



## Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007

### EXECUTIVE SUMMARY

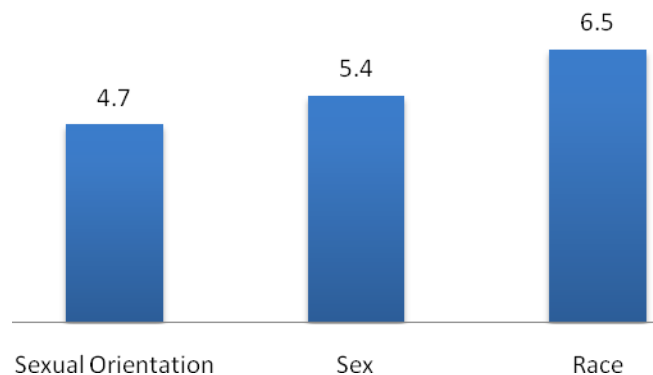
Today, twenty states and the District of Columbia prohibit employment discrimination based on sexual orientation. Of those, thirteen also prohibit discrimination on the basis of gender identity. In an effort to more accurately measure the effect of anti-discrimination laws, this report compares sex, race, and sexual orientation complaint rates through a population-adjusted model.

An aggregation of all available state level data reveals that sexual orientation discrimination laws are used at similar frequencies by Lesbian, Gay, and Bisexual (LGB) workers as sex discrimination laws by female workers, both at 5 complaints per every 10,000 workers. Race complaints are filed at the higher rate of 7 per 10,000 workers. The data do not support the oft-cited "drought" argument, which claims there is not enough sexual orientation discrimination to warrant the passage of ENDA.

Even with similar filing rates, sexual orientation complaints will not overwhelm government agencies; the average annual number of sexual orientation complaints for all states stands at just over 1,200 versus race and sex complaints at 11,500 and 13,800, respectively. For this reason, the data also do not support a "flood" argument, which claims that sexual orientation employment discrimination complaints would overwhelm the Equal Employment Opportunity Commission (EEOC) or the federal judiciary.

Currently, there are not enough data to do a similar analysis of gender identity discrimination complaints. However, surveys of the transgender population reveal extremely high levels of employment discrimination. In addition, data obtained from three states that have prohibited gender identity discrimination do not provide support for the "flood" argument.

National Population-Adjusted Complaint Rates  
(Per 10,000)



## INTRODUCTION

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Today, twenty states and the District of Columbia prohibit employment discrimination based on sexual orientation.<sup>1</sup> Of those, thirteen also prohibit discrimination on the basis of gender identity. As a result, an estimated 3.1 million lesbian, gay, bisexual, and transgender (LGBT) adults live in states that do not provide this protection from discrimination in the workplace.<sup>2</sup>

For more than thirty years, Congress has considered expanding federal anti-discrimination laws to prohibit sexual orientation discrimination. In 2007, Congress debated legislation that would have prohibited both sexual orientation and gender identity discrimination. In November 2007, a version of the Employment Non-Discrimination Act (ENDA) that prohibited sexual orientation but not gender identity discrimination passed in the House of Representatives - a historic first in the thirty-year history of such legislative efforts.

During the 2007 legislative debate, as in prior debates, opponents of ENDA advanced two arguments based on the incidence of sexual orientation discrimination. Some contended that the bill would inundate the Equal Employment Opportunity Commission (EEOC) and federal courts with trivial claims, lowering the overall effectiveness of the EEOC and the judiciary (the “flood” argument). Others argued that the law is simply unnecessary because there are few cases of sexual orientation discrimination occurring in the workplace (the “drought” argument).<sup>3</sup>

This report empirically assesses the validity of the “flood” and “drought” arguments by looking at the experiences of states that have already passed laws prohibiting sexual orientation and/or gender identity employment discrimination. The analysis proceeds in three steps. First, we place sexual orientation employment discrimination complaints in relation to the total number of LGB people in the workforce in order to get a more accurate measure of the complaint-filing rate of LGB people, or a population-adjusted complaint rate. Second, we calculate population-adjusted complaint rates for sex and race. Finally, we compare the complaint rate of LGB people to that of women alleging sex discrimination and people of color alleging race discrimination. The population-adjusted method allows for valid cross-category comparison. Due to the scarcity of available data, we are unable to do a similar analysis for gender identity discrimination complaints.

