, the Center had “taken charge” of him and thus would have a duty to prevent him from causing harm.

The court also reversed the circuit court’s dismissal of the intentional infliction of emotional distress claim. Here, Hassell found, Delk’s factual allegations could, if proved, lead to the conclusion that the Center acted recklessly if it knew Delk was exposed to HIV as a result of this assault and failed to inform her “so that she could have taken preventive measures to avoid transmission of the potentially fatal disease to her husband.” Although apparently Delk was not infected in the incident, the court found that her allegations about past and continuing costs of medical care in consequence of her exposure to HIV were sufficient to meet the requirement of an actual injury. However, in its lone point of agreement with the circuit court, the court concluded that the negligent infliction of emotional distress claim was properly dismissed. In Vir-
ginia, an actual physical injury is necessary to ground such a claim, and none was shown here. “Dekl failed to plead with specificity that she incurred a physical injury which was the natural result of fright or shock proximately caused by the defendant’s alleged negligence,” wrote Haswell. A.S.L.

No Tort Claim Allowed on False HIV+ Diagnosis

In Doe v. Philadelphia Community Health Alternatives AIDS Task Force, 2000 PA Super 6, 2000 WL 14486 (Jan. 11), a three-judge panel of the Superior Court of Pennsylvania affirmed a summary judgment against a plaintiff who sued a testing agency for negligent infliction of emotional distress resulting from a “false positive” test for HIV.

“John Doe” had come to the defendant, known as PCHA, for HIV testing in January 1993, shortly after having an “unsafe sexual experience.” PCHA tested him three times. The first two tests were indeterminate, but after the third test, which PCHA advised “would take into consideration that Appellant was from Africa,” Doe was advised that he had tested positive for HIV. Doe was referred to a treating physician who apparently never retested him during a course of treatment which lasted over a year. Doe was referred to a clinical study during the Spring of 1993. It was during screening for this clinical study that Doe was found not to have any type of HIV or AIDS.

Doe sued PCHA, the treating physician, the laboratories which performed the tests, and the Pennsylvania Department of Health. The private labs were dropped as parties and Doe reached settlements with the other parties before PCHA’s motion for summary judgment was granted.

The appellate court affirmed, reasoning that Pennsylvania does not recognize a cause of action for “fear of AIDS,” and Doe’s claim did not set forth a facts sufficient to support a claim for negligent infliction of emotional distress. In order to prevail on the negligence count, Doe would have to show that PCHA had a contractual or fiduciary relationship with him, that he had suffered a physical impact, that he was in a “zone of danger” and at risk of immediate physical injury or that he had a contemporaneous perception of a tortious injury to a close relative. Doe never alleged a contractual or fiduciary relationship with PCHA (for reasons unstated in this opinion and which elude this writer), nor did “zone of impact” or “contemporaneous perception” apply to this case.

Doe argued that he did suffer a physical impact as a result of PCHA’s negligence in that he had two flu shots which he would not have had but for the false positive test. The court rejected this argument, finding that the shots themselves did not constitute a sufficient impact to sustain a claim for negligent infliction of emotional dis-
tress, as a matter of law; many healthy people take such shots each year, and any physical side effects were minor. Steven Kolodny

AIDS Litigation Notes

The U.S. Supreme Court announced Jan. 21 that it will review a decision by the 11th Circuit in Florida Dept of Corrections v. Dickson, No. 98–829, on whether Congress exceeded its constitutional authority by making the Americans With Disabilities Act (ADA) applicable to state employees. The 11th Circuit held that the ADA was enacted pursuant to Congress’s power to enforce the 14th Amendment Equal Protection Clause, and contains a clear statement of abrogation of 11th Amendment immunity, see 139 F.3d 1426 (1998). On Jan. 25, the Court announced it had granted certiorari in Albrook v. Maumelle, No. 99–423, in which the 8th Circuit rendered a decision contrary to the 11th Circuit ruling, finding an 11th Amendment bar to an ADA suit. (According to a news report in the BNA Daily Labor Report on Jan. 26, the 4th, 5th, 7th, 9th and 11th Circuits have now held that ADA’s application to state employees is constitutional; the 8th Circuit’s en banc ruling in Albrook creates the circuit split. The Supreme Court recently held that state employees may not sue for enforcement of the Age Discrimination in Employment Act, in Kimel v. Florida Board of Regents, 2000 WL 14165 (Jan. 11), due to the concept of state sovereign immunity that a bare majority of the Supreme Court has been developing (over vigorous dissent) during the past two terms as a limitation of Congressional power, and relying on past holdings that age is not a suspect classification under the federal Equal Protection Clause. In its fact-findings embodied in the disabilities statute, Congress found that people with disabilities constitute “a discrete and insular minority who have been faced with restrictions and limitation, subjected to a history of purposeful unequal treatment,” thus using the “buzz words” of suspect classification. Of course, the Court might disagree with Congress about whether people with disabilities fit that category, especially in light of its prior holdings against strict scrutiny in cases brought on behalf of people with mental disabilities.*** If the Court decides that Congress lacked authority to authorize ADA suits against the states, people with HIV/AIDS who are state employees will have lost a valuable weapon in the fight against discrimination in employment, housing and public accommodations and services.

