The court of appeal opinion by Judge Woods noted that § 12940 expressly prohibits both sex discrimination and sexual harassment. The distinction is that sex discrimination in compensation or in terms, conditions or privileges must be alleged, whereas an employee alleging a violation of subdivision (h) (sexual harassment) need not allege loss of tangible job benefits. Mogilefsky advanced two sexual harassment claims: quid pro quo, alleging that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances, or hostile work environment, which does not require allegations of sexual advances. The court described a prior case, *Hart v. National Mortgage & Land Co.*, 189 Cal.App.3d 1420 (1987), which held that § 12940 did not apply as between members of the same sex, as "of questionable value as a legal precedent."

The court found no basis in the statutory language for defendants' contention that the legislature intended to limit coverage to male-female harassment, citing decisions by the Fair Employment and Housing Commission and similar decisions under Title VII of the Civil Rights Act of 1964. The court rejected defendants' "remarkable" argument that the legislature did not intend to protect members of the empowered majority (men) from one another, holding that Mogilefsky alleged harassment "because of sex," and that "such behavior in California is entitled to the protection provided by Government Code § 12940." Finally, the court rejected defendant's policy arguments that (1) freeing everyone from sexual remarks and conduct would violate the 1st Amendment right of free speech; and (2) allowing a cause of action for same gender sexual harassment will make an inquiry into the sexual orientation of the male supervisor a necessity. The matter was sent back to the trial court. B.M.

Boston Judge Rules Gay Irish Can Join Parade

Justice J. Harold Flannery of the Suffolk County, Massachusetts, Superior Court ruled Dec. 15 that an organization of lesbian, gay and bisexual Irish-Americans is entitled to march in the St. Patrick's/Evacuation Day Parade on March 17 on the same basis as other groups. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, No. 92–1518. Flannery found that this case presented a distinctly different set of issues from the New York City dispute over participation of the Irish Lesbian and Gay Organization in the St. Patrick's Day parade administered by the Ancient Order of Hibernians. (See 814 F.Supp. 358 (S.D.N.Y. 1993), holding that ILGO was not entitled to march.) In Boston, the March 17 parade is a combined commemoration of St. Patrick's Day and Evacuation Day, a patriotic celebration of the withdrawal of occupying British troops from Boston during the Revolutionary War. In contrast to New York's parade, which is purely a St. Patrick's Day observance run by an Irish-Catholic organization, the Boston parade was originally run by the city as a patriotic commemoration; earlier in this century, the city delegated to the South Boston Allied War Veterans Council the administrative task of running the parade, which, due to the coincidence of dates, also became identified as a St. Patrick's Day observance. Flannery found that the parade had traditionally been open non-selectively to a wide range of groups, and apart from its celebratory nature did not have any ideological component.

Analyzing the issues under the Massachusetts Law Against Discrimination, which forbids discrimination in places of public accommodation on the basis of sexual orientation, Flannery found that the Boston parade is a place of public accommodation, inasmuch as it takes place on the city streets and is generally open to members of the public on a non-selective basis. However, Flannery concluded that the city had so far distanced itself from the running of the parade that the parade organizers' determination to exclude the gay group was not "state action." Consequently, the plaintiffs' rights to participate were determined solely on the basis of the public accommodations statute, and constitutional claims were dismissed.

Flannery also had to deal with the argument on which ILGO lost its New York case: that ordering the parade organizers to let a gay group march would violate 1st Amendment rights of the organizers. Flannery found this argument unavailing, finding that claims to a right of expressive association on the part of the organizers were weakened by the non-selectivity of parade participation, the lack of a strong ideological component to the parade that would be harmed in any way by the inclusion of gay people, and the strong public policy interest in preventing sexual orientation discrimination in public accommodations.

The Irish-American gay group was represented by Boston attorneys Philip M. Cronin, Elsie Kappler, Gretchen Van Ness and John Ward with Gay and Lesbian Advocates and Defenders. An appeal by the South Boston Allied Veterans Council seems likely. A.S.L.

Transsexual Railroad Worker Loses Discrimination Case

A federal court ruled that a transsexual may not state a claim for sex discrimination under Title VII of the Civil Rights Act and, in a case of first impression, that the plaintiff could not state a claim for sex or disability discrimination under the Pennsylvania Human Rights Act. *Dobre v. National Railroad Passenger Corp.*, 1993 WL 498217 (E.D.Pa., Dec. 1) (not officially published). Andria Dobre presented herself as a man when hired by AMTRAK, but subsequently informed her supervisors that she was receiving hormone treatments to begin sex-reassignment. She was told that she would need a doctor's note if she wanted to dress as a woman on the job and that she could not use the women's restroom. Her supervisors refused to refer to her by her female name and moved her desk out of public view. She filed suit charging sex and disability discrimination.

Judge Hutton found substantial precedent that Dobre had not stated a Title VII claim, observing that "the acts of discrimination alleged by the plaintiff were not due to stereotypical concepts about a woman's ability to perform a job nor were they due to a condition common to women alone. If the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become a female." Turning to state law, Hutton found no basis in Pennsylvania precedent to treat the sex discrimination provision in the state law as any broader than the federal law. Hutton found no Pennsylvania cases deciding whether transsexualism is a physical or mental impairment under Pennsylvania law, but noted *Sommers v. Iowa Civil Rights Commission*, 47 FEP Cases (BNA) 1217 (Iowa 1983), which rejected a claim by an Iowa transsexual for disability discrimination. Hutton asserted that "the fact that transsexualism is a diagnosable condition does not necessarily lead to the conclusion that it is an 'impairment'..." The judge noted that the Americans With Disabilities Act and concurrent amendments to the federal Rehabilitation Act specifically excluded transsexuals from the definition of persons with disabilities. And, the Pennsylvania Supreme Court, in *Civil Service Commission v. Pennsylvania Human Relations Commission*, 591 A.2d 281 (1991), narrowly construed the category of "perceived handicap" under Pennsylvania law in such a way as to preclude its application in this case. Consequently, Hutton dismissed the case. A.S.L.

NY Off-Duty Conduct Law May Apply to Dating

New York Labor Law § 201–d may protect employees and job applicants from discrimination on the basis of their off-duty, lawful dating activities, according to Justice Robert P. Best, New York Supreme Court, Fulton County, in *State v. Wal-Mart Stores, Inc.*, No. 80737/93 (Dec. 16). Denying in part a motion to dismiss, Best held that the State may have stated a valid claim against Wal-Mart, which discharged Laural Allen and Samuel Johnson for maintaining a dating relationship while Allen was separated and living apart from her husband. At