## METHODOLOGY

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Replicating the methodology of William B. Rubenstein’s study completed in 2001, we contacted the administrative agencies responsible for investigating employment discrimination complaints in all twenty-one states that currently prohibit sexual orientation or gender identity discrimination in the workplace.<sup>4</sup> These agencies were contacted directly to acquire the most complete and updated data on sexual orientation, gender identity, race, sex, and other forms of prohibited discrimination.<sup>5</sup> We obtained data regarding sexual orientation discrimination complaints from seventeen states for two or more years from 1999 to 2007. We excluded the four other states from our analysis because their laws were passed too recently to provide at least two years of data on sexual orientation discrimination complaints<sup>6</sup> or because their administrative agency did not respond to our requests for data.<sup>7</sup>

For each state we then calculated an average annual number of complaints per protected group over all the years in which data were available. The range of the average annual number of sexual orientation discrimination complaints within these states is 1 (Vermont) to 605 (California). However, these averages do not tell the entire story of sexual orientation discrimination; the difference in the

average number of complaints between Vermont and California could simply be the result of the difference in the size of the two states' LGB populations.

Accordingly, our analysis uses a population-adjusted measure, which places the actual number of complaints filed by any group in the context of that group's workforce population. To calculate these adjusted-rates we utilize two types of data: the number of complaints filed, delineated by basis of discrimination, and the number of people most likely to file these types of claims in the state's workforce. For example, when examining sex discrimination complaints, we look at the number of sex complaints filed and the number of women in the workforce. We use 2005 American Community Survey (ACS) data to find the workforce population totals for women and people of color.<sup>8</sup>

We have also developed a method to compensate for the lack of reliable data on the number of LGB people in the usual workforce datasets. First, we refer to the National Survey on Family Growth, which found that 4.1% of men and women aged 18-45 identify as gay, lesbian or bisexual.<sup>9</sup> Applying this figure to the total adult population, we estimate that 8.8 million gay, lesbian, or bisexual adults live in the United States. We then assume that, among all LGB people, the proportion who live in a given state is equal to the proportion of same-sex couples who live in that state. Therefore, we multiply 8.8 million by the percentage of same-sex couples living within each state to obtain estimates of LGB individuals in a given state. For example, nearly 15% of same-sex couples live in California, the estimated size of the LGB population in California is approximately 1.3 million (15% of 8.8 million GLB people in the U.S.). Finally, we multiply the LGB population figure by the percent of the population older than sixteen in the workforce of each state to find the number of LGB individuals in the state's workforce; for California, 1.3 million is multiplied by 62% (the percent of population over 16) which yields 827,549 LGB people in the workforce. Given that there is no universally accepted method to calculate the number of LGB people in the workforce, this protocol establishes a reasonable estimate.

We then divide the average annual complaints for each group (LGB, women, and people of color) by that group's workforce population and multiply that figure by 10,000 to generate a population-adjusted complaint rate. The adjusted rate represents the number of discrimination complaints per 10,000 workers in each protected class.