In a brief unpublished opinion in State v. Horton, 1999 WL 1220546 (Dec. 20), the Washington State Court of Appeals, Div. 1, reiterated to a superior court judge who evidently didn’t “get it” that automatically demanding HIV testing of somebody upon conviction of a crime is contrary to state law. In this case, David Horton was convicted of delivering rock cocaine, and King County Superior Court Judge Richard Ishikawa ordered HIV testing as a condition of his sentence. Wrote the court, per curiam, “The State concedes the court did not have authority to impose HIV testing because RCW 70.24.340 limits the imposition of HIV testing as a condition of sentence for a drug offense “associated with the use of hypodermic needles.” The State acknowledges rock cocaine is seldom used by means of a hypodermic needle, and Horton did not possess any such needles or related paraphernalia when he was arrested.” The court remanded for sentencing consistent with its opinion.

In a brief opinion adopting a magistrate’s report, U.S. District Judge Buchwald agreed that a man convicted under the federal terrorism law was not entitled to a petition of habeas corpus based on the argument that he had AIDS, where he was not in a severely debilitated state. See Rhoades v. Senkowski, 2000 WL 60885 (S.D.N.Y., Jan. 21).

Ronald McDonald (we kid you not, that’s the name), an HIV+ man, was sentenced to two years in prison by U.S. District Judge Frank Bullock, Jr., for lying to insurance companies about his health in order to obtain life insurance policies that he then viaticated. McDonald was indicted by federal authorities investigating a pattern of abuse involving many people, and then pleb guilty for the short sentence while promising to assist federal authorities in the continuing investigation. According to a report in the Greensboro (N.C.) News & Record (Jan. 25), McDonald’s attorney maintained that his client didn’t know he was doing anything wrong, but was merely a “pawn” who was “conned” into participating in the fraud. According to allegations of federal investigators, McDonald obtained policies with a face value of $155,000 based on his fraudulent applications, and then sold them to a viatical company for $18,600. As part of the plea bargain, he pled guilty to one count of mail fraud and all other charges were dropped. The insurance agent who helped him with the scheme was also indicted, and his case is pending.

Larry D. Lowe, 44, accused of exposing a 13 year old boy to HIV by fondling him and performing oral sex on him, was convicted in Clay County, Missouri, Circuit Court and sentenced by Judge Larry Harman to six consecutive 7-year prison terms and a fine of $5,000. Lowe continued to maintain his innocence, asserting that he had not had sex with anyone since contracting HIV from drug use and being diagnosed in 1994. Kansas City Star, Jan. 27.

Ryan C. Weaver, 23, was sentenced to almost 5 years in prison in the Chelan County (Wash.) Superior Court after pleading to a second-degree assault charge that he had exposed a sexual partner to HIV. The sexual partner, a woman, approached police after learning that Weaver
was HIV+. She was not infected. Seattle Post-Intelligencer, Jan. 21.

In *Butera v. District of Columbia*, 1999 WL 1297442 (D.D.C., Dec. 22, 1999), U.S. District Judge Green held that it was appropriate to admit expert testimony that a young HIV+ man faced a probably lifespan of 60 more years. Taking note of the availability of treatments that now effectively suppress the operation of HIV, Judge Green found that a doctor who was an expert on AIDS treatment could so testify in a personal injury case where the expected lifespan of the deceased was relevant to the issue of damages. Conceding that nobody knows how long protease inhibitors might work, the court found that an expert in infectious diseases could nonetheless provide such testimony based upon her knowledge of HIV progression in healthy people, and that it was up to the jury to decide what weight to give the testimony. A.S.L.

**S.F. Supervisor Calls for Change in Blood Policy**

San Francisco City Supervisor Mark Leno has asked the U.S. Food and Drug Administration to reconsider its current policy under which sexually-active gay men are disqualified as drug donors. Indeed, under the policy, even sexually-inactive gay men are disqualified, if they have had sex at any time since 1977. Characterizing the policy as “ridiculous,” Leno told the *San Francisco Chronicle*: “The guidelines should ask about sexual behavior, not sexual orientation... We have to increase the city’s blood supply, and there is an able and willing source of blood. This is a blood shortage caused and exacerbated by federal regulations.” In a follow-up interview, Dr. Eric Goosby, director of HIV-AIDS policy for the U.S. Department of Health and Human Services, told the *Chronicle* that he doubted the FDA would ever totally eliminate restrictions on donation by gay men, but there was discussion about significantly cutting down the period of past sexual activity that would be considered significant, possibly to as little as 12 months, in light of the current accuracy of HIV screening tests. A.S.L.

