policy of non-discrimination on the basis of sexual orientation for civilian employees of the Navy. Evidently, unit cohesion and morale among civilian employees are unnecessary. (We imagine this progressive step is being taken because civilian employees don't shower together — at least on base!) A.S.L.

Virginia Appeals Court Awards Custody to Lesbian Mom

Unanimously reversing a notably homophobic decision by Henrico County Circuit Court Judge Buford M. Parsons, Jr., the Court of Appeals of Virginia ruled June 21 that Sharon Bottoms should have custody of her 3–ar old son, rejecting the custody claim of Sharon's mother Kay, to whom Parsons had awarded custody. *Bottoms v. Bottoms*, 1994 WL 278017. The opinion by Judge Sam W. Coleman, III, decisively rejected Parsons' finding that a natural mother living in an openly-lesbian relationship with another woman is *per se* unfit for custody, and ordered the lower court to restore custody to Sharon Bottoms.

The trial court's decision relied heavily on the Virginia Supreme Court's 1985 decision in *Roe v. Roe*, 324 S.E.2d 691, in which that court held that in a custody dispute between natural parents, the homosexual parent openly living in a homosexual relationship — in that case, the father — was presumptively less fit to have custody than the non-homosexual parent. From this, Parsons extracted a holding that lesbian mothers living with their partners are presumptively unfit. Coleman found that Parsons' reliance on *Roe* was misplaced in a case pitting a natural mother against a non-parent. Indeed, the *Roe* court specifically disclaimed any holding that homosexuals were "per se" unfit. Coleman pointed out that in *Roe* the court's task was to determine which of two natural parents was *more fit*. In a case such as Bottoms', the issue for the court is to determine whether the challenged parent is *unfit*; only after a finding of unfitness could the court consider assigning custody to a non-parent such as Kay Bottoms.

As to Sharon's fitness, Coleman found that the record did not contain evidence supporting Parsons' conclusions. Rather than the "clear and convincing evidence" of unfitness that is required to deprive a natural parent of custody, Coleman found here that "No credible evidence proves that Sharon Bottoms is an unfit parent or that her having custody of her son will be harmful to his physical, emotional, or psychological well-being." Trial testimony showed Sharon had not been an "ideal" mother in all respects, but that was not the standard to be met. The psychological evaluation found her son to be a "happy, well-adjusted youngster" and concluded that the mother-child relationship was a good one.

Parsons had also relied on Virginia's sodomy law, and Bottoms' trial testimony that she engaged in oral sex with her domestic partner, April Wade, several times each week (out of the presence of her son). For Parsons, Bottoms was a criminal undeserving of child custody. Coleman disagreed. Although the Virginia Supreme Court ruled in *Doe v. Doe*, 284 S.E.2d 799 (1981) that a mother's "lesbian lifestyle" was a factor to be considered in a custody dispute, the court had held in that case that it was not a dispositive factor, as Parsons seemed to treat it. "The fact that a parent has committed a crime does not render a parent unfit, unless such criminal conduct impacts upon or is harmful to the child, or unless other special circumstances exist aside from the parent's conduct that would render continued custody with the parent deleterious to the child," wrote Coleman. The record revealed no such special circumstances in this case. "A court will not remove a child from the custody of a parent, based on proof that the parent is engaged in private, illegal sexual conduct or conduct considered by some to be deviant, in the absence of proof that such behavior or activity poses a substantial threat of harm to a child's emotional, psychological, or physical well-being." Coleman noted that other recent appellate decisions in Alabama and Mississippi awarded custody to grandparents as against natural lesbian mothers, but that in both cases there was evidence of complicating factors, such as drug use in the home or child neglect by the mother. In neither case had the mother's sexuality been the determinative factor. The court remanded the case "with directions that the circuit court enter an order effectuating the resumption of custody by the mother of her son."

Sharon's attorney, Donald K. Butler (cooperating attorney for the ACLU) hailed the decision as a major breakthrough for gay parents in Virginia. Kay's attorney, R.R. Ryder, claiming that Sharon's son was in grave danger, vowed to appeal to the Virginia Supreme Court on a pro bono basis, and to apply for a stay of the Court of Appeals decision so that the son would remain in the grandmother's custody. News reports at the end of June indicated that Virginia court rules may require that the son stay with Kay Bottoms so long as her appeal to the Virginia Supreme Court is pending, but Sharon's lawyers were attempting to devise a mechanism to secure the son's immediate return. A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court: No Liability in Transsexual Inmate's Rape Unless Officials Were Subjectively Reckless

In a case involving a pre-operative transsexual who was beaten and raped in prison, the U.S. Supreme Court ruled June 6 that prison conditions constitute cruel and unusual punishment only if officials know of, and disregard, an excessive risk to an inmate's health or safety. The plaintiff in *Farmer v. Brennan*, 1994 WL 237595, who was taking estrogen and "project[ed] feminine characteristics," was serving in a federal penitentiary for credit card fraud. After the attack, Farmer sought damages and an injunction barring future confinement in any penitentiary. The complaint alleged that by placing Farmer in the prison's general population despite knowing that Farmer would be particularly vulnerable to sexual attack, officials violated the Eighth Amendment prohibition against cruel and unusual punishment through a deliberately indifferent failure to protect her safety.

The Supreme Court's decision turned on the definition of "deliberate indifference," the standard for determining whether prison officials are liable for failing to prevent inmate assaults. Resolving a circuit split, the Court defined the term as "subjective recklessness," a test based on state of mind. Prison officials are not liable unless they have "knowledge of a substantial risk of serious harm" and they disregard that risk. The Court rejected a more liberal, objective test based on what officials knew or should have known. Without resolving the case, the justices remanded it to the district court. That court had dismissed the claim, apparently because Farmer failed to warn prison officials of the risk in advance. The Supreme Court ruled Farmer should have the chance to establish that they otherwise knew of the danger, even without such advance notice.

Justice Souter's opinion was joined by seven other justices. Justices Blackmun and Stevens wrote separate concurrences, disagreeing with the view that "deliberate indifference" should be measured subjectively. Justice Thomas concurred in the judgment alone; he wrote that prison conditions can never constitute cruel and unusual punishment unless they are literally part of a sentence. K.R.