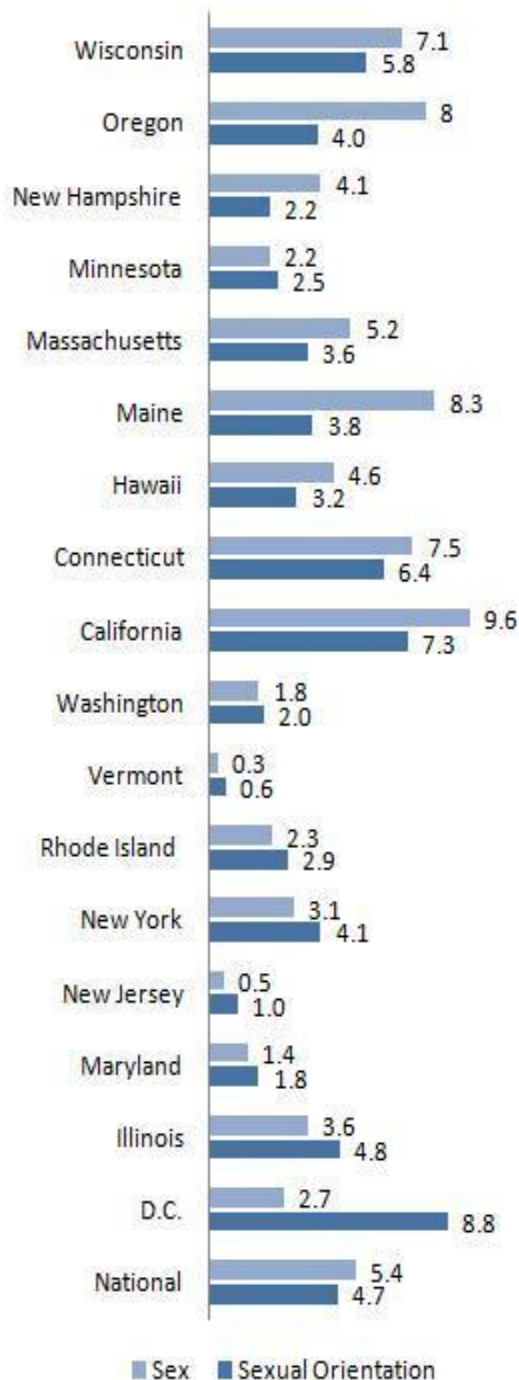
## FINDINGS

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When the size of the LGB workforce is incorporated into the analysis of complaint rates, our measure shows that per capita sexual orientation discrimination complaints are filed at similar rates as race or sex discrimination complaints. This is the primary finding of the study; data from each state support this claim:

- On the national level, of those states with available data, the adjusted rate for both sex and sexual orientation complaint filings is 5 per 10,000 workers; the adjusted rate for race complaint filings is higher at 7 per 10,000.
- The adjusted rate for sexual orientation discrimination is higher than the adjusted rate for sex discrimination in eight of the seventeen states surveyed.
- The adjusted rate for sexual orientation discrimination is higher than the adjusted rate for race discrimination in three of the seventeen states surveyed.

## Population-Adjusted Complaint Rates (Per 10,000)



## POPULATION-ADJUSTED COMPLAINT RATES PROVIDE AN IMPORTANT CONTEXT IN WHICH TO ANALYZE THE RAW COMPLAINT DATA

Population-adjusted complaint rates provide the context in which we can effectively analyze discrimination complaint rates based on race, sex, and sexual orientation. The raw data alone suggests that the number of sexual orientation discrimination complaints is small compared to large numbers of complaints based on race and sex. However, even the most disparate adjusted rates significantly decrease the differences suggested by the raw data.

We refer back to California to demonstrate how interpreting data through a population-adjusted model places the raw numbers in proper perspective. On average from 1999-2007, 4,204 people of color filed discrimination complaints based on race and 6,899 women filed claims based on sex annually. By contrast, an average of 605 LGB people filed claims based on sexual orientation each year.

These raw numbers suggest that sex claims are filed roughly seven times more often than sexual orientation claims and that race claims are filed eleven times more often than sexual orientation claims. But the number of people of color in California's workforce (7,653,464) is higher than the number of women (7,195,990) and both populations are greater than the LGB people in the workforce (827,549). Once we adjust the data for the workforce population of each group, we are able to make more sound comparisons. Adjusted rates show that annually on average, 10 women per 10,000 filed sex claims, 7 LGB workers per 10,000 filed sexual orientation claims, and 5 people of color per 10,000 filed race claims. Although a seemingly small number of sexual orientation complaints, they are actually filed by LGB workers at a frequency 30% higher than race complaints are filed by people of color in California.

## SEXUAL ORIENTATION CLAIMS ARE FILED MORE FREQUENTLY THAN SEX DISCRIMINATION CLAIMS IN EIGHT OF SEVENTEEN STATES

The graph compares the adjusted-rates of sexual orientation and sex discrimination complaints for each of the seventeen states surveyed. On a national level, the adjusted-rates for sexual orientation and sex complaints are quite similar. For eight states (District of Columbia, Illinois, Maryland, New Jersey, New York, Rhode Island, Vermont, and Washington), sexual orientation claims surpass sex claims. The disparity within the remaining states varies from almost zero to more than double.

## SEXUAL ORIENTATION CLAIMS ARE FILED AS FREQUENTLY AS RACE CLAIMS IN SEVEN OF SEVENTEEN STATES

Table 1 compares the adjusted-rates for sexual orientation and race discrimination in each of the seventeen states surveyed. In three states (California, District of Columbia, and Hawaii), sexual orientation complaints are filed more frequently than race complaints. In the other fourteen states, people of color filed complaints based on race at a higher frequency than LGB workers filed complaints based on sexual orientation; the disparity between these rates vary from minimal to substantial.