**PUBLICATIONS NOTED & ANNOUNCEMENTS**

The deadline is Feb. 15 for applications for the summer judicial internship sponsored by the Dr. M. L. “Hank” Henry Fund for Judicial Internships, administered by the Lesbian & Gay Law Foundation of Greater New York. The internship is intended for law students with a demonstrated interest in, and commitment to, lesbian and gay rights. The intern will be exposed to a variety of courts in the federal and state system, working with both openly lesbian and gay non-gay judges. Applicants can obtain details of the information required in the application from the LeGal Foundation: 212–353–9118; le-gal@interport.net. Applications should be sent to the Foundation at: 799 Broadway, Suite 340, New York NY 10003. The selection committee will make its determination and notify the recipient by March 15. The internship pays a stipend of $3,000 for a 10–week program organized by the LeGal Foundation.

Roger Leishman, the director of the ACLU of Illinois’s Lesbian & Gay Rights Project/AIDS & Civil Liberties Project has announced his retirement, and the ACLU of Illinois is now accepting applications for this Chicago-based position. The Director is responsible for administration, litigation, public speaking, legislative work and supervision of volunteer cooperating attorneys. Applicants should have at least 5 years of practice experience, including litigation experience, excellent communication, interpersonal and organizational skills, and of course a strong commitment to civil liberties, including lesbian, gay, bi, transgendered and HIV+ rights. Salary commensurate with experience; full benefits (including domestic partner coverage). Application deadline is March 1, 2000. Send resume and writing sample to: Harvey Grossman, Legal Director, ACLU of Illinois, 180 N. Michigan Ave., Suite 2300, Chicago IL 60601. The ACLU is an equal opportunity/affirmative action employer.

The Georgetown Journal of Gender & the Law is soliciting articles for its Summer 2000 issue. Any articles falling within the broad parameters of the title of the journal would be welcome. Submissions can be directed to the Editor of the journal at Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001. The Journal issued its first number, devoted to a symposium on anti-gay peer harassment in schools, in December 1999 (articles listed below), and its second number will be derived from the proceedings of a symposium held at the Law Center on February 4, titled “Beyond Biology: Adoption, Reproductive Technology, and Intentional Families,” which will explore the role of social change and technological advancements as the driving forces behind, and the mirrors of, evolving family norms, focusing particularly on lesbian and gay families. A.S.L.

**LESBIAN & GAY RELATED LEGAL ISSUES:**


Brake, Deborah, *The Cruelst of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 Georgetown J. Gender & L. 37 (Fall 1999).

Carey, Rea, and Suman Chakraborty, *Glass President or Just Another Suicide Statistic?*: The Effects of Homophobic Harassment on Youth, 1 Georgetown J. Gender & L. 125 (Fall 1999).

Chmielewski, Cynthia M., *The Role of Employees in Stopping Anti-Gay Peer Harassment in the Public Schools*, 1 Georgetown J. Gender & L. 141 (Fall 1999).


Frankfurt, Kate, *An Advocate’s Perspective on Schools’ Responses to Anti-Gay Harassment*, 1 Georgetown J. Gender & L. 153 (Fall 1999).


**Student Notes & Comments:**


Doerhoff, Heidi C., Assessing the Best Interests of the Child: Missouri Declares That a Homosexual Parent is Not Ipso Facto Unfit for Custody, 64 Mo. L. Rev. 949 (Fall 1999).


Guenther, John, Oncale Goes to School: Male-Male Harassment and Gender-Policing, 1 Georgetown J. Gender & L. 159 (Fall 1999).


Lewis, Phillip E., A Brief Comment on the Application of the “Contemporary Community Standard” to the Internet, 22 Campbell L. Rev. 143 (Fall 1999).


Potter, Lillian Howard, “Man-Woman”: Anti-Gay Peer Harassment of Straight High School Students, 1 Georgetown J. Gender & L. 173 (Fall 1999).


Witte, Gretchen, Internet Indecency and Impressionable Minds, 44 Villanova L. Rev. 745 (1999).

Specially Noted:

Symposium, Hostile Hallways: Anti-Gay Peer Harassment in Schools, 1 Georgetown J. Gender & L. No. 1 (Fall 1999) (articles listed separately above; the symposium issue also reprints several speeches given at the conference not listed above). • • • Harper Collins has published As Nature Made Him: The Boy Who Was Raised as a Girl, by John Collins, the account of a male baby whose penis was altered to a vagina after a circumcision accident destroyed the penis, who was then raised as a girl but who later rejected this identity and reclaimed his masculine role.

AIDS & RELATED LEGAL ISSUES:


Bland, Timothy S., and Thomas J. Walsh, Jr., U.S. Supreme Court Resolves Mitigating Measures Issue Under the ADA, 30 U. Memphis L. Rev. 1 (Fall 1999).

Student Notes & Comments:


EDITOR’S NOTE:

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

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