under Title VII is the 5th Circuit, in *Oncale* and other decisions. The court commented that "it is difficult to accord much persuasive force" to the 5th Circuit's decisions, noting that neither provided any reasoning in support of its holding. The court also criticized as "flawed" the most frequently-cited district court decision in opposition to same-sex harassment cases, *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D.Ill. 1988), totally rejecting the *Goluszek* court's contention that Title VII is limited to protecting women in male-dominated workplaces. A.S.L.

Ohio Appeals Court Rejects Same-Sex Harassment Claim

An Ohio appeals court upheld a defense motion for summary judgment in a same-sex harassment case. *Schmitz v. Bob Evans Farms, Inc.*, 1997 WL 218258 (Oh.App. May 1). Plaintiff Kevin Schmitz worked at defendant's restaurant. He asked his supervisor, Jaymz Keller, for a schedule change. Keller complimented and propositioned Schmitz, and said that if Schmitz wanted a schedule change he might "have to do something for it." Schmitz reported the incident to the company, which promptly transferred Keller, who later resigned. Schmitz sued the company, claiming sexual harassment. The company moved for summary judgment, arguing that there was no hostile environment issue, and no quid pro quo because Keller lacked the authority to change Schmitz's schedule. The trial court granted the motion, and the appeals court affirmed, with Justice Nahra finding that the evidence did not establish a change in the terms or conditions of employment. Justice Karpinski concurred, but wrote that the supervisor had apparent authority, and that more serious harassment could have been actionable. O.R.D.

Pennsylvania Court Holds Transsexuals Not Protected Against Discrimination

The Pennsylvania Commonwealth Court affirmed that a person discriminated against because of their transsexual status is not protected by the Pennsylvania Human Relations Act (PHRA). *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 1997 WL 242218 (May 13). The Pennsylvania court also held that Executive Order 1998–1, which prohibits discrimination on the basis of sexual orientation, creates no private right to redress any action that violates the order.

In July 1992, Kristine Holt began a medically supervised transition from male to female. As part of the transition, Holt began to dress and present herself as a woman. After a few weeks of dressing like a woman, Holt was transferred to another office, and was subsequently fired for allegedly violating an employer dress code. Holt filed a complaint alleging, among other things, that her termination violated the PHRA and Executive Order 1988–1. The trial court ruled that Holt failed to state a claim under either the PHRA or Executive Order 1988–1, and dismissed both claims.

On appeal, Justice Dan Pellegrini's opinion for the Commonwealth Court affirmed the trial court. In order for a person to seek protection under the PHRA, their disability must be a physical or mental impairment which substantially limits one or more major life activities. Justice Pellegrini ruled that transsexualism does not fall within that definition, and relied heavily on the decision in *Dobre v. National Railroad Passenger Corporation*, 850 F.Supp. 284 (E.D.Pa. 1993). In *Dobre*, the court held that transsexualism is not covered under the PHRA because it does not affect any bodily function, or limit a major life function. Justice Pellegrini agreed with the trial court that Holt did not present a cause of action under the PHRA.

Justice Pellegrini also affirmed the trial court's ruling that Holt did not state a cause of action under Executive Order 1988–1, which prohibits discrimination on the basis of sexual orientation by a contractor receiving funds from an agency under the jurisdiction of the governor. Pellegrini wrote that the executive order does not create a private right of action to address a violation of the Order, and as such, Holt cannot claim protection under it.

In dissent, Justice James Gardner Collins suggests that Holt should be allowed to make a case that she falls within the class protected by the PHRA, contending that transsexualism maybe a physiological disorder that effects Holt's essential life process activities and functions, which would make it applicable to the PHRA. S.M.R.

Law & Society Notes:

The Supreme Court denied a petition for certiorari in *Peden v. Kansas*, 1997 WL 134321 (May 19), thus leaving in place *Peden v. State*, 930 P.2d 1 (1996), in which the Kansas Supreme Court held that a tax system that imposes higher rates on single than married taxpayers does not violate equal protection, because it is rationally related to a valid state interest in encouraging marriage.

Reacting to documentation presented by the Servicemembers Legal Defense Network showing that the Defense Department is continuing to violate the rights of lesbian and gay servicemembers, the Defense Department has established a formal review to determine whether military investigators are going beyond the bounds prescribed by the "don't ask, don't tell" policy. SLDN presented Secretary of Defense William Cohen with evidence that investigators routinely "ask" questions they shouldn't be asking, and continue the old practice of pressuring individuals suspected of being gay into naming other gays in their unit — a practice that the new policy was supposed to end, given its premise that closeted lesbians and gay men should be allowed to serve because only openly lesbian and gay servicemembers are harmful to morale and good order. (Don't blame us, Senator Nunn and President Clinton thought this one up.) The review was triggered in part by statistics showing that discharges of lesbian and gay servicemembers actually went up under the new policy. *Washington Post*, May 14; *Washington Blade*, May 16.

The Kansas Court of Appeals upheld a bias intimidation ordinance in the city of Wichita, which includes, inter alia, bias crimes motivated by the victim's sexual orientation, in *City of Wichita v. Edwards*, 1997 WL 271473 (May 23). Such decision upholding hate crimes laws have become routine since the U.S. Supreme Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which found that a law enhancing penalties for bias-related crimes is constitutional.

Former California National Guard Lt. Andrew Holmes, whose legal victory in federal district court last year, *Holmes v. California National Guard*, 920 F.Supp. 1510 (N.D.Cal. 1996), is now on appeal to the 9th Circuit, has filed a class action suit in San Francisco Superior Court on behalf of all current members of the Guard who are gay, arguing state law discrimination claims. The federal court had declined to rule on supplementary state law claims filed in the earlier law suit. Said Holmes, "We want to assault the policy aggressively, because if we don't win on one front we may win on the other. And I want to make sure that other people who are in circumstances like me who couldn't come forward are protected as well." *San Francisco Chronicle*, May 28.

The Associated Press reported that Eleanor Feldman, a lesbian truck driver, lost her discrimination case against Rockwell Power Systems in litigation in Wailuku, Hawaii. Judge E. John McConnell