### LIMITATIONS ON THE ANALYSIS OF GENDER IDENTITY EMPLOYMENT DISCRIMINATION AND COMPLAINT RATES

Various studies have found that transgender individuals face a substantial amount of discrimination, possibly even more so than lesbian, gay, and bisexual individuals.<sup>10</sup> However, inadequate data collection is the main barrier to a larger discussion around transgender discrimination in general and to their inclusion in this study in particular.<sup>11</sup> Of the 20 states and the District of Columbia, which currently protect LGB individuals from workplace discrimination, only 13 also include gender identity or gender expression. Of those 13 that do include gender identity/expression, 10 passed the statute within the past 3 years. The recent addition of gender identity protections created a significant data gathering hurdle as some state agencies have not adequately tracked gender identity/expression claims or they include those claims with sexual orientation totals (for example, Washington). As a result, we were only able to collect complaint data for gender identity/expression from Rhode Island, Oregon, and the District of Columbia (see Appendix for totals). We are further prevented from calculating population-adjusted complaint rates for the transgender population due to the lack of reliable data surrounding its actual size. Without a sound estimate of the transgender workforce it is impossible to create adjusted complaint rates. The omission of an analysis of gender identity discrimination complaints in this report reiterates the need for further research.

## CONCLUSION

As the debate surrounding the necessity of LGBT protections reenters the national discourse, a population-adjusted understanding of complaint rates is necessary. This report questions two of the main arguments used to attack the Employment Non-Discrimination Act. First, there is no “drought.” Sexual orientation non-discrimination laws are used on a regular basis - comparable to the frequencies at which race and sex rights laws are utilized. Second, state agencies are not vulnerable to any debilitating “flood” of additional complaints. Given the size of the LGB population, and the filing rates of LGB people, any increase in complaint intake would be negligible on the national level. Sweeping generalizations of “floods” and “droughts” are empirically unsound. The data suggest that sexual orientation employment protections are necessary and manageable.

**Table 1**

### RACE – SEXUAL ORIENTATION (COMPLAINTS PER 10,000 WORKERS)

	Sexual Orientation	Race
National	4.7	6.5
California	7.3	5.5
District of Columbia	8.8	2.1
Hawaii	3.2	1.6
Connecticut	6.4	31.3
Illinois	4.8	6.4
Maine	3.8	37.8
Maryland	1.8	3.2
Massachusetts	3.6	15.2
Minnesota	2.2	9.1
New Hampshire	2.2	7.4
New Jersey	1.0	1.7
New York	4.1	5.9
Oregon	4.0	11.7
Rhode Island	2.3	5.8
Vermont	0.6	1.8
Washington	2.0	3.3
Wisconsin	5.8	38.8

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## ABOUT THE AUTHORS

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<sup>1</sup> Currently California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. For this report we refer to the District of Columbia as a "state."

<sup>2</sup> Figure calculated using American Community Survey (ACS) and National Survey on Family Growth data under the protocol established later in the *Methodology* section of this report.

<sup>3</sup> Rubenstein, William B. 2001. "Do Gay Rights Laws Matter?: An Empirical Assessment." *Southern California Law Review*. Vol 75, 65-120.

<sup>4</sup> Id.

<sup>5</sup> For a more detailed explanation of the methodology and its various shortcomings, including overcounting/undercounting and intersectionality, see id at 76.

<sup>6</sup> Colorado, Iowa, and Oregon.

<sup>7</sup> New Mexico.

<sup>8</sup> We use 2005 ACS data in order to cite already substantiated calculations. See Gates, Gary J. 2006. "Same-sex Couples and the Gay, Lesbian, and Bisexual Population: New Estimates from the American Community Survey." *The Williams Institute, UCLA School of Law*. The Williams Institute. Los Angeles.

<sup>9</sup> National Survey of Family Growth 2002.



<sup>10</sup> For transgender employees in education see Irwin, Jude. 2002. "Discrimination Against Gay Men, Lesbians, and Transgender People Working in Education." *Journal of Gay and Lesbian Social Services*. 14 (2), 65–77. For a more general discussion of discrimination towards transgender individuals see: Lombardi, E., Wilchins, R., Priesing, D., & Malouf, D. 2001. "Gender violence: Transgender experiences with violence and discrimination." *Journal of Homosexuality*, 42 (1), 89–101.

<sup>11</sup> Colvin, A. Roddrick. 2007. "The Rise of Transgender-Inclusive Laws: How Well Are Municipalities Implementing Supportive Nondiscrimination Public Employment Policies?" *Review of Public Personnel Administration*. 27, 336–361.

## APPENDIX

### SEXUAL ORIENTATION, RACE, AND SEX DISCRIMINATION COMPLAINTS FILED WITH STATES

CALIFORNIA (law effective 1992)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation		253	539	609	695	614	694	716	722	605
Race + Color	4,697	4,493	4,425	4,596	4,911	3,849	3,828	3,531	3,503	4,204
Sex	7,719	7,564	7,344	7,381	7,627	6,291	6,289	6,111	5,767	6,899

Source: California Department of Fair Employment and Housing

Connecticut (1991)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation	37	35	44	47	56	57	55	49	60	49
Race + Color	1,061	938	1,037	1,059	1,138	1,219	1,262	1,053	1,020	1,087
Sex	694	635	598	630	668	681	625	601	557	632

Source: Connecticut Commission on Human Rights and Opportunities

District of Columbia (1997)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation						24		12		18
Gender Identity								6		6
Race + Color						30		48		39
Sex						37		42		40

Source: District of Columbia Office of Human Rights

Hawaii (1991)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation	6	10	9	12	5	11	10	7	3	8
Race + Color	74	74	64	79	65	77	61	70	60	69
Sex	142	151	131	148	151	126	111	101	94	128

Source: Hawaii Civil Rights Commission

Illinois (2006)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation									109	109
Race + Color	1,091	1,091	1,141	1,209	1,127	1,095	1,093	1,008	1,056	1,107
Sex	553	989	954	1,080	1,043	1,233	1,248	1,208	1,098	1,045

Source: Illinois Department of Human Rights

Maine (2005)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation								13	33	13
Race + Color	71	68	73	97	82	64	60	64	88	72
Sex	258	263	316	296	262	258	201	236	207	261

Source: Maine Human Rights Commission

<b>Maryland (2001)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation				17	24	22	22	21	28	22
Race + Color		334	328	393	398	266	274	242	240	309
Sex		223	225	216	206	145	150	185	112	193

Source: Maryland Commission on Human Relations

<b>Massachusetts (1989)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation			40	83		81	51	64		64
Race + Color			1,000	954	699	742	635	592		770
Sex			680	913	699	906	931	816		824

Source: Massachusetts Commission Against Discrimination

<b>Minnesota (1993)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation	32	24	31	33	27	22	25	27	21	27
Race + Color	223	238	252	285	214	242	200	165	164	221
Sex	307	346	320	330	284	305	241	190	165	276

Source: Minnesota Department of Human Rights

<b>New Hampshire (1998)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation		8	8	18	16	4	7	5	14	10
Race + Color	25	23	14	19	29	21	24	21	25	22
Sex	171	107	124	126	126	126	118	138	138	130

Source: New Hampshire Commission for Human Rights

<b>New Jersey (1992)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation	13	16	17	9	20	18	20	13	16	13
Race + Color	238	325	270	188	203	207	169	157	220	238
Sex	69	110	101	95	109	99	98	74	94	69

Source: New Jersey Division on Civil Rights

<b>New York (2003)*</b>	<b>CY 1999</b>	<b>CY 2000</b>	<b>CY 2001</b>	<b>CY 2002</b>	<b>CY 2003</b>	<b>CY 2004</b>	<b>CY 2005</b>	<b>CY 2006</b>	<b>CY 2007</b>	<b>Avg.</b>
Sexual Orientation					118	163	152	159	152	149
Race + Color		1,828	1,859	1,874	1,853	1,885	1,884	1,796	1,581	1,820
Sex		1,475	1,471	1,403	1,368	1,448	1,209	1,171	1,114	1,332

Source: New York Division of Human Rights - \*Data are for calendar years, not fiscal years.

<b>Oregon (2007)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation	21	30	15	38	36	45	35	33		32
Gender Identity					1	0	3	0		1
Race + Color	327	319	333	282	269	291	307	310		305
Sex	616	666	605	672	582	629	711	644		641

Source: Oregon Civil Rights Division

<b>Rhode Island (1995)</b>	<b>FY 1999</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Avg.</b>
Sexual Orientation					3	3	7	2	5	4
Gender Identity					0	1	0	0	1	.4
Race + Color					42	38	43	51	52	45
Sex					96	106	73	82	0	71



Source: Rhode Island Commission for Human Rights

Vermont (1991)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation	2	0	0	2	2	2	0	4	0	1
Race + Color	0	1	0	2	2	2	3	3	4	2
Sex	7	3	1	6	0	5	2	10	3	4

Source: Vermont Human Rights Commission

Washington (2006)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation / Gender Identity								34	5	34
Race + Color		246	220	255	203	144	107	189	113	37
Sex		339	300	285	252	186	162	257	191	62

Source: Washington Human Rights Commission

Wisconsin (1982)	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	Avg.
Sexual Orientation			49	85	71	76	58	51	60	64
Race + Color			1,005	1,133	1,110	1,136	1,127	1,004	995	1,073
Sex			1,066	1,175	1,091	987	911	811	727	967

Source: Wisconsin Civil Rights Bureau